

How to Determine if a Worker Should Be Considered an Employee (on payroll) or an Independent Contractor.

By Christopher A. Kerosky

There is no single definitive factor in determining whether an individual is an independent contractor or an employee for purpose of wage and hour laws.

The Courts have held that an individual will be considered an employee where the employer exercises all necessary control by direct or indirect means over the work details of the individual. (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989 48 Cal.3d 341)*).

In addition, according to the Employment Development Department of the state of California, the following factors are to be considered in determining an individual's status as an independent contractor.

1. The individual performs services in an occupation or business distinct from that of the principal.
2. The work performed is not part of the regular business of the principal.
3. The individual supplies his/her own instrumentalities, tools and the work place.
4. The individual has made a significant investment in the equipment or materials required for his or her task(s).
5. The individual's services require a unique skill in a particular occupation.
6. The individual's occupation in the locality is usually done by a specialist without supervision.
7. The individual's opportunity for profit or loss depends on his/her own managerial skill.
8. The time for which the services are to be performed is reasonably limited to the task(s) for which the individual was hired.
9. The working relationship between the individual and the employer.
10. The method of payment is time certain or project specific.
11. The parties do not believe they are creating an employer-employee relationship. (*Borello, Id. at 350*)

12. The individual has the right to control and discretion as to the manner of performance of the contract for services but not means by which the work is accomplished. (*Labor Code Section 2750.5*)
13. The individual customarily in an independently established business. (*Labor Code Section 2750.5*)
14. The individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. (*Labor Code Section 2750.5*)
15. The individual has a substantial investment in the business other than personal services. (*Labor Code Section 2750.5*)
16. The individual holds him/herself out to be in business for him/herself. (*Labor Code Section 2750.5*)
17. The individual bargains for a contract to complete specific project for compensation by project rather than by time. (*Labor Code Section 2750.5*)
18. The individual has control over the time and place the work is performed. (*Labor Code Section 2750.5*)
19. The individual hires his/her own employees. (*Labor Code Section 2750.5*)
20. The individual holds a license to perform the work. (*Labor Code Section 2750.5*)
21. The relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract. (*Labor Code Section 2750.5*)

The risk of considering a worker as an independent contractor rather than an employee are high; if you improperly do so, you as the employer can be liable for all the taxes you were supposed to withhold, plus interest and penalties. The cautious thing to do is, where in doubt, put the worker on payroll and consider them an employee.

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