

Independent Contractors vs. Employees

The following chart compares the factors used by six government agencies to determine if a worker is an independent contractor or an employee.

A YES answer to the following indicates that the worker is likely to be considered an EMPLOYEE:						
★ Most important factor <input type="checkbox"/> Important factor <input checked="" type="checkbox"/> Lesser factor	IRS	EDD	INS	Work Comp	US Labor Dept	CA Labor Com
Does the company exercise control over the manner in which the work is performed?	★	★	★	★	<input type="checkbox"/>	★
Does the company provide instructions?	<input type="checkbox"/>					
Is training provided to the worker?	<input type="checkbox"/>					
Must the work be performed by the worker and not by an assistant?	<input type="checkbox"/>	✓				
Is the work part of the hiring company's primary business?	<input type="checkbox"/>					
Are there set work hours?	<input type="checkbox"/>	✓				
Is the relationship on a continuing basis?	<input type="checkbox"/>					
Does the company exercise any control over the worker's assistants?	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Does the company determine the location of the work?	<input type="checkbox"/>	✓	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Does the company set the order of work done?	<input type="checkbox"/>					
Does the worker have to provide interim reports?	<input type="checkbox"/>					
Is the worker paid by the hour and not by the job?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Does the company reimburse expenses?	<input type="checkbox"/>					
Does the company provide the necessary tools?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Can the worker be fired at will?	<input type="checkbox"/>	★	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Is the worker paid for partial work?	<input type="checkbox"/>					
Is the work typically supervised?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Was the worker hired by the same person who hires employees at the company?	<input type="checkbox"/>					

A NO answer to the following indicates that the worker is likely to be considered an EMPLOYEE:						
★ Most important factor <input type="checkbox"/> Important factor <input checked="" type="checkbox"/> Lesser factor	IRS	EDD	INS	Work Comp	US Labor Dept	CA Labor Com
Has the worker made a significant investment in own business?	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
Does the person have time to work for other companies?	<input type="checkbox"/>	<input checked="" type="checkbox"/>				
Does the person work for many other companies?	<input type="checkbox"/>					
Does the worker offer services to the public?	<input type="checkbox"/>					
Can the worker make a profit or loss?	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
Does the person have a distinct occupation or operate a separate business?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Is the relationship part of an industry practice?		<input type="checkbox"/>				
Does the work performed require skill?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Do both parties believe the worker is an independent contractor?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Is much initiative, judgment, or foresight needed for the worker to succeed?					<input type="checkbox"/>	

It is important to keep in mind that simply calling someone an independent contractor and/or by providing the person with a 1099 does not ensure that the worker will meet the legal requirements.

The risks for employers who misclassify a worker as an independent contractor are significant and include back taxes, penalties, interest, unpaid personal incomes taxes of the misclassified worker, overtime, benefits, leave entitlement, and other rights and protections due to employees. Effective January 1, 2011, California law renders the actual act of misclassification unlawful and **subjects the employer to civil penalties of \$5,000 to \$25,000 per occurrence** plus other significant disciplinary action. This handout should serve as a generic summary of the very complex factors that various agencies use to make their determinations. There is, however, no substitute for case-specific advice regarding a particular worker. We strongly suggest that, in addition to our assistance, you seek legal counsel from an attorney experienced in this particular area of employment law, and/or a formal, written determination from the EDD and/or the IRS.

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