

## Properly Classifying Workers as Employees or Independent Contractors

When hiring individuals in connection with your business, it is essential that you properly classify them as either employees or independent contractors. Assembly Bill 5, enacted in 2019, set the legal standard in California for ensuring appropriate employee classification by establishing the ABC Test, which is a three-factor test that presumes workers are employees unless they satisfy all of three separate requirements.

In this article, we provide information about types of employee classifications, details of Assembly Bill 5's ABC Test for determining the appropriate classification, exceptions to the rule, and consequences of misclassification.

*Note: This article is designed to help people determine the appropriate classification for workers. This document is not intended to constitute legal advice and cannot substitute for expert consultation. If you have specific questions that are related to your business, it is best to consult an attorney.*

<b>Worker Classifications</b>
<p style="text-align: center;"><b>Employees</b></p> <p>Hiring entities generally have greater control over employees than over independent contractors. Things like setting schedules and wages are examples of the types of control hiring entities may exert over employees. Additionally, employees typically have greater rights and protections than independent contractors do. For example, employees generally have rights to:</p> <ul style="list-style-type: none"><li>• Minimum wages</li><li>• Overtime wages*</li><li>• Meal periods*</li><li>• Rest periods*</li><li>• Sick time</li><li>• Payment of wages on specific days and at separation of employment</li><li>• Wage Statements</li><li>• W2 Forms</li><li>• And more</li></ul> <p>* Some employees may be exempt from these rights.</p>
<p style="text-align: center;"><b>Independent Contractors</b></p> <p>Independent contractors typically have fewer rights and protections than employees do. However, they retain some rights like the Fair Employment and Housing Act's prohibition on harassment in the workplace, which applies to all workers. Hiring entities generally have less control over independent contractors than over employees. For example, independent contractors generally have the freedom to:</p> <ul style="list-style-type: none"><li>• Determine their own schedules</li><li>• Set their own fees</li><li>• Have multiple clients</li></ul>

### ABC Test

Under Labor Code § 2775(b), a person providing labor or services is presumed to be an employee rather than an independent contractor. This presumption can be disregarded if the hiring entity is able to demonstrate that the following three conditions (A, B, and C) are all met.

#### A. Control

- The worker must be free from the control and direction of the hiring entity
- If the worker is subject to the type and degree of control a business typically exercises over employees, they would properly be classified as an employee
- Depending on the type of work and the arrangement between the parties, a business does not need to control the precise manner or details of the work in order to have the typical control exercised over employees

#### B. Course of Business

- The worker must perform work that is outside of the usual course of the hiring entity's business
- Contracted workers who provide services in a role comparable to that of an employee will probably be within the usual course of the hiring entity's business
- Examples of work that is outside of the hiring entity's usual course of business:
  - A retail store that hires an outside plumber to repair a leak in a bathroom
  - A retail store that hires an outside electrician to install a new electrical line
- Examples of work that is part of the hiring entity's usual course of business:
  - A clothing manufacturer that hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company
  - A bakery that hires cake decorators to work on a regular basis on its custom-designed cakes

#### C. Independent Establishment

- The worker must be engaged in an independently established trade, occupation, or business
- The worker must have made the decision to go into business for themselves, usually taking steps such as incorporation, licensure, advertising, and offering to provide services to a number of customers
- The hiring entity cannot simply label the worker as an independent contractor or require the worker to enter into a contract that designates them an independent contractor
- The worker must not rely on a single employer

### Exceptions

There are some exceptions to the rule listed above. Some workers may be classified as unpaid interns instead of an employee or independent contractor, but the role has some special requirements. Additionally, some types of workers are presumed to be independent contractors instead of employees. There are also some notable situations that are not valid exceptions.

#### Unpaid Interns

Unpaid interns are workers who do not receive wages or benefits while performing work. To be classified as an unpaid intern, the following conditions must all be met:

- The internship must be part of an established course at an accredited school

- The intern(s) must be trained to work in a specific industry
- The intern(s) must not take the place of any regular employees
- The internship must be supervised by a school or agency
- The intern(s) must not receive any benefits, including health insurance
- The intern(s) must be aware that the internship is unpaid

#### **Types of Workers Presumed to be Independent Contractors**

- Labor Code § 2776
  - Bona fide business-to-business contracting relationships
- Labor Code § 2777
  - Referral agencies and service providers
- Labor Code § 2778
  - Professional services
- Labor Code § 2779
  - Single-engagement events
- Labor Code § 2780
  - Sound recording and musical compositions
- Labor Code § 2781
  - Construction
- Labor Code § 2782
  - Data aggregators
- Labor Code § 2783
  - Certain professions that generally require a license

More information on workers presumed to be independent contractors may be found [here](#)

#### **The following do NOT qualify as exceptions to the General Presumption that Workers are Employees**

- Industry norms
- Independent contractor agreements
- Worker preference for independent contractor status
- How the federal government or other states classify workers

#### **Consequences of Misclassification**

There are potentially significant consequences to improperly classifying workers, including (among others): Money

- Court-awarded money damages to misclassified workers
- Attorneys' fees and other court costs awarded against employers in lawsuits by misclassified workers
- Time
  - Labor Workforce & Development Agency investigations to verify the appropriate classification of workers
  - Tax audits