

# Are You Illegally Classified by Your Employer as an "Independent Contractor" and Not An Employee?

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Are You an Independent Contractor or an Employee?

Many businesses attempt to avoid their responsibilities as employers by improperly categorizing employees as "independent contractors." By doing so, they attempt to avoid paying employer contributions for such things as taxes, social security, insurance and workers compensation leaving the employee to pay self-employment taxes, insurance and other costs typically borne by the employer. Further they attempt to avoid wage and hour regulations (eg overtime and meal breaks), liabilities for discrimination and wrongful termination, and also seek to avoid liability for the negligent acts of the independent contractors.

An employer who improperly categorizes an employee as an independent contractor faces severe penalties from the taxing authorities, and may be liable to the employee for such things as overtime pay, vacation pay, insurance payments or other benefits. Doing so is illegal, and many independent contractors may have claims against their employers for the improper characterization.

There are several factors to consider when determining whether or not a worker is actually an employee under the law and not an independent contract (regardless of what the employer calls them). Over the years a list of factors has been developed by the courts and the taxing authorities in determining whether or not a person is an "employee" or an "independent contract." These factors are codified in the relevant statutes of many states. For example, The California Labor Code §2750.5 provides in part:

Proof of independent contractor status includes satisfactory proof of these factors:

- (a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.
- (b) That the individual is customarily engaged in an independently established business.
- (c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status.

A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

The key questions to ask are:

Does the employer have the right to control the manner in which the work is completed?

Does the provide the tools and equipment for the job? (as opposed to the worker providing his or her own tools and equipment )

Is the worker prohibited from competing against the employer and/or working for other employers at the same time?

Is the worker paid by the hour or with a salary? (as opposed to being paid to complete a distinct project)

If the worker can answer some or all of the foregoing questions affirmatively, then that worker may very well be an employee entitled to all the rights of an employee. If you think that you have had your employment status improperly categorized as an "independent contractor" by your employer you should contact an attorney to discuss your options. Mr. Cartwright practices primarily in the areas of civil litigation, business planning, and identity theft representation. Mr. Cartwright graduated from Tulane University School of Law. While a student at Tulane, he was employed by US Customs. A native Southern Californian, he has practiced in San Diego since graduating from law school. For more information please contact him at: [glc@cartwrightlawgroup.com](mailto:glc@cartwrightlawgroup.com)

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