

Independent Contractor or Employee?

How you should be classified

YOUR LEGAL RIGHTS

Not all people who perform work for a company are employees. Instead, they may be independent contractors. Whether a person is an employee or independent contractor usually depends on the kind of work the worker performs and how the employer supervises that work.

Employers sometimes label workers as independent contractors when they are actually employees. That's because employers who use independent contractors rather than employees don't have to pay payroll taxes for independent contractors, and are not liable for payments under workers' compensation, unemployment insurance, disability insurance, or social security for their independent contractors. This fact sheet describes how to find out if you are an independent contractor and explains what you should do if you think you have been wrongly classified as an independent contractor by your employer.

1. Am I an independent contractor or an employee?

There is no “black and white” definition of who is an independent contractor. Instead, there are a number of factors (set forth in the chart below) that courts and agencies use to decide if you are an independent contractor or employee. All the factors are considered together in making the determination. No one factor is sufficient to determine if you are an independent contractor. Sometimes it can be difficult to decide whether someone is an employee or an independent contractor. In fact, in some “close call” cases, it is possible that one government agency (e.g., the Labor Commissioner) might decide that you are an independent contractor but another agency (e.g., Employment Development Department) might decide that you are an employee.

2. Why does it matter if my employer calls me an independent contractor or an employee?

Different benefits and procedures are available to independent contractors and employees. *Employees* are protected by state wage and hour laws (e.g., minimum wage, break periods), workers' compensation, unemployment insurance, disability insurance, and social security. Employees can also seek assistance from state agencies to enforce the rights provided by these laws. For example, if an employer pays less than minimum wage, an employee can file a claim with the Labor Commissioner. *Independent contractors*, on the other hand, are not protected by wage and hour laws, workers' compensation, unemployment insurance, disability insurance, or social security. Also, independent contractors are unable to turn to most state agencies for assistance, but instead have to go to court to settle wage disputes or enforce other rights. Because it is usually easier to file a claim with state agencies than with the courts, it is important to know whether you are an employee or independent contractor.

3. What factors are used to determine if I’m an independent contractor or employee?

It depends on the agency (e.g. Labor Commissioner, Employment Development Department etc.) reviewing your status. However, most of the factors these agencies look at are similar and are set forth as follows:

	EMPLOYEE	INDEPENDENT CONTRACTOR (IC)
Control This is the most important factor in the different departments’ analyses. Other factors are considered only to the extent that they prove or disprove control.	If the employer can exercise complete control over the way in which a worker completes a job (how, when, and where they do the work), that worker is an employee.	ICs can control the way in which they do their work. The employer is interested only in the IC’s results.
Supervision	Employees generally work under extensive supervision.	ICs generally work unsupervised.
How Work Is Done	Employees have to follow instructions given to them by their employer about when, where, and how work is to be done.	ICs can set their own hours and do the job in their own way. The employer will review only the finished job.
Training	Employees are trained by the employer to do their job in a certain way. They may work with experienced employees to learn the job, or attend courses or meetings.	ICs are not trained by the employer.
Integration	An employee’s work is part of the day-to-day operation of the business. An employee’s work is also coordinated with that of other people in the business, and the success of the business depends upon that work being done. For example, a secretary is probably an employee because his work is coordinated with one or several bosses and other secretaries.	An IC’s work is not an integral part of the employer’s business. It is set apart from the work of the employees. For example, a plumber might be hired by a restaurant to fix the bathroom. He is probably an independent contract because during and after that task, he will have little or no interaction with any of the other employees (waitresses, cooks, etc.).



I N D E P E N D E N T C O N T R A C T O R O R E M P L O Y E E F A C T S H E E T

Who Does the Work	An employee has to do the work she is assigned herself. She can't hire someone else to do it for her.	An IC can hire assistants to perform the work she contracts with the employer to do.
Continuing Relationship	An employee often works for the employer year after year.	An IC is hired only to perform a certain job. When that job is finished, the contract ends.
Hours of Work	Employees' hours are set by the employer. Employees often work full time.	ICs can set their own hours.
Where Work is Done	Employees usually have to work at the employer's office, or at another site designated by the employer.	ICs may work away from the employer's site, and usually supply their own office and/or office equipment.
Order of Tasks	An employer can set the order in which an employee must do certain tasks, particularly if the same results could be achieved by doing the tasks in a different order.	ICs can choose what order they want to perform tasks necessary to complete a job.
Pay	Employees are paid on set dates in regular amounts. Usually, an employer pays an employee travel and business expenses.	ICs are paid by the job, and pay their own expenses.
Work Supplies	Employers provide tools and materials needed to complete work to their employees.	ICs have to provide their own tools and work supplies.
Investment in Facilities or Equipment	Employees have no significant investment in the facilities an employer uses to perform services.	ICs have a real, essential, and significant investment in the facilities in which they work.
Profit or Loss	An employee can't make a profit or lose money based on a good or bad decision. Employees are paid a set wage.	An IC can make a profit or lose money based on a good or bad decision about the services she provides.
Working for More than One Firm	Employees usually only work for one employer.	ICs can work for several firms at the same time.
Worker's Services Available to the General Public	Employees' services are generally available only to their employer and not to the general public.	ICs can make their services available to the general public. Often, they advertise their services and recruit new clients while they're working for one employer.



Right of Employer or Worker to Terminate the Relationship at Will	Employers generally may fire an employee, or an employee generally can quit, without good cause and without notice.	The employer and the IC must complete what was promised. An IC must be able to complete all the work she was hired to do, unless there is a legally recognized reason not to do so.
Business Distinct from Employer	Employees are part of the employer’s business, and do not offer their services separately from the employer.	ICs have a separately established business from the employer, and promote themselves to the general public as available to perform similar services.
Skill Required	If a worker is performing tasks that require little skill or expertise, the worker generally is an employee.	ICs often perform tasks involving high levels of skill or experience.
Belief of the Worker and Employer About the Job	The fact that the worker or employer believes that the worker is an employee will be considered. The circumstances that caused such a belief will also be considered. The decision maker will want to know why such a belief was formed.	The fact that a worker or employer believes that the worker is an independent contractor will be considered. The decision maker will want to know why such a belief was formed.

4. What can I do if my employer says I’m an independent contractor, but I think I’m an employee?

If your employer has been treating you as an independent contractor and you are actually an employee, you may be entitled to recover wages, collect unemployment insurance, have social security withheld, and file a claim with the agency, such as the Labor Commissioner, that handles your claim. Those agencies will determine whether you are an employee or an independent contractor.

If you suspect that you have been misclassified, the most important thing you can do is keep detailed records of the type and hours of work you performed. It might be helpful for you to keep a journal of the hours you work, the tasks you perform every day, and how you are supervised while doing that work. If you want to file a claim for minimum wage violations, promised wages, and/or overtime, you will need to be able to prove that you worked the hours and the kind of work you were doing.



You can also ask a court to determine the narrow legal issue of whether or not you are an employee or an independent contractor, if you want to quickly resolve a conflict with your employer about your overall employment status. California Code of Civil Procedure §1138 allows parties to ask a court to answer a single legal question without filing a lawsuit. Parties who use §1138 benefit from a quick judicial determination and minimal, if any, court fees.

This fact sheet is intended to provide accurate, general information regarding legal rights relating to employment in California. Yet because laws and legal procedures are subject to frequent change and differing interpretations, the Legal Aid Society - Employment Law Center cannot ensure the information in this fact sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your rights in your particular situation.

For further information about your employment rights, please call:

The Workers' Rights Clinic

415-864-8208 (SF Bay Area) or **866-864-8208** (Toll Free in CA)

The Workers' Rights Clinic is a project of The Legal Aid Society - Employment Law Center, a non-profit organization focusing on the employment-related legal rights of low-income workers and providing free legal information on a wide range of employment-related problems.

