



Independent Contractor vs. Employee What is Your Workers' Comp Liability?

The question of whether a worker is an independent contractor or an employee is not easily answered. **Merely agreeing with someone on independent contractor status does not make it so.** Also, California workers' compensation laws relating to employee versus contractor status are different from the laws applied to this status question by other state and federal agencies.

Contrary to what you might think, the mere existence of a written employment contract or a lease will not establish an independent contractor relationship. For example, suppose you are a contractor. You hire a subcontractor with employees for a specific task. The subcontractor or one of the employees is injured on the job. Are you liable for workers' compensation insurance? Yes, if your subcontractor is unlicensed. **The courts have held that a subcontractor can only be considered an independent contractor if licensed, as required by Chapter 9 of Division 3 of the Business and Professions Code. If a subcontractor is unlicensed and performing license required work, the subcontractor is an employee of the contractor. In addition, you could be held liable for workers' compensation benefits if the employee of any uninsured subcontractor is injured while working on a project for you.**

Not all occupations have licenses like the construction industries. California courts and state agencies have typically used a number of tests to determine whether an individual is an employee or an independent contractor. No single test is the sole determining factor. **However, a crucial factor in determining employment status is the right to direct and control.** If you have the right, whether or not that right is exercised, the courts have routinely decided that the "independent contractor" is actually your employee (even if the person is licensed).

Some of the other tests used are:

- Whether the person performing the service has independently chosen the burdens and benefits of self-employment.
- Whether the person performing the service is engaged in a distinct occupation or business.
- The skill required in the particular occupation.
- Whether the employer or the person performing the service supplies the instrumentalities, tools, and place of work.
- Whether the person performing the service has the right to hire and terminate others.
- The right to terminate the relationship at will.

Remember, this list is not exhaustive, and the answer to any single test is not the determining factor.

So, protect yourself! If certain jobs require a license, insist on seeing the license and retain a copy for your records. Contact the Contractor's State License Board to verify that the license is valid for the type of work you are contracting and the person presenting it is listed on the license records. Obtain **original** Certificates of Workers' Compensation Insurance addressed to you from all contractors and subcontractors who have employees or who, in turn, subcontract any portion of their work.

If the occupation doesn't require a license, or if you are unsure of the status of a worker for any reason, **contact your local State Fund office and speak to a representative.** By working together, we can avoid any surprises from an audit. If proper documentation is not maintained and presented to our auditors, we are obligated to charge premium for any liability that may exist under your workers' compensation insurance policy.