

Independent Contractor vs Employee

How to determine if an individual is an employee or Independent Contractor.

The CA Department of Industrial Relations has provided the guidance below to determine if a person is an Independent Contractor or employee.

The ABC test starts with an assumption that all workers are employees, and provides the test that a hiring entity must satisfy to prove that the workers are independent contractors. Under the ABC test, a worker is considered an employee and not an independent contractor, unless the hiring entity (childcare provider) satisfies all three of the following conditions:

***A.** Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?

1. The hiring entity must establish that the worker is free of such control to satisfy Part A of the ABC test.
2. A worker who is subject, either as a matter of contract or in actual practice to the type and degree of control a business typically exercises over employees is considered an employee.
3. Depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work to be found to have maintained the necessary control that an employer ordinarily possesses over its employees.

***B.** Does the worker perform work that is outside the usual course of the hiring entity business?

1. The hiring entity must establish that the worker performs work that is outside the usual course of its business to satisfy Part B of the ABC test.
2. Contracted workers who provide services in a role comparable to that of an existing employee will likely be viewed as working in the usual course of the hiring entity's business.

***C.** Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed by the hiring entity?

1. The hiring entity must prove that the worker is customarily and currently engaged in an independently established trade, occupation, or business.
2. The hiring entity cannot unilaterally determine a worker's status simply by assigning the worker the label of "independent contractor" or by

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requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor.

3. It is required that the independent contractor business actually exists and be in operation when the work is performed. The fact that the business can come into existence in the future is not sufficient.
4. Individuals who independently decide to go into business generally take the usual steps to establish and promote that independent business. These steps may include - Incorporation, licensure, advertising business, routine offerings to provide the services of the independent business to the public or potential customers.
5. If an individual's work relies on a single employer, Part C is not met.

If a hiring entity has a worker sign an agreement stating that the worker is an independent contractor, does not make payroll deductions or withholdings for taxes or Social Security for the worker, and provides the worker with a 1099 rather than a W-2 does not mean that the worker is an independent contractor. That is determined by the ABC test.

If the hiring entity misclassifies a worker as an independent contractor, the hiring entity may face significant liability for restitution and penalties for violation of employee rights and protections. They will be in violation of minimum wage and overtime laws, meal periods and rest breaks, payment of unemployment insurance taxes, providing workers' compensation insurance and the employer and possibly the employee's share of taxes (plus penalties and interest).

It is strongly recommended that Providers seek guidance from an employment specialist/professional to ensure they are accurately reporting the status of the worker.