

# Who is NOT an Employee?

## *A Bite-Sized Legal Guide*

Having employees generally comes with a list of legal obligations, so it's important to determine who is or isn't an employee. To be safe, you may want to take the approach of assuming that anyone working for your enterprise is an employee, and then do an analysis or get legal advice to determine whether they fall into a category of worker that is NOT considered an employee. **Tread carefully!** The consequences of failing to properly categorize someone as an employee can be quite costly. Here are some basic explanations of categories of non-employees for employment law purposes:

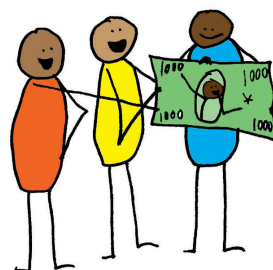
### Unpaid Interns: People that work for their own educational or therapeutic benefit.

For-profit businesses can have unpaid interns, so long as the arrangement in which the intern is working meets the criteria for a valid internship. Commonly, the following criteria are considered in determining who is an intern (also known as trainee or student):

- 1) The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school;
- 2) The training is for the benefit of the trainees;
- 3) The trainees do not displace regular employees, but work under their close observation;
- 4) The employer derives no immediate advantage from the activities of the trainees, and on occasion the employer's operations may be actually impeded;
- 5) The trainees are not necessarily entitled to a job at the conclusion of the training period; and
- 6) The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

### Partners/Owners: People who work together as relative equals for their own and mutual benefit.

Employment law doesn't apply when there is truly no boss/subordinate relationship. It's widely accepted that if you start a sole proprietorship and work for yourself, you are not your own employee. How does that apply when two or more people own, manage, and work for their own business in partnership with one another? A 2003 U.S. Supreme Court decision (*Clackamas Gastroenterology Associates*) adopted the following guidelines for determining when a "master-servant" (boss/subordinate) relationship exists.



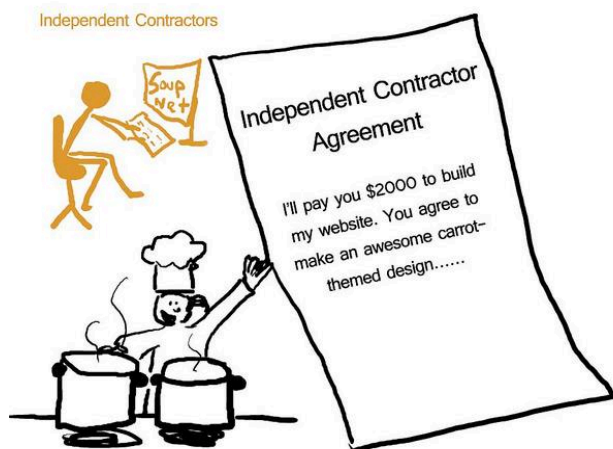
- 1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- 2) Whether and to what extent the organization supervises the individual's work;
- 3) Whether the individual reports to someone higher in the organization;
- 4) Whether and to what extent the individual is able to influence the organization;
- 5) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
- 6) Whether the individual shares in the profits, losses, and liabilities of the organization.

Note that when an owner works for a *corporation* they will be an employee for *tax* purposes (i.e. the entity will withhold payroll taxes and issue a W-2). In part because of this, worker-owners in a corporation, including a cooperative corporation, are more likely to be considered employees for employment and immigration law purposes than worker-owners of an LLC or partnership.

## Independent Contractors: People who work for others in an independent manner.

The legal analysis for independent contractors is different from the test for determining whether someone is a partner and co-owner of a business. One U.S. Supreme Court decision summed up the factors for determining independent contractor status; these factors generally include whether:

- 1) The hiring party's right to control the manner and means by which the product is accomplished;
- 2) The skill required;
- 3) The source of the instrumentalities and tools;
- 4) The location of the work;
- 5) Duration of the relationship between the parties;
- 6) Whether the hiring party has the right to assign additional projects to the hired party;
- 7) The extent of the hired party's discretion over when and how long to work;
- 8) The method of payment;
- 9) The hired party's role in hiring and paying assistants;
- 10) Whether the work is part of the regular business of the hiring party;
- 11) Whether the hiring party is in business;
- 12) The provision of employee benefits; and
- 13) The tax treatment of the hired party.



In California, the test for an independent contractor is even more strict than the standard above. A 2018 California Supreme Court decision (*Dynamex*) set aside the list of factors above in favor of what it calls the "ABC test," which is likely to result in more

independent contractors being treated as employees. This ABC test is now law under AB5. Under this test, a worker is properly considered an independent contractor only if the hiring entity establishes:

- (A) that the **worker is free from the control** and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- (B) that the **worker performs work that is outside the usual course of the hiring entity's business;** and
- (C) that the **worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."**

Rather than weighing multiple factors, this decision requires a worker to meet all three factors in order to be properly classified as an independent contractor.

## Volunteers: People that do work for charitable, religious, or humanitarian benefit.

People can "volunteer," but they must do so for humanitarian/charitable purposes. Generally, this means volunteering for a nonprofit organization. However, even people "volunteering" for a nonprofit could end up being determined to be employees. Here are factors generally considered:

- 1) The nature of the entity receiving the services (i.e., is it a nonprofit?)
- 2) Whether the person expects or receives benefits from those for whom the services are performed. (ie, does the person expect to be paid?)
- 3) Whether the activity is less than a full-time occupation,
- 4) Whether regular employees are displaced by the volunteer,
- 5) Whether the services are offered freely without pressure or coercion, and
- 6) Whether the services are of the kind typically associated with volunteer work.

### **“Work” that isn’t work.**

People can also do “work” that isn’t *work* we typically associate with employment. For example, people picking berries on a U-pick farm have been determined to not be employees of the farm, because the experience of picking berries was recreational. Other activities people do for personal or therapeutic benefit may not be “work”. Tread carefully in making such a determination.



*Revised January 2020.*