

INDEPENDENT CONTRACTOR



VS

EMPLOYEE



INDEPENDENT CONTRACTOR VS. EMPLOYEE (CALIFORNIA LAW)

Employees have significant legal rights that independent contractors do not, and the answer usually comes down to how much control the business exercises over the work.

CONTENTS

The Rights of Employees and Independent Contractors

The Most Common Test in California: The ABC Test

The ABC Test Carve-Outs

The Manner and Means Test

The Test Used by the IRS for Federal Tax Purposes

The Test Under California's Anti-Discrimination Laws

The Federal "Economic Realities" Test

Consequences of Misclassification

What to Do If You've Been Misclassified

References

BY KYLE D. SMITH

Kyle D. Smith is a California employment lawyer and the author of the articles on [WorkLawyers.com](https://worklawyers.com). He represents employees in disputes with their employers, from unpaid wages and misclassification to wrongful termination.

He writes these guides to put the state's labor laws into plain English, in neutral terms, with a citation for every claim.



Independent contractors are workers in business for themselves. They're generally free to work on multiple projects at the same time and take jobs on a freelance basis. In many cases, they can choose when, where, and how they perform the work.¹

Employees are workers employed by a business, person, or government entity.² In an employee-employer relationship, the employer generally exercises control over the wages, hours, and working conditions of the employee.³

The distinction between independent contractors and employees is an important one. Employees have many legal rights that independent contractors do not. Those can include the right to overtime pay,⁴ the right to meal breaks,⁵ and the right to a minimum wage.⁶

In California, there are several legal tests to determine whether a person is an employee or independent contractor. The tests are similar, but not identical. The appropriate test will depend on which rights or obligations are at issue. The most important tests are:

-  The “ABC” test, which is used for most wage and hour purposes under California law;⁷
-  The “manner and means” test, which is used as a fallback under California wage and hour laws where the ABC test does not apply;⁸
-  The “control” test used by the IRS for federal tax purposes;⁹
-  The test under California's anti-discrimination laws;¹⁰ and
-  The “economic realities” test, which is used by federal courts.¹¹

Although each test is slightly different, the key factor in each of them is the same: the degree of control the hiring party exercises over the worker. The more control the hiring party exercises, the more likely it is that the worker will be considered an employee.¹²

The rest of this article will examine each of these tests and explain why the distinction between employees and independent contractors matters to workers and businesses alike.

The Rights of Employees and Independent Contractors



Before exploring the various legal tests that determine whether a worker is an independent contractor or an employee, it's important to understand why the distinction matters.

1.1 Employees Have More Legal Protections

Employees enjoy many benefits that independent contractors do not:

-  Employees have a legal right to overtime pay if they work more than a certain number of hours.¹³
-  Employees have a right to meal breaks.¹⁴
-  Employees have a right to be paid the minimum wage.¹⁵
-  State and federal laws protect employees from unlawful discrimination and retaliation.¹⁶



An employer must withhold state and federal income and payroll taxes from an employee's wages.¹⁷



Employers are required to pay social security, Medicare and unemployment taxes.¹⁸



Employees are protected by workplace safety laws.¹⁹



If an employee is injured on the job, they are eligible for workers' compensation.²⁰



When an employee loses their job, they are often entitled to California unemployment benefits.²¹



Many employees are entitled to take family or medical leave when they or their loved ones suffer from serious health conditions.²²

These benefits can be life-changing for many workers. Employees generally enjoy more stability with their income, more job security, and are responsible for paying fewer taxes.

1.2 Independent Contractors Have More Freedom

Independent contractors do not enjoy many of the rights that employees have. They do, however, have more flexibility and more responsibilities than traditional employees. For example:

- ✓ Independent contractors generally control their own work schedule.
- ✓ Independent contractors usually have authority to decide *how* they will complete their work.
- ✓ Independent contractors may work for more than one business at a time.
- ✓ Independent contractors can set their own pay or negotiate the price of each individual job.
- ✓ Independent contractors sometimes must incur the costs associated with doing their job, like paying for insurance, buying tools, or purchasing parts.
- ✓ Independent contractors must pay their own state and federal taxes.
- ✓ Independent contractors are not entitled to workers' compensation, unemployment benefits, or the protections of most anti-discrimination and workplace safety laws.

As can be seen, the way businesses classify their workers can be important. So, how does the law determine whether a person is an independent contractor? Unfortunately, there is not a single test that applies in all circumstances. California and federal agencies have their own tests for making this determination.

Despite their differences, the core principle for every test is the same: the more control a business exercises over the way a person works, the more likely it will be that the person is an employee, rather than an independent contractor.²³

The Most Common Test in California: The ABC Test



California's wage and hour laws provide significant protections to employees. Those labor laws are generally more favorable to workers than federal labor laws.²⁴ So, more often than not, the most important test to determine whether a worker is an employee is the one used under California law.

2.1 The ABC Test

In most contexts under California law, the default presumption is that a worker is an “employee” if they provide labor or services for someone else in exchange for pay. The burden is on the hiring entity to establish that the worker is *not* an employee.²⁵

A hiring entity can show that a worker is an independent contractor (and thus *not* an employee) only if all three of the following requirements are met:

Abc **Autonomy.** The worker must be free from the control and direction of the hiring entity with regard to how the work is performed.²⁶

Abc Business Dissimilarity. The worker's labor or services must fall outside the usual course of the hiring entity's business.²⁷

Abc Custom of the Worker. The worker must be customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.²⁸

There are, of course, exceptions to this rule,²⁹ but the key takeaway is that California law construes work relationships broadly in favor of finding that a worker is an employee rather than an independent contractor.

2.2 *Dynamex*, AB 5, and AB 2257

The ABC test reflects a dramatic change in California law. It was first adopted by the Supreme Court of California in 2018, in a landmark case called *Dynamex Operations West, Inc. v. Superior Court (Dynamex)*.³⁰

Previously, California law required courts to consider several factors when examining the nature of the worker's relationship with the hiring entity.³¹ This multi-factored approach (called the "manner and means" test) is still used in some situations and is explained in Chapter 4, below.

The court in *Dynamex*, however, found that the manner and means test posed too great a risk of misclassification, which potentially harmed workers, competitors, and the public as a whole.³²

[T]he risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors.

— *Dynamex Operations West, Inc. v. Superior Court*
(2018) 4 Cal.5th 903



In light of the potential harms, the *Dynamex* court made it more difficult for hiring entities to characterize workers as independent contractors. In doing so, it adopted the ABC test and placed the burden on the hiring entity to establish that the worker is an independent contractor.³³

This change in the law was met with approval by the California legislature, which codified the *Dynamex* decision in Assembly Bill No. 5 [↗](#) (AB 5).

AB 5 was signed into law by Governor Gavin Newsom on September 18, 2019.³⁴ It added certain Labor Code sections and changed several other statutes to make the *Dynamex* decision broadly applicable in many wage and hour contexts.

On September 4, 2020, Governor Gavin Newsom signed into law a significant restructuring of the law in AB 2257, which clarified and reorganized exceptions to the ABC test, as well as adding new exceptions.³⁵

The Legislature has revisited these rules several times since then. The codified framework now appears in Labor Code sections 2775 through 2787. Most recently, AB 1514 extended two of the temporary exceptions: the exception for licensed manicurists now runs through January 1, 2029, and the exception for commercial fishers working on American vessels runs through January 1, 2031.³⁶

2.3 A Written Agreement Is **NOT** Determinative

Importantly, the label a business places on a worker does not determine whether the worker is an employee or an independent contractor for legal purposes.³⁷ If, for example, the parties have a written agreement stating that the worker is an independent contractor but the parties act like an employer and employee, courts will ignore the agreement.³⁸

Similarly, the fact that a worker is issued a 1099 form for federal tax purposes, rather than a W-2 form, is not determinative of whether a person is an independent contractor. The legal test used to determine whether an employment relationship exists under California law is slightly different than it is for federal tax purposes. Also, some businesses mistakenly classify their workers as independent contractors to avoid the costs associated with employment.

This means that many workers who call themselves “independent contractors” are actually employees. When a worker has been misclassified, they can be entitled to recover all the benefits they would have received if they had been properly classified as an employee.

EXAMPLE

John works as a cashier at a grocery store. His boss assigns him specific tasks and requires him to show up during specific hours. The grocery store requires John to sign an agreement stating that he is an independent contractor.

Because John meets the legal test of being an employee, and not an independent contractor, the agreement he signed is unlawful and courts will ignore it. Instead, courts will look at the conduct of the worker and the business to determine who really has control over the way the job is performed.

Put simply, the law requires workers to be treated as employees if they meet the legal definition of that role, regardless of whether the business has called them something else. A job title itself is not dispositive of whether a person is an employee or an independent contractor.³⁹

2.4 When the ABC Test Controls

Although the ABC test is the most common under California law, it isn't always the correct test to determine a worker's status as employee or independent contractor. The ABC test controls when applying the following three sets of rules:

 **Labor Code.** California's Labor Code governs most aspects of the employment relationship. These statutes cover rules like the minimum wage,⁴⁰ labor law exemptions,⁴¹ hours of work,⁴² workplace safety,⁴³ and much more.⁴⁴

 **Wage Orders.** The State of California uses a series of wage orders to define many conditions of employment. The wage orders, which are available [here](#),⁴⁵ have the force of law. They address workplace rules, such as: the right to overtime pay, the right to meal and rest breaks, and certain recordkeeping requirements.⁴⁵

 **Unemployment Insurance Code.** California's Unemployment Insurance Code governs, as the name suggests, unemployment insurance. It also covers: disability insurance, certain tax withholdings, the CalWORKs program, and other workforce development programs.⁴⁶

For most workers, if any of the above legal rights are at issue, the ABC test will apply to determine whether the worker is an employee or an independent contractor. But, as with most legal rules, there are exceptions.

If an exception to the ABC test applies, the next most common applicable test is called the “manner and means” test, which is explained in Chapter 4, below. The manner and means test is also the default test used when a court finds, for some reason, that the ABC test cannot be applied in a particular case.⁴⁷

2.5 Rule Conflicts

In some situations, a statute or regulation will provide its own definition of what it means to be an employee. This definition may conflict with the definition provided by the ABC test.

If the Labor Code, wage orders, or the Unemployment Insurance Code expressly defines terms “employee,” “employer,” “employ,” or “independent contractor” differently than how the ABC test defines it, then the ABC test does *not* apply.⁴⁸ Instead, the test provided by those definitions would apply.

The ABC Test Carve-Outs



California law provides for quite a few categories of occupations or contracting relationships to which the ABC test does *not* apply. In these cases, the “manner and means” test (explained in Chapter 4 below) is usually the default test used to determine whether the worker is an employee or an independent contractor.⁴⁹

This chapter will take a closer look at the major exceptions to the ABC test. There are, however, many possible exceptions, often highly nuanced and subject to multiple interpretations, and not all the exceptions are covered here. Some of the exceptions are also temporary: the Legislature gives several of them expiration dates and revisits them regularly.

If you’re unsure whether an exception applies, you should contact an attorney to advise you.

3.1 Insurance Professionals

Certain workers licensed by the Department of Insurance are subject to the “manner and means” test, instead of the ABC test. This can include: licensed insurance agents, brokers, and workers providing underwriting inspections, premium audits, risk

management, claims adjusting, third-party administration, or loss control work for the insurance and financial service industries.⁵⁰

Importantly, the definitions involving insurance professionals span several chapters of the Insurance Code. So it would be a good idea to look closely at Labor Code section 2783, subdivision (a), and the Insurance Code provisions it references to determine whether the manner and means test applies.

3.2 Medical Professionals

The following professions are sometimes subject to the “manner and means” test, instead of the ABC test:⁵¹

-  Physicians and surgeons,
-  Dentists,
-  Podiatrists,
-  Psychologists, or
-  Veterinarians.⁵²

For this exception to the ABC test to apply, two conditions must be met: **(1)** the worker must be licensed by the State of California to perform their work,⁵³ and **(2)** the worker must perform professional or medical services for a “health care entity.”⁵⁴

A *health care entity* for these purposes can be any sole proprietorship, partnership, or professional corporation as defined in section 13401 of the Corporations Code.⁵⁵

In addition to the test described above, there are certain situations in which physicians and surgeons are presumptively treated as independent contractors.⁵⁶ Specifically, if they enter into a contract for the performance of health services on behalf of a licensed primary care clinic,⁵⁷ courts will presume they are independent contractors, rather than employees.⁵⁸

If this presumption applies, it can be rebutted with evidence that the worker is actually an employee.

3.3 Licensed Professionals

Workers in the following professions that hold an *active* license from the State of California are also subject to the “manner and means” test:

-  Lawyers,
-  Architects,
-  Landscape architects,
-  Engineers,
-  Accountants, or
-  Private investigators.⁵⁹

3.4 Securities Workers

Certain workers in securities and investments are subject to the “manner and means” test if any of the following apply *and* they fall into one of the groups listed below:⁶⁰

-  They are registered with the Securities and Exchange Commission,
-  They are registered with the Financial Industry Regulatory Authority, or
-  They are licensed by the State of California to sell securities or advise in the investment of securities.⁶¹

This exception to the ABC test applies to the following groups:

-  Securities broker-dealers,
-  Investment advisers, or
-  The agents and representatives of securities broker-dealers or investment advisors.⁶²

3.5 Professional Service Providers

People that perform certain *professional services* under a contract are subject to the “manner and means” test instead of the ABC test.⁶³ For the manner and means test to apply, however, six criteria must be satisfied:

-  **Business Location.** The worker must maintain a business location separate from the business location of the hiring entity. This location can be just the worker's residence, and the worker can even perform services at the location of the hiring entity, as long as they have some business location separate from the hiring entity's.⁶⁴
-  **Business Filings.** If the work is performed in a jurisdiction that requires the worker to have a business license or business tax registration, the worker must have those required materials.⁶⁵
-  **Service Rates.** The worker must have the ability to set or negotiate their own rates for the services performed.⁶⁶
-  **Work Hours.** The worker must have the ability to set their own hours, with the exception of project completion dates and reasonable business hours.⁶⁷
-  **Other Work.** The worker must be customarily engaged in the same type of work performed under contract with another hiring entity or hold themselves out to other potential customers as available to perform the same type of work.⁶⁸
-  **Independent Judgment.** The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.⁶⁹

If these criteria have been met, then members of the professions listed below *might* be subject to the manner and means test.⁷⁰ Of note, however, many of these professions have specific definitions. So, if you're unsure whether a profession qualifies as a "professional service," you should contact an attorney to advise you.

-  Marketers;⁷¹
-  Human resource administrators;⁷²
-  Travel agent services;⁷³
-  Graphic designers;⁷⁴
-  Grant writers;⁷⁵
-  Fine artists;⁷⁶
-  Agents licensed to practice before the IRS;⁷⁷
-  Payment processing agents;⁷⁸
-  Photographers, photojournalists, videographers, or photo editors;⁷⁹

-  Freelance writers, translators, editors, copy editors, illustrators, or newspaper cartoonists;⁸⁰
-  Content contributors, advisors, producers, narrators, or cartographers for publications;⁸¹
-  Licensed estheticians, licensed electrologists, licensed manicurists, licensed barbers, or licensed cosmetologists;⁸²
-  Specialized performers hired to teach a master class for no more than one week;⁸³
-  Certain appraisers;⁸⁴ and
-  Licensed and registered professional foresters.⁸⁵

Again, these words have specific meanings under the law. So, if a worker could potentially fall under one of these definitions, it is important to carefully review the statutory text to determine the appropriate test.

3.6 Licensed Contractors

Workers who perform services that require a contractor's license issued by the State of California are presumed to be employees.⁸⁶ Likewise, people who work for a person who is required to obtain a contractor's license are presumed to be employees.⁸⁷

This presumption shifts the burden of proof to the business receiving services. This means that, in court, businesses wishing to classify their workers as independent contractors will bear the initial responsibility of showing that the workers were actually independent contractors under the normal test and factors stated above.⁸⁸

Businesses are also responsible for proving that the worker's status as an independent contractor was not a pretext to avoid classifying the worker as an employee.⁸⁹

3.7 Direct Salespersons

Certain direct salespeople are subject to the "manner and means" test, instead of the ABC test.⁹⁰ To qualify as a direct salesperson, for these purposes, the worker must meet the definition of "direct sales salesperson" under section 650 of the Unemployment Insurance Code, as well as all three conditions for exclusion that section 650 lists.

3.8 App-Based Drivers

Drivers for app-based rideshare and delivery companies have their own set of rules. In 2020, California voters passed Proposition 22, which classifies app-based drivers as independent contractors when the network company meets certain conditions, while guaranteeing the drivers specified earnings and benefits.⁹¹ The Supreme Court of California upheld Proposition 22 against a constitutional challenge in 2024.⁹²

3.9 Other Relationships

In addition to the occupations listed above, California law addresses several other types of relationships with specific rules and definitions that are applied to determine whether a worker is an employee or independent contractor. Those include:

-  Bona fide business-to-business contracting relationships,⁹³
-  Referral agencies,⁹⁴
-  Real estate licensees,⁹⁵
-  Home inspectors,⁹⁶
-  Repossession agencies,⁹⁷
-  Single-engagement event contractors,⁹⁸
-  Music industry professionals,⁹⁹
-  Construction subcontractors,¹⁰⁰
-  Data aggregators,¹⁰¹
-  Manufactured housing salespersons,¹⁰²
-  Commercial fishers,¹⁰³
-  Newspaper distributors,¹⁰⁴
-  Persons hired by an international exchange visitor program,¹⁰⁵
-  Competition judges,¹⁰⁶ and
-  Motor club contractors.¹⁰⁷

Because this article does not address all possible professions, and because the law in this area has been rapidly evolving in recent years, this article should not be relied on for specific conclusions about how a worker should be characterized. If you have

questions about how the law should be applied in a specific case, consult with an attorney.

The Manner and Means Test



Although the ABC test is the most common test in the wage and hour context under California law, it does not always apply. The ABC test does not apply, for example, to many licensed professionals.¹⁰⁸

When the ABC test does not apply, the most common fallback test is the “manner and means” test.¹⁰⁹ This test is also sometimes referred to as the *Borello* test, after the court decision that first established it (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations*).¹¹⁰

Under the manner and means test, the key question is whether an “employment relationship” has been created. An *employment relationship* exists when an entity hires someone to do something for their benefit (or the benefit of a third party).¹¹¹ The hiring entity can be a person, a business, an organization, or a governmental body.¹¹²

The legal definition of “employment relationship” is somewhat vague. So California courts have developed a more specific test: An employment relationship will be found when the business has a right to control the manner and means of accomplishing the result desired.¹¹³ This is sometimes referred to as the *manner and means test*.

4.1 The Amount of Control Is Key

The primary question under the manner and means test is the degree to which the hiring business can control *how* a worker does their job. If the business has a right to exercise a high degree of control, the worker will be considered an employee.¹¹⁴ If, on the other hand, the business only has a right to control the result of the work (and not the means by which it is accomplished), an independent contractor relationship is established.¹¹⁵

Put simply, the more control a business exercises over the way a worker does their job, the more likely it is that the worker will be found to be an employee.¹¹⁶ If, for example, the business can control the details involved in how a task is performed, rather than just the end result of the task, they will likely be considered an employer.¹¹⁷

Importantly, businesses do not have to actually exercise control over the way a worker performs the work to be considered an employer. The business only needs to have the right to do so under the parties' agreement.¹¹⁸ The business's right of control can be expressly stated in a written contract, or it can be implied by the nature of the job.¹¹⁹

4.2 Secondary Factors to Consider

It is often difficult to know who has the right to control the manner and means of a particular job.¹²⁰ Courts will therefore consider a series of secondary factors to make a final determination.¹²¹



Is the worker supervised? Independent contractors are free to do their work however they want, according to their own methods. If a person is required to follow a business's procedures, is supervised, or is given instructions on how to work, this suggests the worker is an employee.¹²²



Can the worker be fired at any time? If the business can fire a worker at will, it suggests the worker is an employee. But if a person is an independent contractor, they typically cannot be terminated unless the terms of the contract are fulfilled or breached.¹²³



Is the work a part of the business's normal trade? Work that is part of a business's regular line of work is normally performed by employees. A shoe salesperson in a shoe store, for example, would probably be an employee because they assist with the work normally performed by the business.¹²⁴

-  **Does the worker operate a separate business?** If a worker markets himself or herself as able to provide services for more than one company, it is evidence that the person has a separately-established business. Independent contractors can normally accept work from more than one business, while employees are usually more limited.¹²⁵
-  **Does the worker make business decisions?** A person who can make their own business decisions, particularly those that involve a risk of losing money or an opportunity for profit, is usually an independent contractor. Employees generally do *not* purchase equipment, rent an office, invest in advertising, or purchase insurance coverage with their own money.¹²⁶
-  **Does the worker provide their own equipment?** Employees are usually not required to provide their own equipment, tools, supplies, or the location to perform their work. Independent contractors, on the other hand, often invest in the resources they need to do the job. If a business furnishes the tools for the job, the worker is more likely to be considered an employee.¹²⁷
-  **How long is the work expected to last?** Employees are usually hired for an indefinite period. Independent contractors, on the other hand, are often retained on a per-job basis for a fixed period of time.¹²⁸
-  **How is the worker paid?** Employees are often paid a fixed salary or an hourly wage. Independent contractors, on the other hand, are usually paid a fixed rate per project or per task performed. Additionally, independent contractors generally submit invoices to businesses after a project is completed.¹²⁹
-  **Is the worker a skilled laborer?** Workers who provide unskilled or semi-skilled labor are more likely to be considered employees entitled to full protection of California's labor laws.¹³⁰
-  **Was the worker trained by the business?** Independent contractors generally perform their job independently and do not require training. If the business provides training to workers performing the same job, that can be evidence that a worker is an employee.
-  **How did the parties characterize their relationship?** Courts will sometimes, but not always, consider how the parties described their relationship. If the worker or business believed they were creating an employee-employer relationship, courts may be more likely to find that an employment relationship exists.¹³¹

Courts do not apply a strict formula when looking at these factors. Instead, they view the relationship as a whole and approach the factors flexibly, giving them varying levels of importance depending on the facts of the case.¹³²

If, after using these factors, a court is still unsure about whether a worker is an employee or an independent contractor, they will usually presume the person is an employee.¹³³ Given this, it can be a good idea for businesses to err on the side of caution and treat their workers as employees if there is any doubt about their status.

4.3 Employment Can Exist Even When Control Is Absent

In some circumstances, a business may lack control over how work is performed but a court will nevertheless find that an employer-employee relationship exists.¹³⁴ This can happen when three factors are met:

-  The business retains pervasive control over the operation as a whole,
-  The worker's job responsibilities are an integral part of the operation, and
-  The nature of the work makes detailed control unnecessary.¹³⁵

Cab drivers, for example, can sometimes be deemed employees under this rule, since the drivers perform an indispensable service for a cab company and all three factors are met.¹³⁶

4.4 Workers' Compensation Cases

California employees who have suffered a work-related injury are sometimes entitled to pay or benefits under California's workers' compensation laws.¹³⁷ Workers' compensation claims in California are administered by the Division of Workers' Compensation (the DWC).¹³⁸

The test used to determine whether an employment relationship exists in workers' compensation cases is largely the same as the test used in other California cases.¹³⁹ But the California Supreme Court has noted that the workers' compensation law should be interpreted liberally in favor of awarding compensation.¹⁴⁰ As such, some courts will consider other factors when reviewing cases.¹⁴¹

Specifically, courts in workers' compensation cases may consider:

-  The purpose of the workers' compensation laws,
-  The class of people intended to be protected by the laws,
-  Whether there are any specific statutory exclusions that apply, and



The relative bargaining positions of the parties (including consideration of the parties' mental states, economic strength, and educational attainment).¹⁴²

These factors tend to favor a finding that an employment relationship exists in workers' compensation cases.¹⁴³ It is not clear whether courts will consider them in other contexts.

4.5 Still Not Sure?

If a worker or a business is still confused about whether their relationship meets the legal definition of “employment” under California law, they have the option of requesting a determination by California's Employment Development Department (the EDD). The request can be completed on Form DE 1870 [☞](#) and mailed to the EDD. The EDD will then respond with a written determination.

The Test Used by the IRS for Federal Tax Purposes



The federal tax obligations of workers and businesses can vary significantly depending on whether the worker is classified as an employee or an independent contractor. Most commonly, the distinction will affect self-employment taxes,¹⁴⁴ social security and Medicare withholdings,¹⁴⁵ unemployment taxes,¹⁴⁶ and income tax withholdings.¹⁴⁷

The way a worker is classified can also impact the forms that businesses are required to prepare. Employers are usually required to provide their employees with a completed copy of IRS Form W-2 [↗](#). Independent contractors, on the other hand, are usually provided with a completed copy of IRS Form 1099-NEC [↗](#) by the businesses that paid them. (Before the 2020 tax year, these payments were reported on IRS Form 1099-MISC.)

To determine whether a worker is an employee or an independent contractor, the Internal Revenue Service (the IRS) looks primarily at whether the business has the right to control the details and the means by which the worker performs his or her job.¹⁴⁸ If a business has the right to control the details of an individual's work, the worker will be considered an employee.¹⁴⁹

This test is similar to California's "manner and means" test. And, like California, the IRS uses several factors to analyze whether a business exercises enough control over the way a worker performs their job to create an employment relationship. Those factors include:¹⁵⁰



Behavioral Control. A worker is an employee when the business has a right to control the person's work, even if the employer does not exercise its right of control. This factor looks at which party controls when, where, and how the work is performed, as well as the degree of instruction and training given to the workers, and how the business evaluates the completed work.



Financial Control. When a business has the right to control financial aspects of a worker's job, it is more likely that the worker should be classified as an employee. This factor looks at whether the business pays for the worker's equipment, how the worker's pay is calculated, and whether the worker can experience profit or loss from the job.



Relationship of the Parties. The way the worker and the business view their relationship is a factor. Written contracts describing the relationship are considered, although they're not necessarily conclusive. Other evidence can be considered, like whether the business provides insurance or the permanency of the relationship.¹⁵¹

Behavioral control is the most important of these factors, but none of them are necessarily decisive.¹⁵² Instead, the IRS will look at the entirety of the employment relationship and weigh each factor in light of those circumstances.¹⁵³ The IRS might also consider factors that are not listed above.

5.1 Statutory Employees

Some categories of workers are defined by law to be "employees" for the purposes of federal employment taxes, even if they don't meet the normal employment relationship test explained above. These workers are called *statutory employees*. They can include:



Drivers. Drivers that distribute or deliver meat, vegetables, fruits, bakery products, laundry, dry cleaning, or beverages other than milk are sometimes considered to be employees as a matter of law for IRS purposes.¹⁵⁴



Life Insurance Agents. Life insurance sales agents are sometimes considered employees for IRS purposes if they work full time selling life insurance or annuity contracts primarily for one life insurance company.¹⁵⁵



Traveling Salespeople. Traveling salespeople that work full-time for a business selling merchandise for resale or supplies for use in the buyer's business operation will sometimes meet the statutory definition of “employee” for IRS purposes.¹⁵⁶



At-Home Workers. A person that works at home on materials or goods supplied by a business may be considered a statutory employee for IRS purposes if they are required to return those materials or goods to the business and the business provides specifications for the work to be done.¹⁵⁷

If a worker falls into any of these categories, there are three additional requirements that must be met before a business is legally required to consider the worker a statutory employee. Those requirements are as follows:



The service agreement must state or imply that substantially all the services are to be performed personally by the worker,



The worker must not have a substantial investment in the equipment or property used to perform the services (other than an investment in facilities for transportation, such as a car or truck), and



The services must be performed on a continuing basis for the same business.¹⁵⁸

If all three requirements are met, and the worker falls into one of the categories above, the worker is required by law to be treated as an employee for certain federal employment tax purposes. This is true even if they would not traditionally be considered an employee.¹⁵⁹

Keep in mind, however, that even if this test is not fully met, the worker will still be considered an employee if they meet the IRS's normal classification test. Conversely, it is conceivable that a worker can meet the definition of a statutory employee for federal tax purposes, but still be considered an independent contractor for the purposes of California law.

5.2 Statutory Non-Employees

Certain workers are deemed “non-employees” under federal tax laws. A worker can have this status even if they would otherwise meet the normal employment relationship test explained above. These workers are called *statutory non-employees* and are usually treated as independent contractors. There are three types of statutory non-employees.¹⁶⁰



Qualified Real Estate Agents. Licensed real estate agents that earn substantially all their money from sales or other output, rather than hours worked, are statutory non-employees if they are performing services pursuant to a written agreement that states they will not be treated as an employee for federal tax purposes.¹⁶¹



Direct Sellers. People engaged in the business of selling consumer products, delivering newspapers, or distributing shopping news are sometimes considered statutory non-employees.¹⁶² There are, however, additional requirements needed to meet the legal definition of a “direct seller,” which can be found here: [Tax Tips for Direct Sellers \(IRS\)](#).



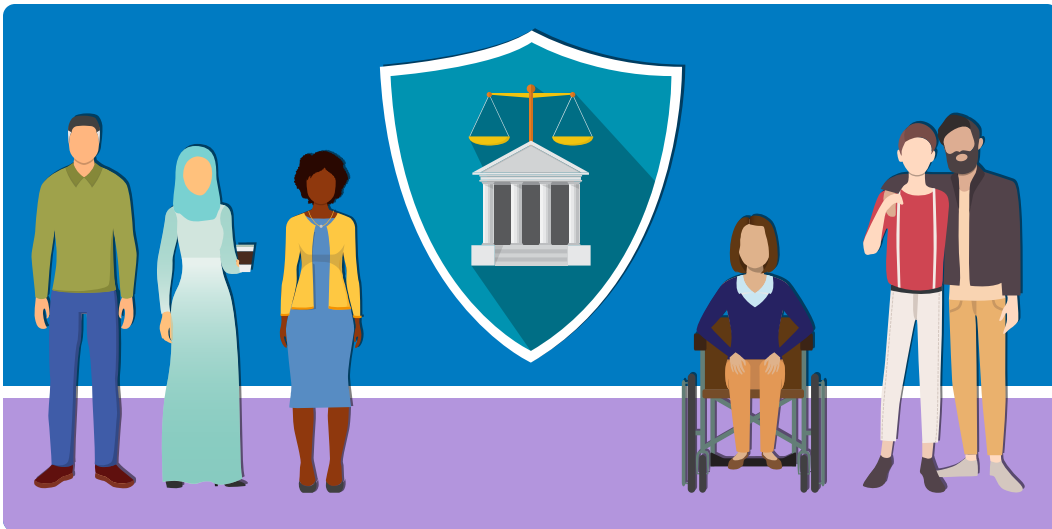
Companion Sitters. A *sitter* is someone who attends to children, the elderly, or the disabled.¹⁶³ Sitters that work with a placement service that puts them in touch with potential clients are often *not* employees of that service if the service doesn't receive or pay the sitter's wages.¹⁶⁴

Of note, these categories are only applicable for the purposes of federal tax law. It is possible for a worker to be considered a statutory non-employee for federal tax purposes, but an employee for the purposes of California's labor laws.

5.3 Still Not Sure?

When a worker or a business is confused about the correct classification, they can file a request [with the IRS](#) to determine the worker's status for the purposes of federal employment taxes and income tax withholding. The request can be completed on [IRS Form SS-8](#). After filing, the IRS can take at least six months to respond with a determination.

The Test Under California's Anti-Discrimination Laws



California's *Fair Employment and Housing Act* (known as “FEHA”) protects employees from workplace discrimination based on many different factors, including race, religion, gender, disability, sexual orientation, veteran status, and age (if the employee is over 40).¹⁶⁵

The scope of FEHA's protections depend, in large part, on how a worker is classified.¹⁶⁶ Specifically, FEHA's anti-discrimination protections usually only apply to the following people:

-  Employees,¹⁶⁷
-  Applicants for employment positions,¹⁶⁸
-  Temporary employees (temps),¹⁶⁹ and
-  Unpaid interns.¹⁷⁰

Volunteers and independent contractors are usually not protected from discrimination under FEHA.¹⁷¹ They are, however, protected from unlawful harassment.¹⁷²

Unlike most other parts of California law, FEHA has adopted a specific definition of “independent contractor” for discrimination and harassment purposes.¹⁷³ Although it largely mirrors the manner and means test discussed in Chapter 4,¹⁷⁴ there are a few key differences. Under FEHA, a person will be considered an independent contractor if:

-  They have a right to control how they perform their job,
-  They have control over the time and place the work is performed,
-  They supply the tools and instruments used in the work,
-  They are customarily engaged in an independently established business, and
-  They perform work that requires a particular skill not ordinarily used in the course of the business's work.¹⁷⁵

As can be seen, the first three factors are mostly identical to the manner and means test used under California law more generally.¹⁷⁶ The remaining two factors, however, put specific focus on the amount of business independence and skill the worker exercises.¹⁷⁷

In addition to the test described above, FEHA specifically excludes certain categories of people from the definition of “employee.”

6.1 Immediate Family Members

Immediate family members are generally not considered employees under FEHA, even if they would be employees for other purposes under California law.¹⁷⁸ A person is an immediate family member if they are employed by their parents, a spouse, or their child.¹⁷⁹

6.2 Certain Non-Profit Workers

Employees who work for a non-profit sheltered workshop or a rehabilitation facility are sometimes not considered “employees” under California's anti-discrimination laws.¹⁸⁰ To qualify under this exemption, the employee must be employed under a special license issued by the Division of Labor Standards Enforcement.¹⁸¹ These places are specifically reserved for the disabled.

Despite this exemption, the employee might have a right to sue the employer if the employer engages in discriminatory or harassing activity that is not necessary to serve employees with disabilities.¹⁸²

6.3 Religious Organizations

Certain religious nonprofit associations and corporations are *not* considered “employers” for these purposes, even if they have employees. Those religious employers are thus not subject to many of California's anti-discrimination laws.¹⁸³

But, if the religious organization has a subdivision that is for-profit (meaning, it is subject to state or federal income taxes), that subdivision would *not* be exempt from California's anti-discrimination laws.¹⁸⁴

Likewise, religious nonprofits that provide certain educational or health care services can sometimes be held liable as “employers” under California law.¹⁸⁵

This exception does not apply to non-religious entities, even if they are nonprofit. So, most nonprofit corporations and nonprofit associations can be considered “employers” under California law.¹⁸⁶

The Federal “Economic Realities” Test



As mentioned above, California labor laws are generally more favorable to workers than federal labor laws.¹⁸⁷ So, for most purposes, California businesses should use the California test to determine whether a worker is an employee or an independent contractor.

In some cases, however, businesses or workers may be required to litigate the issue in federal court. When that happens, the most commonly-used test is called the “economic realities” test.¹⁸⁸ It’s named that because economic realities, not contractual labels, determine a worker’s employment status for most purposes under federal law.¹⁸⁹

Like other tests, the economic realities test looks primarily at the business’s right to control the performance of the worker’s job.¹⁹⁰ If the worker has the exclusive right to control the way they perform their job, then they will be considered an independent contractor. But if a business has a right to control the worker in that regard, the worker will be deemed an employee.

Also like other tests, federal courts use a variety of factors to determine whether the requisite amount of control exists to create an employment relationship.¹⁹¹ In many

ways, the factors of the economic realities test overlap with California's manner and means test. They include the following questions:

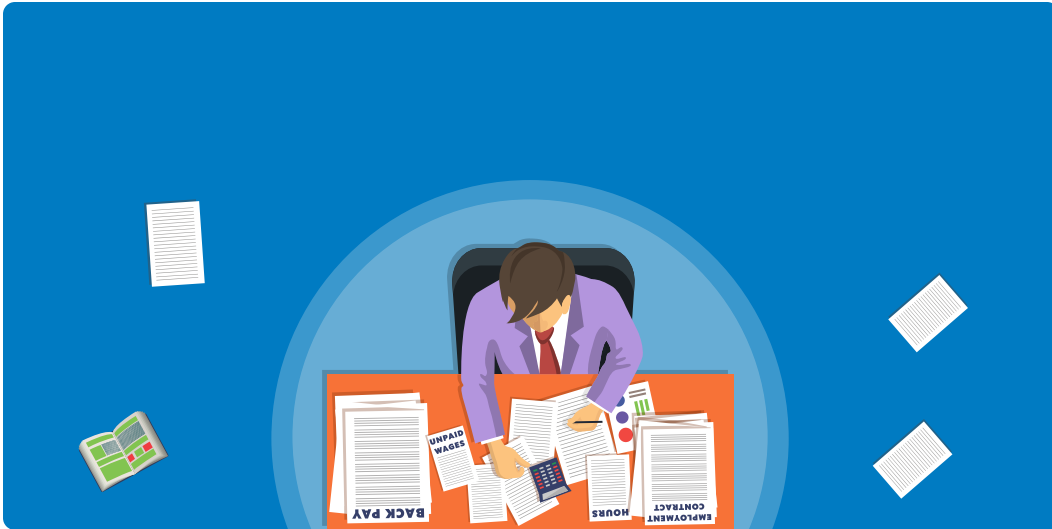
- ❓ How much skill is required to perform the job?
- ❓ Who pays for the instrumentalities and tools used for the job?
- ❓ Where is the work performed?
- ❓ How long is the business relationship expected to last?
- ❓ Does the business have a right to assign additional projects to the worker?
- ❓ How much control does the business have over when the work must be done and how long it will take?
- ❓ How is the worker's pay calculated? By the job? By the hour?
- ❓ Does the worker supply his or her own assistants when needed? Or does the business provide them?
- ❓ Is the work part of the regular business of the hiring party?
- ❓ Does the business provide the worker with benefits?
- ❓ What is the tax treatment of the parties' relationship?¹⁹²

This list of factors is nonexhaustive. So federal courts may consider other factors it deems relevant, when appropriate.¹⁹³ Additionally, none of the factors, standing alone, will determine whether an employment relationship exists.¹⁹⁴ Instead, federal courts will evaluate the total factual context of the business relationship in light of the relevant factors.¹⁹⁵

Finally, the economic realities test emphasizes the substance over the form of the relationship between the alleged employer and the hired party.¹⁹⁶ So courts may disregard any agreements or tax filings relied on by the parties if the performance of the job suggests an employment relationship exists.

Workers and businesses should also know that the federal rules in this area are unsettled. The U.S. Department of Labor adopted a regulation in 2024 describing its own version of the economic realities test, but, as of July 2026, the department has announced that it is not enforcing that rule and has proposed rescinding and replacing it.¹⁹⁷ Until the federal government settles on a final rule, the case law described above remains the safest guide to how federal courts approach the question.

Consequences of Misclassification



Businesses that misclassify their employees as independent contractors face serious legal consequences under both state and federal law. In some cases, the business's attorneys or advisors might also face legal consequences.¹⁹⁸

The extent of the employer's financial costs will depend on the effect of the misclassification and the intent of the employer. They can include, among other things:

8.1 Misclassification Penalty

Under California law, an employer that willfully misclassifies an employee can be subject to civil penalties of no less than \$5,000 and no more than \$15,000 for each violation. If the employer engaged in a pattern or practice of willful misclassification, the penalty increases to between \$10,000 and \$25,000 for each violation.¹⁹⁹

8.2 Back Payments

Misclassified employees are often underpaid or deprived of certain labor rights that they would otherwise be entitled to receive. This commonly happens when an employer fails to pay the employee overtime or a minimum wage. The employer might also owe the employee money for missed meal breaks and rest periods.

If the employee was underpaid as a result of being misclassified as an independent contractor, they can recover many of the costs associated with the misclassification.²⁰⁰ This might include up to three years of back payments or other types of damages for Labor Code violations.²⁰¹

8.3 Unpaid Wage Penalty

In some cases, an employer will fail to pay their employee's wages in full or on-time as a result of misclassifying them as independent contractors. In these situations, the employer may be liable for additional civil penalties in the following amounts:

-  **First Violation.** For any initial violation, the employer must pay \$100 for each failure to pay the full wages of each employee.²⁰²
-  **Subsequent Violations.** For each subsequent violation, or any willful or intentional violation, the employer must pay \$200 for each failure to pay each employee, plus 25% of the amount unlawfully withheld.²⁰³

These penalties can be recovered in one of two ways. The employee can keep the entire penalty for themselves by filing a wage claim with the Labor Commissioner.²⁰⁴ Alternatively, the employee can pursue the penalty on behalf of the state by filing a lawsuit under the Private Attorneys General Act (a “PAGA” claim), but not both for the same violation.²⁰⁵

A PAGA claim is brought as a civil lawsuit against the employer.²⁰⁶ Before filing, the employee must follow certain procedures, which are described in Labor Code sections 2698 through 2699.5.²⁰⁷ For cases filed on or after June 19, 2024, the employee must have personally experienced each violation they seek penalties for, and must have experienced it within the one-year limitations period.²⁰⁸ If the employee signed an arbitration agreement, their individual PAGA claim can be sent to arbitration, but they generally keep the right to pursue penalties on behalf of other employees in court.²⁰⁹

If the employee wins, 35% of the civil penalties goes to the aggrieved employees and 65% goes to the state, and the court may also award reasonable attorney fees

and litigation costs.²¹⁰ The 2024 PAGA reform also caps or reduces the penalties for employers that take reasonable compliance steps or promptly cure violations.²¹¹ Many attorneys take these kinds of cases on a contingency basis, without any upfront fees.

8.4 Waiting Time Penalty

California law provides for a “waiting time penalty” when employers willfully fail to pay final wages, in full and on time, after employment ends.²¹² If an employer misclassifies an employee and that misclassification results in a failure to completely pay the employee's wages at the time their employment ends, the employer might be exposed to this penalty.

Importantly, a failure to pay is “willful” for these purposes only if the employer knows the wages are due and still does not pay them. A good faith dispute about whether any wages are owed will defeat the penalty.²¹³

The waiting time penalty consists of a full day of wages for each day full payment is delayed.²¹⁴ The penalty continues to accrue for as much as 30 days after discharge, depending on when payment is fully satisfied.²¹⁵

The waiting time penalty is calculated by computing the employee's daily wage rate and then multiplying it by the number of days that payment is delayed, up to a maximum of 30 days.²¹⁶ The daily wage rate is typically calculated by adding base wages, commissions, bonuses, and vacation pay that the employee earns in a year, dividing that sum by 52 weeks, and dividing that result by 40 hours.²¹⁷

8.5 Website Notice

A California employer that willfully misclassifies an employee may be required to post a prominent notice on their website that states they engaged in a serious violation of the law by willfully misclassifying employees.²¹⁸ This kind of notice can severely harm the business's reputation.

8.6 Wage Statement Penalty

When a worker is treated as an independent contractor, they often do not track their work hours. Along these same lines, employers may fail to provide itemized wage statements to their misclassified employees. An employer can be fined or sued for

failing to comply with the wage statement and recordkeeping requirements of the California Labor Code.²¹⁹

This kind of fine can cost employers \$250 per employee for the initial violation and \$1,000 per employee for each subsequent violation.²²⁰

8.7 Attorney Fees and Court Costs

Filing a lawsuit can be expensive. Fortunately for misclassified employees, California law will sometimes shift that financial burden to employers. This means that employers may be required to pay for the employee's attorney fees and any court-related costs the employee has to spend.²²¹

8.8 Interest

Employers who misclassify their employees may be responsible for paying interest on any amounts they end up owing to the employee as a result of the misclassification.²²²

8.9 IRS Penalties

If the IRS determines that a worker is actually an employee, the employer may be liable for federal penalties as well as any unpaid taxes.²²³ Many such penalties will apply regardless of whether the misclassification is intentional.

The calculation of the IRS's misclassification penalties can be a little complicated. They can include a percentage of the employee's income and a percentage of the employee's share of the taxes. If the violation was willful, the penalties can be even more severe.

8.10 Criminal Penalties

If a person enters into an independent contractor arrangement with the purpose of willfully evading taxes, they can be found guilty of a felony. In that case, they can be exposed to a fine of up to \$100,000 and five years in prison.²²⁴

Additionally, any employer or agent of an employer that willfully violates the California Labor Code's provisions on wage statements and recordkeeping requirements can be

charged with a misdemeanor. This can result in a fine of up to \$1,000 and one year imprisonment.²²⁵

8.11 Damages for Retaliation

In California, if an employee reasonably believes that the employer has violated a law or regulation, the employee has a right to report that violation to the government. The employee also has a right to report that violation to an employee that supervises them.²²⁶

This means that an employer may not retaliate against employees for complaining about or reporting the fact that they have been misclassified as an independent contractor.²²⁷ Nor may employers retaliate against employees who file wage claims against them.²²⁸

Similarly, employers are prohibited from punishing or firing employees for disclosing information about a legal violation to the government, a law enforcement agency, or their supervisor.²²⁹ And an employer cannot prohibit employees from working with or testifying before any government agency that may be investigating or prosecuting the employer for legal violations.²³⁰

An employer who discharges an employee for reporting unlawful activities commits wrongful termination. An employer who punishes or discriminates against an employee for complaining about a misclassification commits unlawful retaliation. Workers in those cases can file a lawsuit against their employer for monetary damages.

What to Do If You've Been Misclassified



When an employee is misclassified as an independent contractor, it can severely impact their life. This impact may be felt financially, or it can come in the form of reduced labor rights. Workers who believe they have been improperly classified have several options, including the following:

9.1 Resolve the Issue Informally

People who are still working for the business should first raise the issue with them and ask to be classified as an employee. Even if the employer does not reclassify the worker, they will provide a response that the individual can act on.

9.2 File an Unemployment Claim

If a worker is fired, laid off, or otherwise terminated by a business that has improperly classified them as an independent contractor, they can file an unemployment insurance claim with the Employment Development Department (the EDD). The

worker will need to explain that they have been misclassified as an independent contractor instead of an employee, and the agency will investigate.

If the agency agrees, the worker can qualify for unemployment benefits, and the EDD can require the employer to pay the payroll taxes it should have been paying all along.

9.3 File a Workers' Compensation Claim

When a person is injured on the job and the business they work for refuses or fails to provide the person with workers' compensation coverage, they can still file a workers' compensation claim. Disputed cases, including disputes about the worker's employment status, are decided by the Division of Workers' Compensation.

9.4 Contact the IRS

The tax consequences of being misclassified as an independent contractor can be severe. As mentioned above, a taxpayer may ask the IRS to determine their employment status for federal tax purposes. To do so, a taxpayer must file form IRS Form SS-8 [↗](#). The IRS will contact the employer for its version of the facts.

The IRS will then issue a non-binding determination. Although the decision is non-binding, any employer who decides to ignore the IRS decision is likely to regret it.

9.5 Seek Uncollected Taxes

The biggest tax consequence for independent contractors is that they must pay all of their Social Security and Medicare taxes. Employers pay half of the taxes for their employees. If a person believes they were misclassified, they can file IRS Form 8919 [↗](#) to report the uncollected Social Security and Medicare taxes.

9.6 File a Wage Claim

A California employee who believes he or she has been denied overtime can file a wage claim with the Division of Labor Standards Enforcement (DLSE) or file an action in court. With either option, a person's employment status will need to be addressed first.

9.7 Contact a Lawyer

Employees are *not* required to have a lawyer to seek justice from their employer. But it is often a good idea to have one.

The law can be complex and very few cases are straightforward. Even if the facts are strong, an experienced employment law attorney can sometimes help by:

-  Collecting all legally-relevant information,
-  Applying the law to the evidence and related facts in a compelling way,
-  Avoiding the strategic pitfalls many nonlawyers are unfamiliar with, and
-  Maximizing the financial damages the employee receives.

Of course, there is no guarantee that a lawyer will be able to accomplish these things. But, when employees handle their legal disputes without representation, there is sometimes an increased risk that they will lose or severely harm their case due to legal missteps that a lawyer would have avoided.

If the employer contests the employee's claim, which happens often, legal arguments will have to be made and evidence might need to be presented. This might occur in court or with an administrative agency, sometimes according to complicated legal procedures. It can be a good idea to have a lawyer who is familiar with doing those things.

References

-
- 1 Labor Code, § 3353 [“Independent contractor’ means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.”].
 - 2 Labor Code, § 3351; see also Cal. Code of Regs., tit. 8, § 11150, subd. 2(F) [“Employee’ means any person employed by an employer.”].
 - 3 See, e.g., Cal. Code of Regs., tit. 8, § 11150, subd. 2(G) [“Employer’ means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.”].
 - 4 29 U.S.C. § 207; Labor Code, § 510, subd. (a).
 - 5 See Labor Code, § 512, subd. (a); Cal. Code of Regs., tit. 8, §§ 11010–11170 [wage orders of the California Industrial Welfare Commission].
 - 6 Labor Code, § 1182.12, subd. (b).
 - 7 See Labor Code, § 2775, subd. (b); *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903.
 - 8 See Labor Code, § 2775, subds. (b)(2), (b)(3); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.
 - 9 See *Ewens & Miller, Inc. v. Comm’r of Internal Revenue* (2001) 117 T.C. 263, 270.
 - 10 See Gov. Code, § 12940, subd. (j)(5).
 - 11 See *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 324 [112 S.Ct. 1344, 1348].
 - 12 See, e.g., *Ewens & Miller, Inc. v. Comm’r of Internal Revenue* (2001) 117 T.C. 263, 270 [IRS test]; *Estrada v. FedEx Ground Package System, Inc.*

(2007) 154 Cal.App.4th 1, 10 [California test]; *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 324 [112 S.Ct. 1344, 1348] [federal court test]; Gov. Code, § 12940, subd. (j)(5) [the test defining “independent contractor” under California's anti-discrimination laws].

-
- 13 29 U.S.C. § 207; Labor Code, § 510, subd. (a).
-
- 14 See Labor Code, § 512, subd. (a); Cal. Code of Regs., tit. 8, §§ 11010–11170 [wage orders of the California Industrial Welfare Commission].
-
- 15 Labor Code, § 1182.12, subd. (b).
-
- 16 Gov. Code, § 12940, subd. (a); 42 U.S.C. § 2000e-2(a)(1) [prohibiting workplace discrimination on the basis of certain protected categories, like race, color, national origin, religion, and sex].
-
- 17 Employers must withhold the income taxes of employees receiving “wages” as defined in 26 U.S.C. § 3401(a).
-
- 18 26 U.S.C. §§ 3111, 3301.
-
- 19 Labor Code, § 6300, et seq.
-
- 20 Labor Code, § 3700 [all California employers must provide workers compensation benefits to their employees].
-
- 21 Unemp. Ins. Code, § 100.
-
- 22 See, e.g., Gov. Code, § 12945.2.
-
- 23 *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 [“the right to control work details is the 'most important' or 'most significant' consideration”].
-
- 24 Compare, e.g., 29 U.S.C. § 206(a)(1)(C) [federal minimum wage] with Labor Code, § 1182.12, subd. (b) [California's minimum wage]; see also 29 U.S.C. § 207 [federal overtime rules]; Labor Code, § 510 [California's overtime rules].
-
- 25 Labor Code, § 2775, subd. (b)(1) [“For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an

independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied: . . .”].

-
- 26 Labor Code, § 2775, subd. (b)(1)(A) [“The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.”].
-
- 27 Labor Code, § 2775, subd. (b)(1)(B) [“The person performs work that is outside the usual course of the hiring entity’s business.”].
-
- 28 Labor Code, § 2775, subd. (b)(1)(C) [“The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”].
-
- 29 See, e.g., Labor Code, §§ 2775, subds. (b)(2), (b)(3), 2776–2784.
-
- 30 *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903.
-
- 31 See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.
-
- 32 *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903.
-
- 33 *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903.
-
- 34 Stats. 2019, ch. 296, [Assem. Bill No. 5](#) [↗].
-
- 35 Stats. 2020, ch. 38, [Assem. Bill No. 2257](#) [↗].
-
- 36 Stats. 2025, ch. 305, Assem. Bill No. 1514 (effective January 1, 2026), amending Labor Code, §§ 2778, 2783.
-
- 37 Labor Code, § 2775, subd. (b)(1)(A) [both the contract and the worker’s actual performance of the work must allow for the worker to be free from the control and direction of the hiring entity before they can be considered an independent contractor]; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 [“The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.”].
-
- 38 *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 877 [“The agreement characterizing the relationship as one of ‘client—-independent contractor’ will be ignored if the parties, by their actual conduct, act like ‘employer—employee.’”].
-

39	<i>S. G. Borello & Sons, Inc. v. Department of Industrial Relations</i> (1989) 48 Cal.3d 341, 349.
40	Labor Code, § 1182.12.
41	Labor Code, § 515.
42	Labor Code, § 510.
43	Labor Code, § 6300, et seq.
44	Labor Code, § 2775, subd. (b)(1).
45	Labor Code, § 2775, subd. (b)(1).
46	Labor Code, § 2775, subd. (b)(1).
47	Labor Code, § 2775, subd. (b)(3) [“If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court’s decision in <i>S. G. Borello & Sons, Inc. v. Department of Industrial Relations</i> (1989) 48 Cal.3d 341 (<i>Borello</i>).”].
48	See, e.g., Labor Code, § 2775, subd. (b)(2) [“Notwithstanding paragraph (1), any exceptions to the terms “employee,” “employer,” “employ,” or “independent contractor,” and any extensions of employer status or liability, that are expressly made by a provision of this code, the Unemployment Insurance Code, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of “employee” in subdivision 2(E) of Wage Order No. 2, shall remain in effect for the purposes set forth therein.”].
49	See, e.g., Labor Code, §§ 2776–2784.
50	Labor Code, § 2783, subd. (a).
51	Labor Code, § 2783, subd. (b).
52	Labor Code, § 2783, subd. (b).
53	To qualify for this exception to the ABC test, the license must be issued by the State of California pursuant to Business and Professions Code sections 500 through 4999.122. (Labor Code, § 2783, subd. (b).)
54	Labor Code, § 2783, subd. (b).

55	Labor Code, § 2783, subd. (b).
56	Labor Code, § 2750.6.
57	See Health & Saf. Code, § 1204 [defining the classes of primary care clinics eligible for licensure].
58	Labor Code, § 2750.6.
59	Labor Code, § 2783, subd. (c).
60	Labor Code, § 2783, subd. (d).
61	The license mentioned in this option applies specifically to people licensed under Corporations Code sections 25210 through 25256. (Labor Code, § 2783, subd. (d).)
62	Labor Code, § 2783, subd. (d).
63	Labor Code, § 2778.
64	Labor Code, § 2778, subd. (a)(1).
65	Labor Code, § 2778, subd. (a)(2).
66	Labor Code, § 2778, subd. (a)(3).
67	Labor Code, § 2778, subd. (a)(4).
68	Labor Code, § 2778, subd. (a)(5).
69	Labor Code, § 2778, subd. (a)(6).
70	Labor Code, § 2778, subd. (b).
71	Labor Code, § 2778, subd. (b)(2)(A).
72	Labor Code, § 2778, subd. (b)(2)(B).
73	Labor Code, § 2778, subd. (b)(2)(C).
74	Labor Code, § 2778, subd. (b)(2)(D).
75	Labor Code, § 2778, subd. (b)(2)(E).
76	Labor Code, § 2778, subd. (b)(2)(F).
77	Labor Code, § 2778, subd. (b)(2)(G).
78	Labor Code, § 2778, subd. (b)(2)(H).
79	Labor Code, § 2778, subd. (b)(2)(I).

80	Labor Code, § 2778, subd. (b)(2)(J).
81	Labor Code, § 2778, subd. (b)(2)(K).
82	Labor Code, § 2778, subd. (b)(2)(L). This item currently applies to licensed manicurists only through January 1, 2029. (Stats. 2025, ch. 305, Assem. Bill No. 1514.)
83	Labor Code, § 2778, subd. (b)(2)(M).
84	Labor Code, § 2778, subd. (b)(2)(N).
85	Labor Code, § 2778, subd. (b)(2)(O).
86	Labor Code, § 2750.5; see Bus. & Prof. Code, §§ 7000–7191 [contractor licensing].
87	Labor Code, § 2750.5 [“There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.”].
88	Labor Code, § 2750.5.
89	Labor Code, § 2750.5, subd. (c) [requiring proof that “the individual’s independent contractor status is bona fide and not a subterfuge to avoid employee status”].
90	Labor Code, § 2783, subd. (e).
91	Bus. & Prof. Code, § 7448 et seq.
92	<i>Castellanos v. State of California</i> (2024) 16 Cal.5th 588.
93	Labor Code, § 2776.
94	Labor Code, § 2777.
95	Labor Code, § 2778, subd. (c)(1).
96	Labor Code, § 2778, subd. (c)(2).
97	Labor Code, § 2778, subd. (c)(3).
98	Labor Code, § 2779.
99	Labor Code, § 2780.

100	Labor Code, § 2781.
101	Labor Code, § 2782.
102	Labor Code, § 2783, subd. (f).
103	Labor Code, § 2783, subd. (g). This exception currently runs through January 1, 2031. (Stats. 2025, ch. 305, Assem. Bill No. 1514.)
104	Labor Code, § 2783, subd. (h).
105	Labor Code, § 2783, subd. (i).
106	Labor Code, § 2783, subd. (j).
107	Labor Code, § 2784.
108	See Labor Code, § 2783.
109	See Labor Code, § 2775, subd. (b)(3) ["If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in <i>S. G. Borello & Sons, Inc. v. Department of Industrial Relations</i> (1989) 48 Cal.3d 341 (<i>Borello</i>)."].
110	<i>S. G. Borello & Sons, Inc. v. Department of Industrial Relations</i> (1989) 48 Cal.3d 341.
111	Labor Code, § 2750 ["The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."].
112	Labor Code, § 18 ["'Person' means any person, association, organization, partnership, business trust, limited liability company, or corporation."].
113	<i>S. G. Borello & Sons, Inc. v. Department of Industrial Relations</i> (1989) 48 Cal.3d 341, 350; see also Labor Code, § 3353 [defining "independent contractor" as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."].

- 114 *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10 [“The essence of the test is the ‘control of details’—that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work”]; see also Labor Code, § 3351 [“‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed . . .”].
-
- 115 *Tieberg v. Unemployment Ins. Appeals Board* (1970) 2 Cal.3d 943, 946–947.
-
- 116 *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 528 [“Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer’s right to control how the end result is achieved.”].
-
- 117 *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 535.
-
- 118 *Hardin v. Elvitsky* (1965) 232 Cal.App.2d 357, 373 [“The determination of whether the status of an employee or that of an independent contractor exists is governed primarily by the right of control which rests in the employer, rather than by his actual exercise of control; and where no express agreement is shown as to the right of the claimed employer to control the mode and manner of doing the work, the existence or non-existence of the right must be determined by reasonable inferences drawn from the circumstances shown, and is a question for the jury.”].
-
- 119 *Burlingham v. Gray* (1943) 22 Cal.2d 87, 100 [“Where there is shown no express agreement as to the right of the claimed employer to control the mode and manner of doing the work, the existence or nonexistence of the right must be determined by reasonable inferences drawn from the circumstances shown, and is a question for the jury.”].
-
- 120 *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 [“[T]he courts have long recognized that the ‘control’ test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the ‘most important’ or ‘most significant’ consideration, the authorities also endorse several ‘secondary’ indicia of the nature of a service relationship.”].
-

- 121 *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 584.
-
- 122 *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351 [considering “the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision”].
-
- 123 *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 539 [“[T]he hirer's right to fire at will and the basic level of skill called for by the job, are often of inordinate importance.”].
-
- 124 *Tieberg v. Unemployment Ins. Appeals Board* (1970) 2 Cal.3d 943, 949 [considering “whether or not the one performing services is engaged in a distinct occupation or business”].
-
- 125 *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10 [considering “whether the worker is engaged in a distinct occupation or business”].
-
- 126 *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 355 [noting that other jurisdictions consider “the alleged employee's opportunity for profit or loss depending on his managerial skill”].
-
- 127 *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 584 [considering “whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work”].
-
- 128 *Tieberg v. Unemployment Ins. Appeals Board* (1970) 2 Cal.3d 943, 949 [considering “the length of time for which the services are to be performed”].
-
- 129 *Varisco v. Gateway Science & Engineering, Inc.* (2008) 166 Cal.App.4th 1099, 1103 [considering “the method of payment, whether by the time or by the job”].
-
- 130 *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 539 [“[T]he hirer's right to fire at will and the basic level of skill called for by the job, are often of inordinate importance.”].
-
- 131 *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351 [considering “whether or not the parties believe they are

creating the relationship of employer-employee”].

- 132 *Germann v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 776, 783 [“Not all these factors are of equal weight. The decisive test is the right of control, not only as to results, but as to the manner in which the work is done. . . . Generally, however, the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.”].
-
- 133 See Labor Code, § 3357 [“Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.”]; see also *Jones v. Workers' Comp. Appeals Bd.* (1971) 20 Cal.App.3d 124, 127 [applying a presumption that a worker is an employee if they “perform work 'for another'”].
-
- 134 *Yellow Cab Coop. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1295 [“the statutory test of 'control' may be satisfied even where 'complete control' or 'control over details' is lacking — at least where the principal retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, the nature of the work makes detailed control unnecessary, and adherence to statutory purpose favors a finding of coverage.”].
-
- 135 *Yellow Cab Coop. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1295.
-
- 136 *Yellow Cab Coop. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1295.
-
- 137 See Labor Code, § 3201; Cal. Const., art. XIV, § 4.
-
- 138 Labor Code, § 3205.
-
- 139 See, e.g., *Johnson v. Workmen's Comp. Appeals Bd.* (1974) 41 Cal.App.3d 318, 321.
-
- 140 *Greydanus v. Industrial Accident Comm'n* (1965) 63 Cal.2d 490, 493 [“[I]t is well recognized that workmen's compensation statutes are to be construed liberally in favor of awarding compensation.”].
-
- 141 *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351 [“[T]he concept of 'employment' embodied in the [Workers Compensation] Act is not inherently limited by common law

principles. We have acknowledged that the Act's definition of the employment relationship must be construed with particular reference to the 'history and fundamental purposes' of the statute.”].

142 *Truesdale v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 608, 617; *Johnson v. Workmen's Comp. Appeals Bd.* (1974) 41 Cal.App.3d 318, 322 [“[R]ather than relying merely upon the specific and several tests listed in *Tieberg* and *Empire Star*, we should also consider (a) the purpose of the statute and the intention of the Legislature, (b) the persons sought to be protected, (c) if the petitioner is or is not of a class of persons generally intended to be protected, (d) whether there are any other specific statutory exclusions, and (e) what are the relative bargaining positions of the parties mentally, economically and educationally.”].

143 *Greydanus v. Industrial Accident Comm'n* (1965) 63 Cal.2d 490, 493.

144 26 U.S.C. §§ 1401–1403.

145 26 U.S.C. §§ 3101–3128.

146 26 U.S.C. §§ 3301–3311.

147 26 U.S.C. §§ 3401–3406.

148 *Weber v. Commissioner* (1994) 103 T.C. 378, 387 [“Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done.”]; *Professional & Executive Leasing v. Commissioner* (9th Cir. 1988) 862 F.2d 751, 753; see also 26 U.S.C. § 3121(d)(2) [“any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”]; 26 C.F.R. § 31.3121(d)-1(c)(1) [“Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.”].

149 *Ewens & Miller, Inc. v. Comm'r of Internal Revenue* (2001) 117 T.C. 263, 270.

- 150 See Internal Revenue Service, *Publication 15-A: Employer's Supplemental Tax Guide*, [available here](#) ⁷. This guide provides a simplified version of the IRS's traditional multi-part test, which is outlined in *Ewens & Miller, Inc. v. Comm'r of Internal Revenue* (2001) 117 T.C. 263, 270.
-
- 151 See *Ewens & Miller, Inc. v. Comm'r of Internal Revenue* (2001) 117 T.C. 263, 270.
-
- 152 *Matthews v. Commissioner* (1989) 92 T.C. 351, 361 [“In determining the existence of a common law employer-employee relationship, the crucial test lies in the right of control, or lack of it, which the employer may exercise respecting the manner in which the service is to be performed and the means to be employed in its accomplishment, as well as the result to be obtained.”], citations and quotation marks omitted; *Weber v. Commissioner* (1994) 103 T.C. 378, 387 [“No one factor dictates the outcome. Rather, we must look at all the facts and circumstances of each case.”].
-
- 153 *NLRB v. United Ins. Co.* (1968) 390 U.S. 254, 258 [88 S.Ct. 988, 991] [“In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”].
-
- 154 26 U.S.C. § 3121(d)(3)(A) [defining “employee” to include “an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal”].
-
- 155 26 U.S.C. § 3121(d)(3)(B) [defining “employee” to include “a full-time life insurance salesman”].
-
- 156 26 U.S.C. § 3121(d)(3)(D) [defining “employee” to include “a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations”].
-

- 157 26 U.S.C. § 3121(d)(3)(C) [defining “employee” to include “a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him”].
-
- 158 26 U.S.C. § 3121(d)(3) [the statutory employee exception applies “if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term 'employee' under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed”].
-
- 159 26 U.S.C. § 3121(d)(3).
-
- 160 26 U.S.C. §§ 3506(a), 3508(c).
-
- 161 26 U.S.C. § 3508(b)(1).
-
- 162 26 U.S.C. § 3508(b)(2).
-
- 163 26 U.S.C. § 3506(b) [“For purposes of this section, the term 'sitters' means individuals who furnish personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled.”].
-
- 164 26 U.S.C. § 3506(a) [“For purposes of this subtitle, a person engaged in the trade or business of putting sitters in touch with individuals who wish to employ them shall not be treated as the employer of such sitters (and such sitters shall not be treated as employees of such person) if such person does not pay or receive the salary or wages of the sitters and is compensated by the sitters or the persons who employ them on a fee basis.”].
-
- 165 Gov. Code, § 12940, subd. (a); *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 638 [“The broad purpose of the FEHA is to safeguard an employee's right to seek, obtain, and hold employment without experiencing discrimination on account of race, religious creed,

color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.”].

166 See Gov. Code, § 12940, subd. (a).

167 *Shephard v. Loyola Marymount Univ.* (2002) 102 Cal.App.4th 837, 842 [“In order to recover under the discrimination in employment provisions of the FEHA, the aggrieved plaintiff must be an employee.”].

168 Gov. Code, § 12940; *Sada v. Robert F. Kennedy Med. Ctr.* (1997) 56 Cal.App.4th 138, 144.

169 Cal. Code of Regs., tit. 2, § 11008, subd. (c)(5) [“An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.”].

170 Gov. Code, § 12940, subds. (c), (j), & (l).

171 Gov. Code, § 12940, subd. (a); see also *Estrada v. City of Los Angeles* (2013) 218 Cal.App.4th 143, 155 [unpaid volunteer found to not be an employee within the meaning of FEHA].

172 Gov. Code, § 12940, subd. (j).

173 Gov. Code, § 12940, subd. (j)(5).

174 See Cal. Code of Regs., tit. 2, § 11008, subd. (c)(1) [“‘Employee’ does not include an independent contractor as defined in Labor Code section 3353.”].

175 Gov. Code, § 12940, subd. (j)(5).

176 See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350.

177 Gov. Code, § 12940, subd. (j)(5).

178 Gov. Code, § 12926, subd. (c); *Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 632 [noting that FEHA excludes persons employed by close relatives].

- 179 Gov. Code, § 12926, subd. (c); Cal. Code of Regs., tit. 2, § 11008, subd. (c)(2) [“‘Employee’ does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.”].
-
- 180 Gov. Code, § 12926.05, subd. (a); Cal. Code of Regs., tit. 2, § 11008, subd. (c)(3) [“‘Employee’ does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.”].
-
- 181 Gov. Code, § 12926.05; Labor Code, §§ 1191, 1191.5.
-
- 182 Gov. Code, § 12926.05, subd. (b)(2).
-
- 183 Gov. Code, § 12926, subd. (d).
-
- 184 Cal. Code of Regs., tit. 2, § 11008, subd. (d)(5) [“A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.”].
-
- 185 See Gov. Code, § 12926.2.
-
- 186 Cal. Code of Regs., tit. 2, § 11008, subd. (d)(6) [“‘Employer’ includes any non-profit corporation or non-profit association other than that defined in subsection (5).”].
-
- 187 Compare, e.g., 29 U.S.C. § 206(a)(1)(C) [federal minimum wage] with Labor Code, § 1182.12, subd. (b) [California’s minimum wage]; see also 29 U.S.C. § 207 [federal overtime rules]; Labor Code, § 510 [California’s overtime rules].
-
- 188 *Spirides v. Reinhardt* (D.C. Cir. 1979) 613 F.2d 826, 831 [“determination of whether an individual is an employee or an independent contractor for purposes of the Act involves, as appellant suggests, analysis of the ‘economic realities’ of the work relationship.”].
-
- 189 *Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979) 603 F.2d 748, 755.
-

- 190 *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 323 [112 S.Ct. 1344, 1348].
-
- 191 *Cnty. for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 751–752 [109 S.Ct. 2166, 2179].
-
- 192 *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 324 [112 S.Ct. 1344, 1348]; *Cnty. for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 751–752 [109 S.Ct. 2166, 2178–2179]; *Loomis Cabinet Co. v. OSHRC* (9th Cir. 1994) 20 F.3d 938, 942.
-
- 193 *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 324 [112 S.Ct. 1344, 1348] [describing these as “nonexhaustive criteria”].
-
- 194 *Cnty. for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 752 [109 S.Ct. 2166, 2179] [“No one of these factors is determinative.”].
-
- 195 *NLRB v. United Ins. Co.* (1968) 390 U.S. 254, 258 [88 S.Ct. 988, 991] [“total factual context is assessed in light of the pertinent common-law agency principles”].
-
- 196 *Loomis Cabinet Co. v. OSHRC* (9th Cir. 1994) 20 F.3d 938, 942.
-
- 197 29 C.F.R. pt. 795 (2024); U.S. Dept. of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2025-1 (May 1, 2025); see U.S. Dept. of Labor, [Independent Contractor Rulemaking](#) ²⁷ (2026).
-
- 198 Labor Code, § 2753, subd. (a) [“A person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable with the employer if the individual is found not to be an independent contractor.”].
-
- 199 Labor Code, § 226.8, subds. (b), (c).
-
- 200 Labor Code, § 2802, subd. (a) [“An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”].
-
- 201 Code Civ. Proc., § 338, subd. (a) [statute of limitations: “Within three years: (a) An action upon a liability created by statute, other than a

penalty or forfeiture.”]; *Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404 [“[A]n employer’s obligation to pay overtime compensation to his employee would not exist but for the Labor Code. An action to enforce that obligation therefore is governed by the three-year statute of limitations . . .”].

-
- 202 Labor Code, § 210, subd. (a)(1).
-
- 203 Labor Code, § 210, subd. (a)(2).
-
- 204 Labor Code, § 210, subd. (b), as amended by Stats. 2019, ch. 716, Assem. Bill No. 673.
-
- 205 Labor Code, § 210, subds. (b), (c).
-
- 206 Labor Code, § 2699, subd. (a).
-
- 207 Labor Code, § 2699.3.
-
- 208 Labor Code, § 2699, subd. (c), as amended by Stats. 2024, Assem. Bill No. 2288 and Sen. Bill No. 92.
-
- 209 *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639; *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104.
-
- 210 Labor Code, § 2699, subds. (k)(1), (m). For actions noticed before June 19, 2024, the employees’ share is 25% under the prior version of the statute.
-
- 211 Labor Code, § 2699, subds. (g), (h); see also Labor Code, § 2699.3 [cure procedures].
-
- 212 Labor Code, § 203, subd. (a); see *McLean v. State of California* (2016) 1 Cal.5th 615, 619 [“An ‘employer’ that ‘willfully fails to pay’ in accordance with sections 201 and 202 ‘any wages of an employee who is discharged or who quits’ is subject to so-called waiting-time penalties of up to 30 days’ wages.”].
-
- 213 Cal. Code of Regs., tit. 8, § 13520.
-
- 214 Labor Code, § 203, subd. (a) [“If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 201.6, 201.8, 201.9, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an

action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment.”].

-
- 215 Labor Code, § 203.
-
- 216 *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [“[T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days.”].
-
- 217 *Drumm v. Morningstar, Inc.* (N.D. Cal. 2010) 695 F.Supp.2d 1014, 1019 [approving jury instruction specifying this manner of calculation].
-
- 218 Labor Code, § 226.8, subd. (e).
-
- 219 Labor Code, § 226; Labor Code, § 2699, subd. (f).
-
- 220 Labor Code, § 226.3.
-
- 221 Labor Code, §§ 2699, subd. (k)(1), 2802, subd. (c) [“For purposes of this section, the term 'necessary expenditures or losses' shall include all reasonable costs, including, but not limited to, attorney’s fees incurred by the employee enforcing the rights granted by this section.”].
-
- 222 Labor Code, § 2802 [“Interest shall accrue from the date on which the employee incurred the necessary expenditure or loss.”].
-
- 223 26 U.S.C. §§ 3102, 3403, 3509.
-
- 224 26 U.S.C. § 7201 [“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$ 100,000 (\$ 500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.”]; see, e.g., *United States v. Jungles* (7th Cir. 1990) 903 F.2d 468, 472.
-
- 225 Labor Code, § 226.6.
-
- 226 Labor Code, § 1102.5, subd. (a); Health & Saf. Code, §§ 1596.881, 1596.882.
-

227	Labor Code, § 1102.5, subd. (a).
228	Labor Code, § 98, subd. (a); <i>Post v. Palo/Haklar & Associates</i> (2000) 23 Cal.4th 942, 946 [“[I]f an employer fails to pay wages in the amount, time, or manner required by contract or statute, the employee may seek administrative relief by filing a wage claim with the commissioner or, in the alternative, may seek judicial relief by filing an ordinary civil action for breach of contract and/or for the wages prescribed by statute.”].
229	Labor Code, § 1102.5, subd. (a).
230	Labor Code, § 1102.5, subd. (b).