

Employee vs. Independent Contractor

Under California law, workers are either “employees” or “independent contractors”.

Whether a worker is an employee or an independent contractor matters because only employees are entitled to certain labor protections like minimum wage, overtime, meal and rest breaks, reimbursement for business expenses incurred in performing their jobs, and workers’ compensation.

Employees can also go to state agencies like the California Labor Commissioner to seek enforcement of state labor laws. But independent contractors generally have to go to court to enforce their contract rights.

Employee Status

The law assumes that workers are employees unless the purported employer proves otherwise. To prove that a worker is an independent contractor not entitled to minimum wage, overtime, and other wage and hour protections, the purported employer must show that **all 3** parts of the following “ABC” test are true:

A) The worker is free from the purported employer’s control and direction. For example, the worker sets her own schedule and pay, decides her own assignments and how the work should be done.

B) The worker performs work *outside* the usual scope of the purported employer’s business. In other words, the service the worker performs is different from the service

generally provided by the purported employer’s business.

C) The worker customarily engages in an independent business of the same nature as what the worker is doing for the purported employer. For instance, the worker solicits work from and provides the same service to other clients.

Example:

Nicole is a manicurist. She finds a job opening at a nail salon through a newspaper posting, applies for the job, and is interviewed by the owner. The owner sets her work schedule and pay rate. The owner also makes all customer appointments, and decides which customers Nicole sees and when she sees them. The owner purchases the supplies that Nicole uses to perform her work, and also dictates the steps Nicole must follow when giving the client a manicure, including how long the service can be, and other customer service rules. The customers pay the owner directly and the owner pays Nicole at the end of each day. Because the owner controls when and how Nicole performs the work, she is an employee. Another fact that makes her an employee is her performance of the same service provided by the owner’s salon.

Independent Contractor Status

Independent contractors are generally workers who work without supervision, decide scheduling, pay, and how their work is performed, provide services outside the usual scope of the purported employer’s business, **and** operate their own businesses.

Examples:

Nora is a plumber. She is called by a Home Depot store to repair a leak in a bathroom there. She is an independent contractor because: A) she decides which assignments to take, how and when she will perform the work, B) her plumbing services are not part of the Home Depot’s usual course of business (to sell home improvement supplies), **and** C) she has her own business where she provides plumbing services for other customers.

Nick is a hair stylist. He is hired by a wedding coordinator to do the hair for the bride and her bridal party. Nick is an independent contractor because: A) he can freely choose which jobs to take, how much to charge, and how to perform his work, B) the wedding coordinator is not in the business of providing hair services, **and** C) Nick has his own separate business providing hair styling services for other customers.

Though independent contractors are not protected by the same labor protections as employees, they are entitled to enforcement of the terms of their contract – including the promised pay.

Labels are not decisive!

Though an employer may call a worker an independent contractor or report a worker’s income on a Form 1099 instead of a W-2, neither makes the worker an independent contractor. The label itself is not decisive.

The law looks beyond the label and examines who exercises actual control, what the employer’s usual course of business is, and whether the worker has an independently-established occupation or business. Every case is different.

Take Precautions, Before a Problem Arises

Keep Your Own Records: Write your work hours on a calendar each day, so that you have an accurate record of the hours you worked. If you are not provided with accurate pay stubs or pay records, it is also helpful to record how much you were paid each pay period. Keep copies of any documents provided to you by the purported employer, including time and pay records or any workplace rules or policies. Keep running notes of how a purported employer supervises or controls your work. All of these records can be extremely helpful in assessing and then later proving any claim you may have.

Where can I find assistance if I believe that I have been misclassified and my labor rights have been violated?

You can contact **AAAJ-Asian Law Caucus** if you believe that you have been misclassified or if you have any questions about your labor rights. We provide free legal consultations, including in-house support in Vietnamese, Mandarin, and Cantonese. We can also provide support in other languages.

55 Columbus Avenue
San Francisco, CA 94111
(415) 896-1701
www.advancingjustice-alc.org

You can also contact and/or file a complaint with the state Labor Commissioner's office if you believe that your wage and hour labor rights are violated. That office can help you

assess your classification status and whether your labor rights have been violated. There is a statute of limitations (deadline) to file a claim. Labor Commissioner wage claims generally can only seek unpaid wages and other amounts owed for a claim period starting 2 or 3 years immediately prior to the date you file your claim.

Department of Labor Standards Enforcement (State Labor Commissioner)
455 Golden Gate Avenue, 10th Floor East
San Francisco, CA 94102-7001
(415) 703-5300 (press 3 for Cantonese or press 4 for Mandarin)

The mission of AAAJ-Asian Law Caucus is to promote, advance and represent the legal and civil rights of the Asian and Pacific Islander (API) communities. Recognizing that social, economic, political and racial inequalities continue to exist in the United States, AAAJ-Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income, immigrant, and underserved APIs.

Last Updated: 10/11/2018

We encourage the reproduction of this brochure and ask only that you credit AAAJ-Asian Law Caucus when reprinting.

This handout is distributed for the purpose of increasing public awareness of the law. The information should not be taken as legal advice.

Know Your Rights:

Independent Contractor vs. Employee



ASIAN AMERICANS
**ADVANCING
JUSTICE**

ASIAN LAW CAUCUS

Serving the community since 1972