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Exclusively Representing Employers

"WHO'S THE BOSS"

Joint Employer Developments In Discrimination, Labor and Wage & Hour Law

February, 2015

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I. Independent Contractors

A. *Twenty Factors In Analyzing Whether Individual. Is Independent Contractor or Employee (developed by the IRS):*

1. Instructions: by the employer regarding when, where and how job is done creates employee relationship; control is present if company has the right to require compliance with its instructions.

2. Training: if required by employer or required attendance at training meetings, then company wants the services to be done in a particular manner creates employee relationship; the more training equals more control by the employer; no training creates independent contractor status.

3. Integration: services of contractor are merged into scope and function of enterprise; dependence and control are present.

4. Services rendered personally by specific contractor: company is interested in the contractor's specific methods and results = employee status.

5. Hiring supervising and paying assistants = control; if company hires, supervises assistants then control by company = employee status; if contractor hires and supervises and pays assistants = independence [=11]7 independent contractor status.

6. Continuing relationship = employee status.

7. Set hours of work = control; employee is not the master of his/her time which goes into the issue of the right to control an independent contractor.

8. Full-time work required = control of company = employees.

9. Working on company premises: control is implied if services are performed on company premises and if they could have been performed elsewhere = direction and supervision = employees.

10. Order or sequence: is worker free to follow own order of work or required to follow company directions.

11. Oral or written reports: does the worker have to account for his/her actions = company supervises work = control.

12. Pay by hour, week or month = employee status. Regular payments to worker = control; has the right to control the work and company expects a days' work for a days' pay. Regular payments = permanence.

13. Payment of business or traveling expenses = employee.

14. Furnishing tools or materials by company = employee status. Company determines which tools to use and how they should be used = employee relationship. Independent contractor furnishes own tools.

15. Investment by worker in facilities he/she uses to perform the services = independent contractor; otherwise, there is a dependence on the company for company premises to perform the work = employee.

16. Profit or loss = if worker has potential for realization of profit or loss from services = independent contractor; if no use of capital and there is not ability to realize a profit or loss = employee.

17. Working for more than one employer at a time = independent contractor since they are free from control by any one employer; but an employee can work for more than one employer also, so this is not determinative.

18. Services available to the public = independent contractor.

19. Right to Discharge: threat of discharge = control by the company; independent contractor cannot be fired if he performs under the contract.

20. Right to Terminate: ability on the part of the worker to break off the relationship without liability for breach of contract = employee; independent contractor is legally bound to complete the job.

B. *Labor Commissioner Utilizes an Eleven Point Test:*

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;

2. Whether or not the work is a part of the regular business of the principal or alleged employer;

3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;

4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;

5. Whether the service rendered requires a special skill;

6. 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;

7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;

8. The length of time for which the services are to be performed;

9. The degree of permanence of the working relationship;

10. The method of payment, whether by time or by the job; and

11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

C. *Other Tests For Determining Independent Contractor Relationship*

1. "Right to Control Test"

(a) the extent of control which, by the agreement, the [service recipient] may exercise over the details of the work;

(b) whether or not the [service provider] is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the [service recipient] employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether [service recipient] or the [service provider] supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the [service provider] is [retained];

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the [service recipient];

(i) whether or not the parties believe they are creating the relation of [employment].

2. Economic Realities Test

a. the extent to which services are part of the alleged employer's business;

b. the nature and degree of control exercised by the alleged employer;

c. the extent of the relative investments of the contractor and the alleged employer;

d. the degree to which the contractor's opportunity for profit and loss is determined by the alleged employer;

e. the skill and initiative required for performing the job; and

f. the permanence and duration of the relationship.

3. The "Engage, Suffer, or Permit" Test

This test is used by Courts and state agencies (such as the DLSE), when violations of the Wage Orders are at issue. The California Supreme Court, in *Martinez v. Combs* (2010) 49 Cal. 4th 35, noted that the California Wage Orders provide what appears to be an expansive definition of employment. The Wage Orders define "employ" as "to engage, suffer, or permit to work." *Martinez* concluded that "employ" has "three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." *Martinez* said, without explaining the significance of its statement, that the Wage Order definition of employment is broader than the common law definition of employment.

Employment Development Department
State of California

EMPLOYMENT DETERMINATION GUIDE

Purpose:

This worksheet is to be used by the proprietor of a business to determine whether a worker is most likely an employee or an independent contractor.

General Information:

Generally speaking, whether a worker is an employee or an independent contractor depends on the application of the factors contained in the California common law of employment and statutory provisions of the California Unemployment Insurance Code.

If a worker is an employee under the common law of employment, the business by which the worker is employed must report the worker's earnings to the Employment Development Department (EDD) and must pay employment taxes on those wages. If the worker is an independent contractor and the business pays the worker $600 or more in payments, the business must file a Form 1099-MISC with the Internal Revenue Service (IRS) and must file a *Report of Independent Contractor(s)* (DE 542) with the EDD within 20 days of either making payments totaling $600 or more, or entering into a contract for $600 or more with an independent contractor in any calendar year. For more detailed information regarding your independent contractor reporting requirements, view the latest revision of the *California Employer's Guide* (DE 44) available on the EDD website at **www.edd.ca.gov/Payroll_Taxes/Forms_and_Publications.htm**.

The basic test for determining whether a worker is an independent contractor or an employee is whether the principal has the right to direct and control the manner and means by which the work is performed. When the principal has the "right of control," the worker will be an employee even if the principal never actually exercises the control. If the principal does not have the right of direction and control, the worker will generally be an independent contractor.

If, on the face of the relationship, it is not clear whether the principal has the "right of control," there are secondary factors that are considered to determine the existence or nonexistence of the right of control.

The enclosed worksheet addresses the basic test and secondary factors through a series of questions. If use of the worksheet clearly demonstrates that a worker is an employee, you should contact the EDD and arrange to report the worker and pay the relevant taxes. You may also want to contact the IRS and your workers' compensation insurance carrier to ensure that you are in compliance with federal tax laws and with state workers' compensation statutes.

If after completing the worksheet you are not sure whether the worker is an independent contractor or employee, you may also contact the Taxpayer Assistance Center for advice by calling 1-888-745-3886 or request a written ruling by completing a *Determination of Employment Work Status* (DE 1870). The DE 1870 is designed to analyze a working relationship in detail and serves as the basis for a written determination from the EDD on employment status.

WORKSHEET ON EMPLOYMENT STATUS

Questions 1 – 3 are significant questions. If the answer to any of them is "Yes," it is a strong indication that the worker is an employee.

1. Do you instruct or supervise the person while he or she is working? Yes _____ No _____

   Independent contractors are free to do jobs in their own way, using specific methods they choose. A person or firm engages an independent contractor for the job's end result. When a worker is required to follow company procedure manuals and/or is given specific instructions on how to perform the work, the worker is normally an employee.

2. Can the worker quit or be discharged (fired) at any time? Yes _____ No _____

   If you have the right to fire the worker at will and without cause, it indicates that you have the right to control the worker.

   Independent contractors are engaged to do specific jobs and cannot be fired before the job is complete unless they violate the terms of the contract. They are not free to quit and walk away until the job is complete. For example, if a shoe store owner hires a licensed painter to paint the store, and the work had started, the store owner would not be able to just terminate the painter, without there being a good reason or just cause for doing so.

3. Is the work being performed part of your regular business? Yes _____ No _____

   Work which is a necessary part of the regular trade or business is normally done by employees. For example, a sales clerk is selling shoes in a shoe store. A shoe store owner could not operate without sales clerks to sell shoes. On the other hand, a plumber engaged to fix the pipes in the bathroom of the store is performing a service on a one-time or occasional basis that is not an essential part of the purpose of the business enterprise. A certified public accountant engaged to prepare tax returns and financial statements for the business would also be an example of an independent contractor.

A "No" answer to questions 4 – 6 indicates that the individual is not in a business for himself or herself and would, therefore, normally be an employee.

4. Does the worker have a separately established business? Yes _____ No _____

When individuals hold themselves out to the general public as available to perform services similar to those performed for you, it is evidence that the individuals are operating separately established businesses and would normally be independent contractors. Independent contractors are free to hire employees and assign the work to others in any way they choose. Independent contractors have the authority to fire their employees without your knowledge or consent. Independent contractors can normally advertise their services in newspapers and/or publications, the Internet, yellow page listings, radio, television, and/or seek new customers through the use of business cards.

5. Is the worker free to make business decisions which affect his or her ability to profit from the work? Yes _____ No _____

An individual is normally an independent contractor when he or she is free to make business decisions which impact his or her ability to profit or suffer a loss. This involves real economic risk, not just the risk of not getting paid. These decisions would normally involve the acquisition, use, and/or disposition of equipment, facilities, and stock in trade which are under his or her control. Further examples of the ability to make economic business decisions include the amount and type of advertising for the business, the priority in which assignments are worked, and selection of the types and amounts of insurance coverage for the business.

6. Does the individual have a substantial investment which would subject him or her to a financial risk of loss? Yes _____ No _____

Independent contractors furnish the tools, equipment, and supplies needed to perform the work. Independent contractors normally have an investment in the items needed to complete their tasks. To the extent necessary for the specific type of business, independent contractors provide their own business facility.

Questions 7 – 13 are additional factors that should be considered. A "Yes" answer to any of the questions is an indication the worker may be an employee, but no one factor by itself is deciding. When those factors are considered, a determination of whether an individual is an employee will depend upon a grouping of factors that are significant in relationship to the service being performed. However, the greater the number of "Yes" answers to questions 7 – 13 the greater the likelihood the worker is performing services as an employee.

7. Do you have employees who do the same type of work? Yes _____ No _____

   If the work being done is basically the same as work that is normally done by your employees, it indicates that the worker is an employee. This applies even if the work is being done on a one-time basis. For instance, to handle an extra workload or replace an employee who is on vacation, a worker is hired to fill in on a temporary basis. This worker is a temporary employee, not an independent contractor.

   (Note: If you contract with a temporary agency to provide you with a worker, the worker is normally an employee but may be an employee of the temporary agency. You may refer to the EDD's *Information Sheet: Temporary Services and Employee Leasing Industries* [DE 231F] on the subject of temporary service and leasing employers.)

8. Do you furnish the tools, equipment, or supplies used to perform the work? Yes _____ No _____

   Independent contractors furnish the tools, equipment, and supplies needed to perform the work. Independent contractors normally have an investment in the items needed to complete their tasks.

9. Is the work considered unskilled or semi-skilled labor? Yes _____ No _____

   The courts and the California Unemployment Insurance Appeals Board have held that workers who are considered unskilled or semi-skilled are the type of workers the law is meant to protect and are generally employees.

10. Do you provide training for the worker? Yes _____ No _____

In skilled or semi-skilled work, independent contractors usually do not need training. If training is required to do the task, it is an indication that the worker is an employee.

11. Is the worker paid a fixed salary, an hourly wage, or based on a piece rate basis? Yes _____ No _____

Independent contractors agree to do a job and bill for the service performed. Typically, payments to independent contractors for labor or services are made upon the completion of the project or completion of the performance of specific portions of the project.

12. Did the worker previously perform the same or similar services for you as an employee? Yes _____ No _____

If the worker previously performed the same or similar services for you as an employee, it is an indication that the individual is still an employee.

13. Does the worker believe that he or she is an employee? Yes _____ No _____

Although belief of the parties is not controlling, intent of the parties is a factor to consider when making an employment or independent contractor determination. When both the worker and principal believe the worker is an independent contractor, an argument exists to support an independent contractor relationship between the parties.

Interpretations of Answers

Depending on the services being performed and the type of occupation, this questionnaire may produce a variety of results. There may be some factors which lean toward employment and some which lean toward independence. The answers to questions 1 – 6 provide a strong indication of the presence or absence of direction and control. The answers to questions 7 – 13 when joined with other evidence may carry greater weight when indicating the presence or absence of direction and control.

1. If all of the answers to questions 1 – 3 are "No" and all of the answers to questions 4 – 6 are "Yes," there is an indication of independence. When this is the case, there are likely to be a number of "No" answers to questions 7 – 13 which add to the support of the determination.

2. If all of the answers to questions 1 – 3 are "Yes" and all of the answers to questions 4 – 6 are "No," it is very strong indication that the worker in question is an employee. When this is the case, there are likely to be a number of "Yes" answers to questions 7 – 13 which add to the support of the determination.

3. If the answer to question 1 or 2 is "Yes" or the answer to any one of questions 4 – 6 is "No," there is a likelihood of employment. At the very least, this pattern of answers makes the determination more difficult since the responses to questions 7 – 13 will probably be mixed. In such situations, the business owner would be well advised to complete a DE 1870, giving all of the facts of the working relationship and requesting a ruling from the EDD.

4. If the answer to question 3 is "Yes" and the answer to question 4 is "No," there is a likelihood of employment. Given this pattern of answers, it is probable that the answers to questions 5 and 6 will also be "No." When this happens you may also see more "Yes" answers to the last group of questions (7 – 13). This scenario would support an employment determination.

These four scenarios illustrate only a few combinations of answers that could result from the use of this Employment Determination Guide, depending on the working relationship a principal may have with a worker and the type of occupation. The more the pattern of answers vary from the above four situations, the more difficult it is to interpret them. In situations 1 and 2, there is a greater chance that the interpretation will be accurate, and they present the least risk to the business owner of misclassifying the worker. With other combinations of answers, the EDD recommends that business owners complete a DE 1870, giving a complete description of the working relationship and requesting a ruling from the EDD.

NOTE: Some agent or commission drivers, traveling or city salespeople, homeworkers, artists, authors, and workers in the construction industry are employees by law even if they would otherwise be considered independent contractors under common law. If you are dealing with workers in any of these fields, request *Information Sheet: Statutory Employees* (DE 231SE) from the Taxpayer Assistance Center at 1-888-745-3886 or access the EDD website at **www.edd.ca.gov/Payroll_Taxes/**.

SOME EXAMPLES OF INDEPENDENT CONTRACTORS AND COMMON LAW EMPLOYEES

Independent Contractors	Employees
An attorney or accountant who has his or her own office, advertises in the yellow pages of the phone book under "Attorneys" or "Accountants," bills clients by the hour, is engaged by the job or paid an annual retainer, and can hire a substitute to do the work is an example of an independent contractor.	An attorney or accountant who is employed by a firm to handle their legal affairs or financial records, works in an office at the firm's place of business, attends meetings as needed, and the firm bills the clients and pays the attorney or accountant on a regular basis is an example of an employee.
An auto mechanic who has a station license, a resale license, buys the parts necessary for the repairs, sets his or her own prices, collects from the customer, sets his or her own hours and days of work, and owns or rents the shop from a third party is an example of an independent contractor.	An auto mechanic working in someone's shop who is paid a percentage of the work billed to the customer, where the owner of the shop sets the prices, hours, and days the shop is open, schedules the work, and collects from the customers is an example of an employee.
Dance instructors who select their own dance routines to teach, locate and rent their own facilities, provide their own sound systems, music and clothing, collect fees from customers, and are free to hire assistants are examples of independent contractors.	Dance instructors working in a health club where the club sets hours of work, the routines to be taught and pays the instructors from fees collected by the club are examples of employees.
A repairperson who owns or rents a shop, advertises the services to the public, furnishes all of the tools, equipment, and supplies necessary to make repairs, sets the price for services, and collects from the customers is an example of an independent contractor.	A repairperson working in a shop where the owner sets the prices, the hours and days the shop is open, and the repairperson is paid a percentage of the work done is an example of an employee.

NOTE: Payroll tax audits conducted by the EDD have disclosed misclassified workers in virtually every type and size of business. However, certain industries seem more prone to have a higher number of misclassified workers than others. Historically, industries at higher risk of having misclassified workers include businesses that use:

- Construction workers
- Seasonal workers
- Short-term or "casual" workers
- Outside salespersons

U.S. Wage and Hour Division
(Revised May 2014)

Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the Fair Labor Standards Act (FLSA).

Determining Whether an Employment Relationship Exists: Is a Worker an Employee or Independent Contractor?

In order for the FLSA's minimum wage and overtime provisions to apply to a worker, the worker must be an "employee" of the employer, meaning that an employment relationship must exist between the worker and the employer. The FLSA defines "employ" as including to "suffer or permit to work", representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Applying the FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves.

A number of "economic realities" factors are helpful guides in resolving whether a worker is truly in business for himself or herself, or like most, is economically dependent on an employer who can require (or allow) employees to work *and* who can prevent employees from working. The Supreme Court has indicated that there is no single rule or test for determining whether an individual is an employee or independent contractor for purposes of the FLSA. The Court has held that the totality of the working relationship is determinative, meaning that all facts relevant to the relationship between the worker and the employer must be considered.

While the factors considered can vary, and while no one set of factors is exclusive, the following factors are generally considered when determining whether an employment relationship exists under the FLSA *(i.e.*, whether a worker is an employee, as opposed to an independent contractor):

1) The extent to which the work performed is an integral part of the employer's business. If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.

2) Whether the worker's managerial skills affect his or her opportunity for profit and loss. Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.

3) The relative investments in facilities and equipment by the worker *and* the employer. The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing risk of loss, this factor indicates that the worker may be an independent contractor.

4) The worker's skill and initiative. Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

5) The permanency of the worker's relationship with the employer. Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of a permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.

6) The nature and degree of control by the employer. Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.

There are certain factors which are immaterial in determining the existence of an employment relationship. For example, the fact that the worker has signed an agreement stating that he or she is an independent contractor is not controlling because the reality of the working relationship – and not the label given to the relationship in an agreement – is determinative. Likewise, the fact that the worker has incorporated a business and/or is licensed by a State/local government agency has little bearing on determining the existence of an employment relationship. Additionally, the Supreme Court has held that employee status is not determined by the time or mode of pay.

Requirements Under the FLSA

When an employer-employee relationship exists, and the employee is engaged in work that is subject to the FLSA, the employee must be paid at least the Federal minimum wage of $7.25 per hour, effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The FLSA also has youth employment provisions which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

F. Areas of Liability:

There are a number of areas where the misclassification of employees and/or independent contractors can create liability:

a. EEO: Title VII and FEHA;

b. FLSA and state wage and hour laws;

c. ERISA;

d. NLRA,

e. OSHA;

f. Unemployment Insurance;

g. Immigration;

h. Wrongful Termination litigation;

i. Workers' compensation;

j. Tax laws; and

k. Employee benefit programs.

G. Brand Reputation:

Labor Code section 226.8(e) provides that is the Labor and Workforce Development Agency or a Court issues a determination that a person or employer has "willfully" misclassified employees as Independent Contractors, the employer shall be required to display "prominently" on its Website, in an area easily accessible to the general public, and notice that sets forth the following language:

(1) That a Court has found that the employer has committed a serious violation of the law by engaging in the willful misclassification of employees.

(2) That the employer has changed its business practices in order to avoid committing further violations of the law.

(3) That any employee who believes he or she is being misclassified as an independent contractor may contact the Labor and Workforce Development Agency, and include the contact information for such agency.

(4) That the notice is being posted pursuant to State and/or Court Order.

II. **Volunteers, Trainees and Interns**

- **Volunteers**

A. A volunteer is not an employee and falls outside the sweep of agencies designated to protect the employees, such as the Labor Commissioner or United States Department of Labor.

B. A volunteer is someone who, without promise or expectation of compensation, but solely for his or her personal purpose or pleasure, works in activities carried on by other persons either for their pleasure or profit. In other words, a volunteer is someone who donates their services, without contemplation of payment, for humanitarian or public service reasons.

C. The intention that a volunteer not desire "cash" compensation is not the final factor. A volunteer could be considered an Employee if the individual receives "in-kind" compensation. Under the Fair Labor Standards Act, the test of whether an individual is an employee depends on the "economic realities." Thus, an individual that receives other benefits, such as health benefits, transportation, food, shelter, clothing, etc., can be considered working for compensation and thus an employee.

D. In addition to not receiving compensation, the individual must offer their services freely and without direct or indirect pressure or coercion. Meaning, a person could not be considered a volunteer if they were required to be "working" at a certain place and time.

E. If the circumstances are right, a volunteer can be forced to be an "employee" if a complaint is made by another individual or through the result of an independent investigation. In one case, the United States Supreme Court has held that even individuals who vehemently protested to being considered employees rather than volunteers were nonetheless employees and the employers were subject to the "employee-type" laws. The Court reasoned that the purposes of the FLSA require that it be applied even to those who would decline its protections. If an exception to the FLSA were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act.

F. Also, under workers' compensation principles, the test of whether a person was providing "voluntary service" for a public agency or a nonprofit organization, so as not to be an employee for worker's compensation purposes, depends on whether the services were rendered

for charitable or gratuitous reasons or for remuneration. (Cal. Labor Code §§ 3351, 3352.).

G. Section 3352 provides than an "employee" excludes the following: "Any person performing voluntary service for a public agency or a private, nonprofit organization who receives no remuneration for the services other than meals, transportation, lodging, or reimbursement for incidental expenses."

- **Trainees & Interns**

A. Trainees are not employees under federal law if all of the following criteria are:

1. The training, even though it includes operation of the employer's facilities, must be similar to that given in a vocational school;

2. The training must be for the benefit of the trainees or students;

3. The trainees or students must not displace regular employees, but must work under their close observation;

4. The employer providing the training must derive no immediate advantage from the activities of the trainees or students and on occasion its operations should actually be impeded;

5. The trainees or students must not necessarily be entitled to a job at the conclusion of their training period; and

6. The employer and trainees or students must understand that the trainees or students are not entitled to wages for the time spent in training.

B. Courts that have utilized this test have held that no single factor is controlling, but that one must look to the totality of the circumstances to determine whether the individual should be considered an employee.

C. Under state law, the Labor Commissioner has added the following additional requirements:

1. The clinical training should be part of an educational curriculum;

2. The students should not receive employment benefits;

3. The training should be general, so as to qualify the students for work in any similar business, rather than designed specifically for a job with the employer offering the program;

4. Upon completion of the program, the students should not be fully trained to work specifically for the employer offering the program, but should require further specific training for such employment;

5. The screening process for the program should not be the same as for employment and should not appear to be for that purpose; it should involve only criteria relevant for admission to an independent educational program; and

6. Any advertisements for the program should be couched clearly in terms of education, rather than employment, although the employer may indicate that qualified graduates will be considered for employment.

D. Both federal and state agencies will issue an opinion as to whether the training program will be deemed to result in an employment situation

Government Code §12940(c)

For any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of the person discriminated against.

Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act

This fact sheet provides general information to help determine whether interns must be paid the minimum wage and overtime under the Fair Labor Standards Act for the services that they provide to "for-profit" private sector employers.

Background

The Fair Labor Standards Act (FLSA) defines the term "employ" very broadly as including to "suffer or permit to work." Covered and non-exempt individuals who are "suffered or permitted" to work must be compensated under the law for the services they perform for an employer. Internships in the "for-profit" private sector will most often be viewed as employment, unless the test described below relating to trainees is met. Interns in the "for-profit" private sector who qualify as employees rather than trainees typically must be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek.*

The Test For Unpaid Interns

There are some circumstances under which individuals who participate in "for-profit" private sector internships or training programs may do so without compensation. The Supreme Court has held that the term "suffer or permit to work" cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. This may apply to interns who receive training for their own educational benefit if the training meets certain criteria. The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.

The following six criteria must be applied when making this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern. This exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of "employ" is very broad. Some of the most commonly discussed factors for "for-profit" private sector internship programs are considered below.

Similar To An Education Environment And The Primary Beneficiary Of The Activity
In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit). The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training. Under these circumstances the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern. On the other hand, if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.

Displacement And Supervision Issues
If an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns should be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek. If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees and entitled compensation under the FLSA. Conversely, if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience. On the other hand, if the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training.

Job Entitlement
The internship should be of a fixed duration, established prior to the outset of the internship. Further, unpaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.

Where to Obtain Additional Information
This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

[*] The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sectors.

III. Joint Employer Liability

SECTION 2810.3

Section 2810.3 is added to the Labor Code, to read:

2810.3.

(a) As used in this section:

(1) (A) "Client employer" means a business entity, regardless of its form, that obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(B) "Client employer" does not include any of the following:

(i) A business entity with a workforce of less than 25 workers, including those hired directly by the client employer• and those obtained from, or provided by, any labor contractor.

(ii) A business entity with five or fewer workers supplied by a labor contractor or labor contractors to the client employer at any given time.

(2) "Labor" has the same meaning provided by Section 200.

(3) "Labor contractor" means an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business. "Labor contractor" does not include any of the following:

(A) A bona fide nonprofit, community-based organization that provides services to workers.

(B) A bona fide labor organization or apprenticeship program or hiring hall operated pursuant to a collective bargaining agreement.

(C) A motion picture payroll services company as defined in subparagraph (A) of paragraph (4) of subdivision. (f) of Section 679 of the Unemployment insurance Code.

(4) "Wages" has the same meaning provided by Section 200 and all sums payable to an employee or the state based upon any failure to pay wages, as provided by law.

(5) "Worker" does not include an employee who is exempt from the payment of an overtime rate of compensation for executive, administrative, and professional employees pursuant to wage orders by the Industrial Welfare Commission described in Section 515.

(6) "Usual course of business" means the regular and customary work of a business, performed within or upon the premises or worksite of the client employer.

(b) A client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for both of the following:

(1) The payment of wages.

(2) Failure to secure valid workers' compensation coverage as required by Section 3700.

(c) A client employer shall not shift to the labor contractor any legal duties or liabilities under the provisions of Division 5 (commencing with Section 6300) with respect to workers supplied by the labor contractor.

(d) At least 30 days prior to filing a civil action against a client employer for violations covered by this section, a worker or his or her representative shall notify the client employer of violations under subdivision (b).

(e) Neither the client employer nor the labor contractor may take any adverse action against any worker for providing notification of violations or filing a claim or civil action.

(f) The provisions of subdivisions (b) and (c) are in addition to, and shall be supplemental of, any other theories of liability or requirement established by statute or common law.

(g) This section does not prohibit a client employer from establishing, exercising, or enforcing by contract any otherwise lawful remedies against a labor contractor for liability created by acts of a labor contractor.

(h) This section does not prohibit a labor contractor from establishing, exercising, or enforcing by contract any otherwise lawful remedies against a client employer for liability created by acts of a client employer.

(i) Upon request by a state enforcement agency or department, a client employer or a labor contractor shall provide to the agency or department any information within its possession, custody, or control required to verify compliance with applicable state laws. Upon request, these records shall be made available promptly for inspection, and the state agency or department shall be permitted to copy them. This subdivision does not require the disclosure of information that is not otherwise required to be disclosed by employers upon request by a state enforcement agency or department.

. . .

(m) A waiver of this section is contrary to public policy, and is void and unenforceable.

(n) This section shall not be interpreted to impose individual liability on a homeowner for labor or services received at the home or the owner of a home-based business for labor or services received at the home.

(o) This section shall not be interpreted to impose liability on a client employer for the use of an independent contractor other than a labor contractor or to change the definition of independent contractor.

NOTICE TO EMPLOYEE

Labor Code section 2810.5

EMPLOYEE

Employee Name: _____

Start Date: _____

EMPLOYER

Legal Name of Hiring Employer: _____

Is hiring employer a staffing agency/business (e.g., Temporary Services Agency; Employee Leasing Company; or Professional Employer Organization [PEO])? □ Yes □ No

Other Names Hiring Employer is "doing business as" (if applicable):

_____

Physical Address of Hiring Employer's Main Office:

_____

Hiring Employer's Mailing Address (if different than above):

_____

Hiring Employer's Telephone Number: _____

If the hiring employer is a staffing agency/business (above box checked "Yes"), the following is the other entity for whom this employee will perform work:

Name: _____

Physical Address of Main Office: _____

Mailing Address: _____

Telephone Number: _____

WAGE INFORMATION

Rate(s) of Pay: _____ Overtime Rate(s) of Pay: _____

Rate by (check box): □ Hour □ Shift □ Day □ Week □ Salary □ Piece rate □ Commission

□ Other (provide specifics): _____

Does a written agreement exist providing the rate(s) of pay? (check box) □ Yes □ No

If yes, are all rate(s) of pay and bases thereof contained in that written agreement? □ Yes □ No

Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances):

_____

(If the employee has signed the acknowledgment of receipt below, it does not constitute a "voluntary written agreement" as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document.)

Regular Payday: _____

DLSE-NTE (rev 11/2014)

WORKER'S COMPENSATION

Insurance Carrier's Name: _____

Address: _____

Telephone Number: _____

Policy No.: _____

□ Self-Insured (Labor Code 3700) and Certificate Number for Consent to Self-Insure: _____

PAID SICK LEAVE

Unless exempt, the employee identified on this notice is entitled to minimum requirements for paid sick leave under state law which provides that an employee:

a. May accrue paid sick leave and may request and use up to 3 days or 24 hours of accrued paid sick leave per year;
b. May not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and
c. Has the right to file a complaint against an employer who retaliates or discriminates against an employee for
   1. requesting or using accrued sick days;
   2. attempting to exercise the right to use accrued paid sick days;
   3. filing a complaint or alleging a violation of Article 1.5 section 245 et seq. of the California Labor Code;
   4. cooperating in an investigation or prosecution of an alleged violation of this Article or opposing any policy or practice or act that is prohibited by Article 1.5 section 245 et seq. of the California Labor Code.

The following applies to the employee identified on this notice: (Check one box)

□ 1. Accrues paid sick leave only pursuant to the minimum requirements stated in Labor Code §245 et seq. with no other employer policy providing additional or different terms for accrual and use of paid sick leave.

□ 2. Accrues paid sick leave pursuant to the employer's policy which satisfies or exceeds the accrual, carryover, and use requirements of Labor Code §246.

□ 3. Employer provides no less than 24 hours (or 3 days) of paid sick leave at the beginning of each 12-month period.

□ 4. The employee is exempt from paid sick leave protection by Labor Code §245.5. (State exemption and specific subsection for exemption):_____

ACKNOWLEDGEMENT OF RECEIPT
(Optional)

_____ _____
(PRINT NAME of Employer representative) (PRINT NAME of Employee)

_____ _____
(SIGNATURE of Employer Representative) (SIGNATURE of Employee)

_____ _____
(Date) (Date)

The employee's signature on this notice merely constitutes acknowledgement of receipt.

Labor Code section 2810.5(b) requires that the employer notify you in writing of any changes to the information set forth in this Notice within seven calendar days after the time of the changes, unless one of the following applies: (a) All changes are reflected on a timely wage statement furnished in accordance with Labor Code section 226; (b) Notice of all changes is provided in another writing required by law within seven days of the changes.