

Every day there is a commercial advertising the right to **not** be classified as an employee. Why do you think that is?

I never see a commercial advertising the right to **not** be classified as a business owner. And I know why that is! Business owners must advertise their professional services to acquire customers or clients to service.

Employee workers are employed by business owners as a part of the business' operations for business owner to meet its business objectives. These business objectives more times than not are to meet customer needs that the business owner has to offer. Be it products or services, the business owner must advertise to acquire its target market audience.

Now, why do I say all workers are employees, except for? Whether a person owns a business or works for a business, that person is classified by Federal law and some state laws as an employee.

Federal law, Chapter 26 of United States Code Section 3401(c) states that **“the term “employee” includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. .. term “employee” also includes an officer of a corporation.”** Federal law further identifies an employee “under common-law rules” as anyone who perform services for you “if you control what will be done and how it will be done.” This control is based on three (3) categories of evidence: 1) Behavioral control; 2) Financial Control, and 3) Relationship of the Parties.

Behavioral control is evidenced by facts which indicate whether the service recipient “has a right to direct or control how the worker performs” the tasks for which her or she is hired. These facts illustrate the right to control how a worker performs, including “the provision of training or instruction.” Example: A worker is needed to transport products to a customer, i.e. food prepared by a restaurant, retail store products held for sale by the retailer. Restaurateur or retailer will hire workers to transport its products to the customer. Restaurateur will train its staff, including its deliver personnel on food safety procedures to ensure food product is safe for its customer’s consumption as required by health & safety agency where it does business and is licensed or permit, as well as Food & Drug Administration laws.

Think about it? As an employee worker would you be held responsible if food delivered to a customer for consummation made the customer sick or ill from eating it? Not likely, it would be the liability of the Restaurateur. It was produced in the kitchen or commercial kitchen operated by the Restaurateur. The Restaurateur maintained business insurance to protect itself in the event of a lawsuit.

A retailer will do the same. A retailer will train its staff on ensuring the product requested by the customer is free of damage and packaged to prevent damage. A retailer will also hire a worker to transport its products to the customer. A retailer will also maintain business insurance to protect itself in the event of a lawsuit.

What type of worker is hired by either the restaurateur or the retailer? Well, more times than not, it is an employee who the business can direct and control the means of the work, what will be done

RESOURCES: [IRS.GOV](https://www.irs.gov), [PUBLICATION 15; EDD.CA.GOV](https://www.edd.ca.gov)

and how it will be done. Some may say, well a driver transporting does not necessarily have to be an employee of the restaurateur or the retailer. Of course, while that may be true, it does not necessarily mean the worker is not controlled. Often, businesses hire third-party businesses to accomplish their delivery services to support their product distribution. Generally, if the restaurateur or retailer hires a third-party provider, contracts and/or agreements are signed, and liability clauses are included to cover lawsuits and legal fees. Third-party providers are business owners who maintain business insurance to protect their businesses. No one drives a car without insurance, no one expects services at a hospital without insurance. It is not wise for any business not to maintain its business insurance.

Financial control is evidenced by facts which indicate whether the service recipient” has a right to direct or control financial aspects of the worker’s activities”. These include “significant investment, unreimbursed expenses, making services available to the relevant market, the method of payment, and the opportunity for profit or loss.” All employee workers have an expectation of a paycheck either monthly, weekly, or bi-weekly based on options offered by the employer. But no employee worker expects to bill the customer for its payment and get paid in 30-day terms, which is indicative of standard business practices. Example: Restaurateur bills the customer at the time it takes the order and payment is due at the time the order is placed. Retailer also bills the customer at the time it takes the order and the payment is due at the time the order is placed. The customer understands that no product will be delivered if payment is not made at the time of order for both type of businesses. Furthermore, the customer also knows that a refund policy affords the customer the right to return the product if not satisfied. If no refund is made, the customer has rights for lawsuit or arbitration as indicated by state and/ or federal laws for consumer protection. Financial retribution may be made based on a lawsuit or arbitration settlement and payment may be made by insurance companies for businesses that hold business insurance. Significant investment, opportunity for profit or loss, collection of nonpayment from insufficient funds are protected for the business owner by maintaining business insurance, etc. Worker’s injuries on the job are covered by employers who maintain worker’s compensation insurance, commercial auto insurance, disability insurance, etc. Businesses generally maintain these insurances in the event of lawsuits from employee workers. Businesses generally are not required to pay another business unless found to be negligent. Hence, businesses maintain business insurance in the event of lawsuits for negligence, even if the business owner is not at fault. Businesses hold themselves out to the public and have a right to make services available to its relevant market. Businesses have a right to decide the form of payment to receive from its customers and how to process those payments. Third-party payment processors generally make businesses verify themselves with employer identification number (EIN) letter from the Internal Revenue Service.

Do you know of a person who would not maintain insurance to protect itself from losses of their livelihood, house, car, savings accounts, retirement accounts, including 401(k), Roth IRA, inheritance, social security benefits? Lawsuit settlements and arbitration agreements may be paid from these sources of income, to name a few. Do you know of a person who would not maintain insurance in the event they are hurt, injured on a job? Be smart about how a business classifies you as a worker.

Relationship of the Parties according to IRC Treasury Regulations Section 31.3121(d)-1, Employment Tax Regulations, “existence of an employer-employee, or independent contractor

RESOURCES: [IRS.GOV](https://www.irs.gov), [PUBLICATION 15; EDD.CA.GOV](https://www.edd.ca.gov)

relationship is a question of fact...In applying the common-law rules, consideration is given whether the service recipient has behavioral and financial control over the worker and evaluates the relationship between the parties, including how they view their relationship.”

Relationship of the Parties is evidenced by examining the “parties’ agreements and actions with respects to each other, paying close attention to those facts which show not only how they perceive their own relationship but also how they represent their relationship to others”. Facts which illustrate “how the parties perceive their relationship include : 1) intent of the parties as expressed in written contracts; 2) the provision of, or lack of, employee benefits; 3) the right of the parties to terminate the relationship; 4) the permanency of the relationship, and 5) whether the services performed are part of the service recipient’s regular business activities. “

Intent of the Parties demonstrates what I am expected to do for you and what your expectations of the job hired to be performed which is usually expressed in a written contract, employment agreement, employment application, detailed in a job advertisement, etc. Are you required to complete a job interview, submit a resume, customer reference? All these expectations are viewed as intent.

Employee benefits are medical, dental, vision, retirement plans, group insurance, vacation, sick pay, disability benefits, etc. are discussed, offered, or not offered.

Termination of the relationship is based on performance, work objectives met, term of work, deliverables, fired-at will, etc.

Permanency of the relationship is based on terms of use of services being hired. Is one-time use of services, one-year, probationary, temporary, permanent, as needed, seasonal, or on-call being offered?

Services performed are part of the business operations or regular business activities of the service recipient. Know the job being asked or hired to do and for who job is being performed. Know what skill set is being asked of you. Know if you will be trained or required to already have the skill set.

Are you afraid of being fired, terminated? Are you not knowing where you next paycheck or payment for services is coming from? Business employee-owners do not have this fear the same as regular employee workers. Business owners have contracts signed with customers or clients to pay on certain payment terms. Businesses have insurance to cover interruption of business. Employees have unemployment insurance to cover loss of job or wages.

Know how you are being classified and how you will insure your next paycheck or payment for services! Afterall, you got to eat! Rent or mortgage must be paid! Do not let an employer treat you as a business owner unless you are in business and your services are held out to the public.

Now there are three (3) other worker classifications recognized by Federal law which are not employee worker. These are statutory workers, nonemployee workers, and independent contractor workers. Statutory workers are independent workers under common-law rules treated as employees by statute for employment tax purposes, specifically Social Security and Medicare taxes.” These statutory

RESOURCES: [IRS.GOV](https://www.irs.gov), [PUBLICATION 15; EDD.CA.GOV](https://www.edd.ca.gov)

ALL WORKERS ARE EMPLOYEES, EXCEPT FOR

workers are specifically identified in the IRC as a full-time life insurance agents for one (1) life insurance company, a drivers who is your agent or paid on commission, an individual who works at home on materials or goods that you supply and that must be returned to you or to a person you name, if you also furnish specifications for the work done, or a full-time traveling or city salesperson who works on your behalf and turns in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments and it's the salesperson's principal business activity.

Nonemployee workers are treated as self-employed for all Federal tax purposes, including income and employment taxes. These nonemployee workers are specifically identified in the IRC as direct sellers, licenses real estate agents, and companion sitters who are not employees of a companion sitting placement service.

Independent contractor as defined by IRC "an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done." Independent contractors have an independent trade, business, or profession in which they offer their services to the general public.

State laws vary by state. Worker may be an employee for Federal Law purposes and an independent contractor for State purposes, or vice versa. California uses the ABC test.

California, Assembly Bill (AB) 5 was recently signed into law and "it replaces the common law test with the ABC test to determine whether a worker is an employee or independent contractor" in California. Therefore," effective January 1, 2020, hiring entities are required to classify workers as employees unless they meet all conditions of the ABC test. "edd.ca.gov/payroll taxes/ab-5.htm.

The answer to the question is simple. Since business owners must advertise their professional services to acquire customers or clients to service, businesses must solicit workers to help them meet this business objective. All workers are employees except for those specifically identified in IRC.**

RESOURCES: [IRS.GOV](https://www.irs.gov), [PUBLICATION 15](#); [EDD.CA.GOV](https://edd.ca.gov)

All rights reserved. No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, without the prior written permission of the publisher.

The information provided in this publication is for educational purposes only, and does not necessarily reflect all laws, rules, or regulations for the tax year covered. This publication is designed to provide accurate and authoritative information concerning the subject matter covered, but it is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

To the extent any advice relating to a Federal tax issue or State tax issue is contained in this communication, it was not written or intended to be used, and cannot be used, for the purpose of (a) avoiding any tax related penalties that may be imposed on you or any other person under the Internal Revenue Code, or any state tax agency (b) promoting, marketing or recommending to another person any transaction or matter addressed in this communication.

©2020 LB1 Mobile Tax Assistance and Education Services Foundation

RESOURCES: [IRS.GOV](https://www.irs.gov), [PUBLICATION 15](https://www.edd.ca.gov); [EDD.CA.GOV](https://www.edd.ca.gov)