"What Are The Most Common Employer / HR Questions That Clients Ask Our Attorneys"?

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Can I Classify An Employee As An Independent Contractor?

An Independent Contractor is not an Employee.

* Employees are paid pursuant to an IRS Form W-2, and Independent Contractors are paid pursuant to IRS Form W-9.
* Person performing work for another will be presumed to be an Employee.
* Generally, employment laws do not apply to Independent Contractors.

Independent Contractor v. Employee

* An Independent Contractor is "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." (*Labor Code* §3353.) (control, permanence & dependence)
* "Employer" has the "right to control the manners and means of accomplishing the result desired." (*SG Borello & Sons v Dept. of Ind. Rel.* (1989) 48 Cal.3d 341, 404.)

Independent Contractor v. Employee

The IRS has developed guidelines to help the employer correctly classify the employment relationship focusing on three main factors:

* How much control the employer has over the worker's behavior and work results. (Who controls training, where and what time the person works, what equipment they use?)
* How much control the employer has over finances? (Does the employer have primary control over the person's profit or loss?)
* What is the relationship between the parties? (Does the worker receive benefits? Is it a long-term relationship? Is there an agreement?)

Independent Contractor v. Employee

Following are the 20-points that have been established by the IRS:

* 1. Must the individual take instructions from your management staff regarding when, where, and how work is to be done?
* 2. Does the individual receive training from your company?
* 3. Is the success or continuation of your business somewhat dependent on the type of service provided by the individual?
* 4. Must the individual personally perform the contracted services?
* 5. Have you hired, supervised, or paid individuals to assist the worker in completing the project stated in the contract?
* 6. Is there a continuing relationship between your company and the individual?
* 7. Must the individual work set hours?
* 8. Is the individual required to work full time at your company?
* 9. Is the work performed on company premises?
* 10. Is the individual required to follow a set sequence or routine in the performance of his work?

Independent Contractor v. Employee

* 11. Must the individual give you reports regarding his/her work?
* 12. Is the individual paid by the hour, week, or month?
* 13. Do you reimburse the individual for business/travel expenses?
* 14. Do you supply the individual with needed tools or materials?
* 15. Have you made a significant investment in facilities used by the individual to perform services?
* 16. Is the individual free from suffering a loss or realizing a profit based on his work?
* 17. Does the individual only perform services for your company?
* 18. Does the individual limit the availability of his services to the general public?
* 19. Do you have the right to discharge the individual?
* 20. May the individual terminate his services at any time?

Independent Contractor v. Employee

* The checklist helps determine who has the "right of control." Does the employer have control or the "right of control" over the individual's performance of the job, and how the individual accomplishes the job?
* The greater the control exercised over the terms and conditions of employment, the greater the chance that the controlling entity will be held to be the employer. The right to control (not the act itself) determines the status as an independent contractor or employee.

Independent Contractor v. Employee

* Can the individual acknowledge in writing that he/she is an Independent Contractor to protect the principal?
* Agreement is only one factor to be considered.
* Balance of Factors/Totality of Circumstances.
* Analysis may changed based on the specific industry.

Independent Contractor v. Employee

* Consequences of mischaracterization:
  * Unpaid Overtime
  * Missed Meal and Rest Periods
  * Recordkeeping Violations – failing to accurately record hours worked, meal periods, and pay stub violations.
  * Penalties for Unpaid Wages, e.g. Section 203.
* Also Tax Laws, Workers' Compensation, Immigration, Wrongful Termination, FEHA, FMLA/CFRA, PDL.
* Intentional misclassification of an employee as IC may carry penalties up to $25,000.

Am I Liable To An Employee Who Chooses Not To Take A Meal Period?

* Under California law, employees must be provided with no less than a 30-minute meal period when the work period is more than 5 hours.
* Meal period must be provided no later than the end of the 5th hour of work.
* Employee must be relieved of all duty **and** must be free to leave the premises.

Meal Periods – On Duty

* If employee is not relieved of all duties, the meal period must be considered an "on duty" meal period (counted as hours worked).
* Permitted only when the "nature of the work" prevents an employee from being relieved of all duty.
* Objective Test – not allowed unless, based on an objective criteria, the EE is prevented from being relieved of all duty based on the necessary job duties.
* Written agreement required including right of revocation in writing.

Meal Periods

* If the employer requires the employee to remain on the premises during the meal period, the meal period must be paid, even if the employee is relieved of all duties. (*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th. 968.)

Meal Periods

* How does an employer satisfy its obligation?
* Employer not require to ensure that no work is performed. But, it must do more than just make a meal period available.
* ER must actually relieve employees of all duty, relinquish control over their activities, permit a reasonable opportunity to take an uninterrupted 30 minute break (in which they can come and go), **and** the ER must not impede or discourage them from taking the meal period. (particular facts may vary in different industries)

Meal Periods

* The law does not allow for "an employer's exerting coercion against taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.)
* Self Imposed Penalty - If ER fails to provide a compliant meal period, ER must pay 1 additional hour of pay at the employee's regular rate

Meal Periods

* If employee is relieved of all duty and free to leave premises (no discouragement or coercion from employer), but he freely chooses not to comply with meal period policy or to work, the employer is not liable for meal period premium.
* However, if employer knows or how to reason to know EE is performing work, EE must be compensated.
* Counseling option.

Meal Periods

* Meal Period Waivers:
  * If total work period is no more than 6 hours, meal period may be waived by mutual consent.
  * If EE works more than 10 hours but no more than 12, EE may waive second meal period if 1st period was not waived

Preventative Measures

* Must have a written policy.
* Train management to enforce policy.
* Conduct regular self audits to ensure compliance.

Can I Terminate an Employee After Employee Has Exhausted FMLA Leave?

* FMLA Basic Entitlement
  Under the Family and Medical Leave Act (FMLA), covered employers (over 50 EEs) must provide up to 12 weeks of unpaid, job-protected leave to eligible employees.
* Who is an eligible employee?
  1. have been employed by a covered employer for at least 12 months;
  2. have had at least 1,250 hours of service during the 12-month period immediately before the leave started; and
  3. be employed at a worksite where the employer employs 50 or more employees within 75 miles, or at a public agency, public school board, or elementary or secondary school.

FMLA Leave

FMLA - Covered employers must provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- A serious health condition that makes the employee unable to perform his job.
- Incapacity due to pregnancy, prenatal medical care, or child birth.
- Care for employee's child after birth, or placement for adoption or foster care. (within 1 year)
- Care for employee's spouse, son, daughter or parent with a serious health condition.

FMLA v. CFRA

* CFRA is a state law found in the FEHA.
* CFRA mirrors the federal FMLA and runs concurrently (50+ employees, 12 weeks of protected leave)
* Differences:
  * CFRA include "registered domestic partners" in the definition of family member.
  * Disability related to Pregnancy not considered a "serious health condition" and not covered under CFRA. (See PDL)

Pregnancy Disability Leave

* Employers with five or more FT or PT employees
* EE disabled by pregnancy is entitled to up to 4 months of leave. (the number of working days EE would normally work in 1/3 of the year or 17 1/3 weeks)
* Leave can be taken before or after birth during any period of time the EE is physically unable to work b/c of pregnancy or a pregnancy-related condition.
* Disabled: prenatal/ postnatal care, sever morning sickness, bed rest, childbirth, recovery, loss or end of pregnancy.
* Entitled to PDL in addition to CFRA. EE could take 4 months of PDL and 12 weeks CFRA to bond with the baby, adopted child, or to care for a parent, spouse or child with a serious health condition.

FEHA/ADA

- **Prohibit discrimination, harassment and retaliation on the basis of a disability.**
- **Also require employers to make *reasonable accommodations* to enable a disabled individual to perform the essential functions of the job.**
- **The FEHA/ADA do not provide job security. (compare with FMLA/CFRA/PDL)**
- **State law may impose a higher burden on the employer. (Duty to engage in the interactive process.)**

FEHA/ADA

- ADA/FEHA leaves cover situations where FMLA/CFRA/PDL leaves do not apply.
- The ADA/FEHA provides that an employer must provide a *reasonable accommodation* for the known physical or mental disability of an applicant or employee unless it would create an *undue hardship*.

FMLA/ADA- Reasonable Accommodation

* Accommodations must be reasonable, meaning that the size of the employer, the type of business, and the positions available are taken into consideration.
* Examples include:
  -Job restructuring
  -Part-time, modified work schedules
  -Reassignment to a vacant position or another location
  -Temporary leave of absence
  -Equipment or special devices

FMLA/ADA – Reasonable Accommodation

* The only basis for a denial of leave as a reasonable accommodation under the FEHA/ADA is through showing that it would pose an undue hardship to the employer.
* Thus, a qualified individual with a disability is entitled to additional leave time beyond the twelve weeks permitted under the FMLA/CFRA so long as that additional leave time would not constitute an undue hardship on the employer.

FMLA-Interactive Process

- Under California law, the employer is also required to initiate the interactive process to determine what reasonable accommodations, if any, are needed.

FEHA – Interactive Process

Begin the process when triggered – do not delay

- ✓ Employer is required to engage in a "timely, good faith, interactive" process
- ✓ Meet with employee in person, if possible
- ✓ Interview others and obtain pertinent medical information
- ✓ Complete any necessary forms, reports, claims, etc. and document your file
- ✓ Make sure company policies are up to date, comply with the law and are applied consistently
- ✓ Obtain job descriptions and update if necessary

FMLA- Interactive Process

Begin the process when triggered – do not delay *(continued)*

- ✓ Do not disparage or discriminate against an employee who reports an injury, claim or disability
- ✓ Examine all reasonable accommodations
- ✓ Stay in contact with the employee
- ✓ Do not forget the process is "on going" and must be revisited
- ✓ Develop a plan to offer an accommodation, if available, and be prepared to deal with an employee you cannot accommodate.

Can I Discipline An Employee Who Criticized Management on Social Media?

* Section 7 of the National Labor Relations Act (the Act) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

Concerted Activities

* Translation: Employees at union *and non-union* workplaces have the right to help each other by sharing information, signing petitions, and seeking to improve wages and working conditions.
* Includes communication via e-mail using the employer's e-mail systems during their non-working time, if the employer gives the employees access to the e-mail system for business communication. (*Purple Communications, Inc.)*

Concerted Activities

* Email has "effectively become a natural gathering place pervasively used for employee-to-employee conversations" and the fact that this "gathering place" is virtual does not undermine the role that email plays in Section 7 protected workplace discussions.
* "E-mail is the modern-day equivalent of the workplace water cooler for employee communication."
* Thus, email's use for Section 7 activity must be protected under the NLRA. The Board will no longer "perpetuate" an "outmoded assessment of workplace realities."

Concerted Activities

* Two recent cases have found the NLRB protection extends to employees who criticize management on social media, such as Facebook.
* Employees have a legally protected right to criticize their employer and urge workers to think the same way about the company.
* "Bob is such a nasty mother f .. . . Don't know how to talk to people!! F. . . his mother and his entire f. . .. family What a loser. Vote yes for the union." (*Pier Sixty*)

Concerted Activities

* The Board found that the Facebook post was a lawful expression of the EEs feeling about the company and his supervisor, especially when the comment appeared during the run up to an NLRB supervised union election.
* Did employee go too far? According to the Board, the "Facebook post, although vulgar and inappropriate, was not so egregious as to exceed the Act's protection."

Concerted Activities

* Court reasoned (1) Facebook post addressed workplace concerns regarding treatment of employee and an upcoming union election; (2) the employer had a past tolerance of profanity in the workplace; (3) activity did not occur in the workplace, but on an online forum that did not impact customer or a catering event; and (4) EE removed the post from Facebook shortly after learning that the post was publicly accessible.

Concerted Activities

* In the second case, a security officer called into a talk radio show to criticize his employer, which contracts with TSA, and to advocate that TSA operations not be contracted out to private companies like his employer. (*Trinity Technology Group*)
* Call was legally protected, because the call was a "logical outgrowth of the employees' discussions of their common complaints," and "it was evident to listeners that the comments concerned an ongoing labor dispute."

Concerted Activities

* Although some statements were inaccurate, they were not disloyal, reckless, or maliciously untrue, but rather a complaint of safety matters.
* Take Away: Business owners must be careful when disciplining or terminating employees who have publicly criticized the company, if the criticism involves or relates to workplace conditions. Applies to both union and nonunion employers.

Can I Mail An Employee's Final Pay Check ?

* Final Pay Rules
* Termination – Pay is due immediately at the time of termination.
* Resignation with 72 hours notice – Pay is due immediately at the time of separation.
* Resignation without notice – Pay is due within 72 hours.
* Cannot mail final pay without authorization of employee.
* Labor Code Section 203 serves as a daily penalty for ANY unpaid wages (including accrued vacation and unpaid meal/rest period penalties) for up to 30 calendar days after separation.

Questions and Answers

Questions?

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Thank You!

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