

EMPLOYMENT
& LABOR LAW

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A L A W C O R P O R A T I O N

EMPLOYEE, INDEPENDENT CONTRACTOR OR VOLUNTEER

When Definitions Mean Dollars

Employment Law Workshop

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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 = 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. Areas of Liability:

1. 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.

II. 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 a volunteer 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 that 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.”

III. Trainees & Interns

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

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.

Your Group's Name: _____

Office use: _____

Office use: _____

[Organization Name] Volunteer Contract and Release from Liability

In signing this form, I understand and agree to the following?

1. **ORIENTATION:** I acknowledge that I have attended the New Volunteer Orientation and I further agree to the following policies and procedures presented.
2. **CONFIDENTIALITY (GENERAL):** I agree to keep [Organization Name] records regarding previous and existing clients confidential.
3. **CANCELLATIONS:** I agree to call in 48 hours before my scheduled shift if I am unable to make it, except in an emergency, in which case I shall call in as soon as possible.
4. **EXITS:** I agree to notify [Organization Name] in writing at least two weeks in advance of any extended leave or resignation from my volunteer duties.
5. **LIABILITY:** I understand that [Organization Name]'s money goes toward direct service to clients, and therefore, if I am injured while acting as an unpaid member of the staff, I must depend on my own health insurance to provide my care. I acknowledge that I am not an employee of [Organization Name] with respect to matters covered by this document and, accordingly, I am not covered by California State Worker's Compensation Law.

If I choose to be a Volunteer Driver:

1. **LICENSE:** I am in possession of a valid **California Driver's License # _____**, **expiration date: _____**. I agree to inform [Organization Name] promptly if my license expires, is suspended, or is revoked, and further agree to refrain from driving on behalf of [Organization Name] while my license is expired, suspended, or revoked. [Organization Name] agrees that it will treat this information with due regard for confidentiality, but will disclose such information if required by law or valid court order.
2. **INSURANCE:** I agree to obtain and maintain the minimum car insurance required by the State of California. If my insurance expires or is canceled, I will promptly notify [Organization Name]. **My insurance carrier is _____, policy # _____**. [Organization Name] agrees that it will treat this information with due regard for confidentiality but will disclose such information if required by law or a valid court order. I acknowledge that [Organization Name] will not be responsible for any of the costs incurred in operation any personal vehicle utilized by me, including, without limitation, cost of any maintenance and gasoline.
3. **TRAINING:** I acknowledge that the duties of a Delivery Volunteer have been explained to me at the Volunteer Orientation. I am aware that my duties as a Delivery Volunteer may include, but are not limited to, delivering meals in my own car, or assisting meal delivery in the car of another volunteer or in a [Organization Name] vehicle, to the homes of [Organization Name]'s clients.

4. CONFIDENTIALITY: If I am asked while delivering food to explain my presence and/or identify a client, I will say I am delivering takeout or I am a friend delivering a meal. **I will not identify [Organization Name] while delivering meals.**

5. DELIVERY DUTIES AND HAZARDS: I am aware that delivering meals to [Organization Name]'s clients is a potentially hazardous activity. I acknowledge that the potential hazards have been explained to me at the Volunteer Orientation. Those hazards include, but are not limited to, back injury due to lifting, personal injury from car accidents, property damage or injury to others in an accident, falls and mugging. I am voluntarily participating in these activities with the knowledge of the danger involved, and therefore agree to accept any and all risks of injury, death, and confirm this statement by **placing my initials here:**_____.

6. CITATIONS: I agree that if, while delivering meals for [Organization Name], I am cited for traffic or parking violations, that I will be responsible for any fines received and any related costs or fees.

If I choose to be a Kitchen Volunteer:

1. TRAINING: I acknowledge that the duties of a Kitchen Volunteer have been explained to me at the Volunteer Orientation. I am aware that my duties as a kitchen volunteer may include, but are not limited to, lifting, handling knives, operation heavy equipment, wrapping foods, and cleaning up.

2. KITCHEN DUTIES AND HAZARDS: I am aware that volunteering for [Organization Name] to work in the kitchen can be a potentially hazardous activity. Those hazards include, but are not limited to, injuries from slips and falls; back injuries from lifting and standing; burns and cuts. I am voluntarily participating in these activities with the knowledge of the danger involved and therefore agree to accept any and all risks of injury or death and confirm this statement by **placing my initials here:**_____.

If I choose to volunteer in other capacities (Office Support, Outreach, Special Events):

1. DUTIES AND HAZARDS: I am aware that volunteering for [Organization Name] in the capacity of the office support, outreach, and/or special events can be a potentially hazardous activity. I am voluntarily participating in these activities with the knowledge of any danger involved and therefore agree to accept any and all risks of injury or death and confirm this statement by **placing my initials here:**_____.

RELEASE: As consideration for being permitted by [Organization Name] to participate in these activities and the use of their facilities, I hereby agree that I, my assignees, heirs, spouses, guardians, and legal representatives will not make a claim against, sue, or attach the property of [Organization Name] or any of its agents, directors, employees, representatives, contractors, or volunteers for injury of damage resulting from the negligence or other acts, howsoever caused, by an agent, director, employee, representative, contractor, or volunteer of [Organization Name] as a result of my participation as a volunteer. I hereby furthermore release [Organization Name] and its agents, directors, employees, representatives, contractors, and volunteers from all actions, claims, or demands that I, my assignees, heirs, spouse, guardians, and legal representatives now have or may hereafter have for injury of damage, whether currently known or unknown, resulting from my participation as a volunteer. This release of liability and assumption of risk, in addition to covering any past occurrences, is intended to discharge in advance their respective successors and assigns from and against any and all liability arising out of or connected in any way with my participation as a volunteer for [Organization Name], even though that liability may arise out of negligence or carelessness on the part of the persons or entities above mentioned, or any other cause.

PHOTO RELEASE: I acknowledge that my picture/likeness may be taken/recorded and release permission for that picture/likeness to be used by [Organization Name]. I acknowledge that [Organization Name] may use said picture in print media or other forms of visual communication as it or its designees see fit. I attest that I am not entitled to any form of monetary/financial compensation for the use of my likeness, have not been promised such, and recognize that [Organization Name] need not provide compensation for this or any other type.

I HAVE CAREFULLY READ THIS CONTRACT AND FULLY UNDERSTAND ITS CONTENTS. I AM AWARE THAT THIS IS A RELEASE FROM LIABILITY AND A CONTRACT BETWEEN MYSELF AND [Organization Name], AND I SIGN IT OF MY OWN FREE WILL

Volunteer Name (please print): _____

Phone: _____ **E-mail:** _____

Volunteer Signature: _____ **Date:** _____

PARENT/GUARDIAN CONSENT (if a volunteer is under 18): I hereby give my permission for **my son/daughter** _____, **age** _____, to volunteer at [Organization Name]. I acknowledge that I am informed of the hazards involved in the volunteer activity. I have read and understand the Volunteer Contract and Release from Liability and also agree to be bound by its terms in consideration for [Organization Name] allowing my son/daughter to participate as a volunteer.

Parent/Guardian Name (please print): _____

Parent/Guardian signature: _____ **Date:** _____

Emergency Phone Number: _____

OFF-DUTY RECREATIONAL ACTIVITIES AGREEMENT

Employee Name:

I, _____, release XXYYZZ from any and all liability for any and all injuries or illnesses that I may incur while voluntarily participating in any off-duty recreational, social, or athletic activity sponsored by XXYYZZ.

I understand that neither XXYYZZ nor its Workers' Compensation Carrier, _____ is responsible for payment of workers' compensation benefits for any injury or illness that I may incur while voluntarily participating in any off-duty recreational, social, or athletic activity sponsored by XXYYZZ.

Employee Signature:

Date:

Supervisor Signature:

Date: