

HIRING INDEPENDENT CONTRACTORS – BUYER BEWARE!

Millions of American businesses hire independent contractors to perform all types of services. And millions of American workers prefer to work as contractors rather than employees.

Indeed, due to the COVID-19 pandemic, it's likely that more people than ever want the freedom that comes with being an independent contractor.

But for decades, many state and federal agencies have had it in for businesses that hire independent contractors rather than employees. They prefer that you classify your workers as employees because then you must

- pay unemployment insurance premiums,
- provide workers' comp, and
- withhold taxes from employee pay.

Employees are also protected by state and federal labor laws that regulate worker rights such as a minimum wage, overtime, and the right to unionize.

In 2020, California launched the broadest assault on independent contractors in recent memory when it passed a law popularly known as AB-5 that established an incredibly strict new "ABC test" for determining whether California workers should be classified as employees for purposes of California law. Many feared this would spell the end of independent contractors in California.

It hasn't worked out that way. The California legislature received a firestorm of complaints from California-based independent contractors and the firms that hire them. As a result, it significantly watered down the new law by providing over 100 exemptions to the ABC test. Meanwhile, California voters responded by passing Proposition 22, which completely exempted most drivers for app-based rideshare and delivery platforms such as Uber, Lyft, and DoorDash.

This outcome appears to have dampened the appetite of many other state legislators to make it harder to hire independent contractors.

But the new Biden administration wants to take up where California left off. It supports adoption of the ABC test across all federal law. This is not likely to happen anytime soon.

The ABC Test – Under the ABC test, all workers are presumed to be employees. Under this test, a worker qualifies as an independent contractor only if that worker:

- a. is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, and
- b. performs work that is outside the usual course of the hiring entity's business, and (this one is huge and the Nevada Unemployment is relying heavily on it).
- c. is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed

As usual, there are exemptions to the ABC Tests for California, these include. Will Nevada follow? We do not know yet but it is expected many states will:

- physicians, surgeons, dentists, veterinarians, etc
- insurance brokers, underwriters, risk managers
- lawyers
- architects and engineers
- private investigators
- accountants
- registered security broker-dealers and investment advisors
- direct sales salespeople
- travel agents
- grant writers
- enrolled agents
- appraisers
- home inspectors
- freelance writers
- licenses barbers, manicurists, cosmetologists, etc
- licenses real estate sales and brokers
- the list goes on.

Thus, despite everything you may have heard, businesses can still hire independent contractors. But you need to be careful and hire only bona fide independent contractors.

Employers who misclassify employees as independent contractors to reduce labor costs and gain an advantage over competitors can end up paying large back taxes, fines, and judgments.