

## When is an employee not an employee? When they are an independent contractor!



People such as doctors, dentists, veterinarians, lawyers, accountants, contractors, subcontractors, public stenographers, or auctioneers who are in an independent trade, business, or profession in which they offer their services to the general public are generally independent contractors. However, whether these people are independent contractors or employees depends on the facts in each case. The general rule is that 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.

Here are eight questions to review before hiring an independent contractor:

1. Who controls the manner and means of accomplishing the work performed?
2. Who provides the tools and equipment to perform the work?
3. Does the individual have a separate business or offer his or her services to businesses other than yours?
4. Is there an agreement specifying that the individual is providing the services as an independent contractor?
5. Is the business relationship short or long term?
6. What is the method and terms of payment for services performed?
7. How much skill is required to perform the task or service?
8. Does the individual retain financial control of his or her business?

While the independent contractor is his or her own boss, work stays within the definitions of oral or written contract and adheres to certain requirements. An employee, on the other hand, relies on the business for steady income, gives up elements of control and independence, is eligible for certain benefits and works within constraint of workplace.

Under the Common-Law Doctrine of respondeat superior, an employer is liable for the negligent acts of its employee. However, generally, under Common Law the hiring party is not responsible for the negligence of an independent contractor. The Restatement (Second) of Torts identifies a few exceptions to this rule. The hiring party may be liable when, owing to its failure to exercise reasonable care to retain a competent and careful contractor, a third party is physically harmed. Also, when an independent contractor acts pursuant to orders or directions negligently given by the hiring party, the latter may be held liable. Notwithstanding the exceptions, the hiring party's risk of liability is greatly reduced by hiring independent contractors rather than employees.

### Hostile Work Environment /Harassment Legal Update

In a recent Court of Appeal decision the Court provided further definition of the specific legal distinction between sexual discrimination and sexual harassment. The plaintiff in this action was an employee of Conco Companies (Conco). Conco hired the plaintiff as an apprentice iron worker at a job site with Seaman as his supervisor. After he complained that Mr. Seaman subjected him to a barrage of sexually demeaning comments and gestures, he received similar comments from male co-workers. He was also subjected to physical threats by co-workers in retaliation for his complaints about Mr. Seaman.

Although the plaintiff's employer changed his work site, his union later suspended him, rendering him ineligible for employment. After the suspension expired, Conco did not re-hire him. Later he sued Conco and



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Mr. Seaman, alleging sexual harassment and retaliation under the California Fair Employment and Housing Act (“FEHA”). The trial court granted the defendants’ motion for summary judgment on all claims.

The Appellate Court reversed in part. With regard to plaintiff’s claim for discrimination, the Court noted that generally, an FEHA plaintiff must show that gender is a substantial factor in the discrimination, and had plaintiff been the other gender, the plaintiff would not have been treated in the same manner. Accordingly, as the Court noted, it is the disparate treatment of an employee on the basis of sex that is the essence of a sexual harassment claim.

The Court noted that this issue is more complicated to resolve in determining when same-sex harassment amounts to discrimination because of sex. The statements made to the plaintiff were crude, offensive and demeaning. However, the Court found that no evidence was presented from which a reasonable trier-of-fact could conclude that they were an expression of actual sexual desire or intent by Mr. Seaman, or that they resulted from the plaintiff’s actual or perceived sexual orientation. The Court observed that the mere fact that words may have sexual content or connotations, or discuss sex, is not sufficient to establish sexual harassment.

To establish retaliation under the FEHA, a plaintiff must show that he engaged in a protected activity, the employer subjected the employee to an adverse employment action, and a causal link existed between the protected activity and the employer’s action. Here, the Court found that the plaintiff engaged in protected activity within the meaning of FEHA when he complained about Mr. Seaman’s conduct. He also raised triable issues sufficient to defeat the motion for summary judgment as to whether his co-workers engaged in retaliatory harassment

that was severe enough to constitute an adverse employment action, whether Conco knew of the improper conduct, and whether Conco properly responded to it. As such, the Appellate Court found that summary adjudication of the cause of action for retaliation under the FEHA was improper.

Creation or tolerance of a hostile work environment for an employee in retaliation for the employee’s complaining about prohibited conduct is an adverse employment action within the meaning of the FEHA. Further, an employer’s alleged retaliatory responses may be considered collectively to determine whether the employee was subjected to an adverse employment action. Retaliation claims are inherently fact-specific, and the impact of an employer’s action in a particular case must be evaluated in context. The challenge for plaintiffs in same-sex harassment claims is to establish that the discrimination occurred because of the plaintiff’s sex. Evidence, in and of itself, of statements that were crude or demeaning may be relevant to show discrimination, but they are not necessarily sufficient to establish actionable conduct. ▲

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