

“The Office”

A Workers’ Compensation Perspective
on Employment and Safety, including
Non-traditional Work Spaces

By:

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Overview

WORKERS' COMP.

- Who is an Employee?
 - Statutory Definitions
 - Independent Contractors
 - *Borello* Factors
- Who is an Employer?
 - Statutory Definitions
 - “Employer” Identity
 - Specific Industries

CAL. OSHA

- Who is an Employee?
 - Statutory Definitions
 - [Compare]
- Who is an Employer?
 - Statutory Definitions
 - Four Categories
 - Specific Industries/
Hypothetical

Who is an Employee?

Labor Code ¶ 3351: Employee

- “Employee” means every person in the services of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed
 - Includes:
 - (a) Aliens and minors
 - (b) Paid public officers
 - (c) Public and Private Board of Director members while rendering services for pay, unless expressly excluded
 - (d) Individuals employed by a residential dwelling owner with incidental duties of maintenance/use of dwelling, supervision of children, except as provided by section 3352(h)
 - (e) Persons incarcerated while engaged in work assignment
 - (f) Members of Partnership or LLC receiving wages irrespective of profits from partnership
 - (g) [Operative 7/01/2018] Person with power to revoke a trust, unless expressly excluded

Who is Not an Employee?

Labor Code ¶ 3352: Employees Excluded

- (a) Parent, spouse or child performing volunteer services
- (b) Religious, charitable or relief organizations – Performing services for aid or sustenance only.
- (c) Deputy Clerk/Sheriff - Receiving no compensation and for own convenience.
- (d) Recreational Camp/Hunt/Lodge Operated by a Nonprofit – Member or family is member performing voluntarily services receiving no compensation other than meals, lodging or transportation.
- (e) Ski Patrol Person – Performing voluntary services for no compensation other than meals, lodging, use of ski tow/ski lift facilities.
- (f) Ski Lift Operator – While not performing prescribed duties and participating in recreational activities on his/her own initiative.
- (g) Sports or Athletics Participant – Receives no compensation other than use of athletic equipment, uniforms, transportation, travel, meals, lodgings, other incidental expenses, other than regular employee.
- (h) Residential Dwelling Workers – Work less that 52 hours or earned less than \$100 in wages during last 90 days.

Labor Code ¶ 3352: Employees Excluded

- (i) Public Agency, Private Nonprofit Organization – Receives no remuneration other than meals, transportation, lodging, incidental expense reimbursement.
- (j) Sport Officiator – In amateur sporting events sponsored by any public agency or private, nonprofit organization, receiving no remuneration other than stipend, such as to cover meals, transportation, lodging, rule books/courses, uniforms, equipment.
- (k) Student Athletes – Participating in amateur sporting events sponsored by public agency, public or private nonprofit college, university or school, receiving no remuneration other than use of equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grant-in-aid, other incidental expenses.
- (l) Law Enforcement Officer – Regularly employed by local/state law enforcement to prevent/detect crimes/particular individuals under supervision of peace officer.
- (m) Law Enforcement Officer – Regularly employed by Oregon State Police, Nevada DMV/Public Safety who works as K-12/high school/college police officers.
- (n) Sports Official – Entity sponsoring intercollegiate or interscholastic sports event other than regular employee, or public or private agency/entity/organization, including umpire, referee, judge, scorekeeper, timekeeper, other than regular employee.
- (o) Owner-Builder of Principal Residence – Participating in mutual self-help housing program.

Independent Contractors

- Labor Code ¶ 3353: Independent Contractor
 - 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.

Presumption of Employment

- Labor Code § 3357: Presumption of Employment
 - Any person rendering services for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.
 - Burden of proof - Upon the party raising the issue of independent contractor under to the Labor Code.

Employee v. Independent Contractor

Borello Factors

- (a) Distinct occupation or business
- (b) Work performed done under direction of principal/specialist without supervision
- (c) Higher skill required
- (d) Supplies own instruments, tools and place of work
- (e) Length of time for which services are to be performed
- (f) Method of payment, whether by time or job
- (g) Whether work is part of regular business of principal
- (h) Whether parties believes they are creating employer-employee relationship
- (a) Opportunity for profit or loss depending on managerial skill
- (b) Investment in equipment or material for task, or employment of helpers
- (c) Whether services rendered requires a special skill
- (d) Degree of permanence of the working relationships
- (e) Whether the service rendered is an integral part of alleged employer's business

S.G. Borello & Sons, Inc. (1989) 48 Cal. 3rd 341; citing *(Perguica v. IAC (Walker) (1949) CA 2d. 857)*

S.G. Borello & Sons, Inc. (1989) 48 Cal. 3rd 341

Right of Control

- Important Factors
 - Most important factor historically: *right of control* over the alleged employee with respect to means and manner in which she performs the job. (*Jones v. WCAB* (1971) 20 CA 3d 124)
 - Strong evidentiary support of employment relationship is the *right of employer to end services at will*. (*Perguica v. IAC (Walker)* (1949) CA 2d. 857)

Who is an Employer?

Labor Code ¶ 3300: Employer

- (a) The State, every State Agency
- (b) Each County, City, District, public and quasi public corporations, public agencies
- (c) Every Person; Public Service Corporations with natural person in service
- (d) Legal Representative of Deceased Employer

Who is Not an Employer?

Labor Code ¶ 3301: Specified Sponsors not Employers

- (a) Sponsor of a Bowling Team
- (b) Private, nonprofit organization while acting solely as sponsor of individual performing services as condition of court sentencing

Who is the Employer?

Dual Employment: General-Special Employment

- General and Special Employment
 - When the employee of one person (general) is in effect “loaned” to another (special) with the right of the control over the employee inherent in both persons. (*Koewalski v. Shell Oil Co.*) (1979) 23 CA 3d 163.
- Primary Issue
 - Whether the special employer has the right to control and direct the activities of the alleged employee or the manner and method in which the worker is performed, whether exercised or not.
- Secondary Factors
 - Whether parties believe they are creating a special employer-employee relationship
 - The employee consents to the special employment relationship
 - The alleged special employer has the power to discharge the worker
 - The employee provides unskilled labor
 - The work performed is part of the special employer’s regular business
 - The employment period is lengthy
 - The special employer provides the tools and equipment used

General-Special Employment

Joint and Several Liability

- Where general and special employment is established, each employer is jointly and severally liable. (*Kowalski v. Shell Oil*, 23 CA 3d. 168)
- Labor Code ¶ 3602(d)
 - A employer may secure the compensation on employees provided to it by agreement by another employer under which the other employer agrees to obtain, and has in fact obtained, workers' compensation coverage for those employees

General-Special Relationship

CIGA Consideration

- CIGA must “pay and “discharge only covered claims as defined by Insurance Code ¶ 1063.2.
- In the General/Special defense, an employer (i.e. a temp. agency) sends an employee to do work for another company.
 - The employee has two employers - the original/temp agency (general) employer and the other (special) employer.
- The Special Employer’s Insurance or self-insurance may be “other insurance” under Insurance Code ¶ 1063.1(c)(9).
- CIGA is required to show that the special Employer had right to control and direct activities of the employees, or manner and methods in which work is performed, whether exercised or not. (*McFarland v. Voorheis-Trindle Company* 52 Cal. 2d 698.)
- Implication:
 - If a (Special) employer contracts with another (General) employer with an agreement that the other (General) employer provides workers’ compensation benefits, and the other (General) employer’s insurance carrier becomes insolvent, the (Special) employer will be considered “other insurance,” assuming the Special employer had the right of control over the employee.

General-Special Relationship?

Specific Industries/Examples

- Leased Equipment Operators
 - Where equipment lessor provides the lessee with not only the equipment but also an operator of the equipment.
 - Issue - whether lessee exercises such actual control over all the activities of the operator as to also become his employer.
 - Residual control, such as retaining the right of direction over the manner in which the job is performed for the purposes of obtaining the desired result, does not create a special employment relationship. (*Thomas v. Edgington Oil Co.* (1977) 73 CA 3d. 61.)

General-Special Relationship

Specific Industries/Examples

- Gardener/Tree Trimmer: Labor Code ¶ 2750.5:
 - Worker performing services with no contractor license but is required to have a license is presumed an employee.
- Unlicensed, Uninsured Contractor
 - Employee of unlicensed, uninsured contractor is in legal effect employee of premise owner.
- Licensed Sub-Contractor
 - Generally no general-special relationship
- Unlicensed, Uninsured Sub-Contractor
 - Conclusive Presumption of General-Special Relationship
 - Subcontractor Fraud? - No exception

General Special Relationship

Temporary Workers

- General-special relationship found when Labor Broker (general) supplied Special employer with a temporary employee, and Special employer exercised right of control over employee, regardless of intent of parties. (*Santa Cruz Poultry, Inc. v. Superior Court (Stier)* (1987) 194 CA 3d. 575)
- Temporary laborer worker found employee of General employer only because Agency was under contract to provide laborers, pay workers' compensation coverage and reserved right to hire, fire and control employee. (*AMS Staff Leasing v. WCAB (Tellez)* (2003) 68 Cal. Comp. Cases 1182)

Uber: Case Study

- Two cases
 - *Douglas O’Conner, et. al. v. Uber Technologies, Inc., et. al.* (CA)
 - *Hakah Yucesoy, et. al. v. Uber Technologies, Inc., et. al.* (MA)
- Presumption – Uber’s drivers rendered a service to Uber creating a rebuttable presumption of employment status.
 - Once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee. *Narayan v. EGL, Inc.*, 616 F. ed 895, 900 (9th Cir. 2010)
 - The burden then shifts to the employer to prove, if they can, that presumed employee was an independent contractor.
- *Borello* factors
 - Right to control work details (*S.G. Borello & Sons, Inc. v. Dept of Indus. Relations, supra.*)
 - Right to discharge
 - Secondary Factors

Uber: Case Study

- Presumption of Employment Applied
 - Court focused on substance of what Uber did (enabled customers to book and receive rides) than then the mechanics of its platform (use of internet enabled smartphones and software applications to connect drivers and passengers)
 - Uber not viable business without drivers
 - Exercises significant control over driver revenue
 - Control over qualification of drivers
- Burden Shifts – Uber to Prove Independent Contractor Status
 - Mixed Question of Law and Fact
- Result
 - Uber can keep categorizing drivers as independent contractors
 - Provide transparency and more information about driver quality rating
 - Publish detailed deactivation policy
 - Agree not to deactivate drivers who decline trips regularly
 - Assist drivers with creation of driver association in states of CA and MA
 - \$100 million set aside in driver trust account

California Occupational Safety and Health Administration (Cal. Osha)

Occupational Safety and Health

Who is the Employee/Employer?

- Labor Code ¶ 6304.1: Employee
 - Every person who is required or directed by an employer to engage in any employment or go to work to be at any time in any place of employment.
- Labor Code ¶ 6304: Employer
 - “Employer” shall have the same meaning as in Section 3300.
- Labor Code ¶ 6303(a): Employment (Cal Osha)
 - Carrying on of any trade, enterprise, project, industry, business occupation or work in which any person is engaged permitted to work for hire, except for household domestic services.

Multi-Employer Work Sites

Cal Osha Regulation ¶ 336.10

- On multi-employer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division:

Multi-Employer Worksites

Cal. Osha Regulation ¶ 336.10

- (a) Exposing Employer - the employer whose employees were exposed to the hazard
- (b) Creating Employer - the employer who actually created the hazard
- (c) Controlling Employer - the employer who was responsible, by contract or through actual practice, for safety and health conditions on worksite, i.e. the employer who had the authority for ensuring that the hazardous condition is corrected
- (d) Correcting Employer - the employer who had the responsibility for actual correcting the hazard

Multi-Employer Worksites Defenses

- Cal. Osha Regulation ¶ 336.11
 - Citation shall not be issued to *exposing* employer if all five of following defenses are met:
 - (a) The employer did not create the hazard
 - (b) The employer did not have the responsibility or the authority to have the hazard corrected.
 - (c) The employer did not have the ability to correct or remove the hazard.
 - (d) The employer can demonstrate that the creating, the controlling and/or correcting employers, as appropriate, were specifically notified or were aware of the hazards to which his/her employees were exposed.
 - (e) The employer took appropriate feasible steps to protect his/her employees from the hazard, instructed them to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it. For extreme hazards involved, employee should be removed from job if no other way to protect them from hazard.

Hypothetical #1:

Film Production Set

- Disney (Distribution Co.) entered into an agreement with Second Mate (Production Co.), who contracted with Cast & Crew Production to issue payroll. Disney prepared production safety guidebook and required Second Mate to designate a Safety Coordinator. Second Mate hired Angelotti Stunt Performer through its loan-out company Skiddadle, Inc. Stephan Sports Equipment provided stunt equipment, including a descender, which is a cable used to suspend stunt performers in the air. Angelotti Stunt Performer was injured, related in part to a malfunction of the descender cable.
 - Who is/are the employer(s) for Cal OSHA purposes?

Hypothetical #1: Answer

Film Production Set

- Exposing Employer – Second Mate. There is likely a general-special relationship with Cast & Crew and Second Mate with the latter as the special employer.
- Creating Employee - Stephan Sports Equipment
- Controlling Employer – Second Mate. (Not likely Disney because exercised no control over performance or equipment.)
- Correcting Employer – Stephan Sports Equipment.

*Facts loosely based on *Angelotti v. The Walt Disney Co. et al.*, (2011) 192 Cal. App. 4th 1394.

Hypothetical #2

Exposing Employer Defense?

- Sexy Entertainment Inc., and adult film company, contracts with Husband and Wife couple to live stream video in their own, including bedroom. Husband injures himself when a faulty screw comes loose on a chair while performing.
 - Who is the exposing employer and are there any defenses?

Hypothetical #2: Answer

Exposing Employer Defense?

- Defenses
 - (a) Employer did not create the hazard - **Yes.**
 - (b) Employer did not have responsibility or the authority to have the hazard corrected - **Yes.**
 - (c) Employer did not have ability to correct or remove the hazard - **Yes.**
 - (d) The employer can demonstrate that Creating, Controlling and/or Correcting employers, as appropriate, were specifically notified or were aware of the hazards to which his/her employees were exposed - **Yes.**
 - (e) Employer took appropriate feasible steps to protect his/her employees from the hazard, instructed them to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it. For extreme hazards involved, employee should be removed from job if no other way to protect them from hazard - **Likely yes.**

Hypothetical #3

Specific Industry

- Sexy Entertainment Inc., and adult film company, contracts with Husband and Wife couple to live stream video in their own, including bedroom. Husband contracts sexually transmitted disease while performing with a third party without the use of a personal protective equipment?
 - Does the exposing employer and are there any defenses?

Hypothetical #3: Answer Specific Industry

- Defenses
 - (a) Employer did not create the hazard - **Yes**.
 - (b) Employer did not have responsibility or the authority to have the hazard corrected - **Yes**.
 - (c) Employer did not have ability to correct or remove the hazard - **Yes**.
 - (d) The employer can demonstrate that Creating, Controlling and/or Correcting employers, as appropriate, were specifically notified or were aware of the hazards to which his/her employees were exposed - **Yes**.
 - (e) Employer took appropriate feasible steps to protect his/her employees from the hazard, instructed them to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it. For extreme hazards involved, employee should be removed from job if no other way to protect them from hazard - **Likely No**.

Questions?

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