

Employee or Independent contractor: Proving Legal Status For Your Liability Case

In cases involving Taxi/Uber drivers, defense often claims the at-fault-driver was an independent contractor and not an employee. This is mainly to limit liability and at times Plaintiff's access to coverage.

by Parisima Roshanzamir
Column Editor Ben Coughlan

An employer is vicariously liable for the tortious conduct of its employees when committed within the course and scope of the employment. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208.) The law is not the same when it comes to "independent contractors." According to California Labor Code section 3353, 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. In the case of an independent contractor, liability may be limited.



Owner and founder of Roshanzamir law, Parisima Roshanzamir is a personal injury trial attorney focusing on serious personal injury and wrongful death cases in San Diego. You may reach Parisima at Paris@Roshanzamirlaw.com.

Employees are sometimes improperly classified as an "independent contractor" because in addition to limiting their legal exposure, the classification may allow the employer to opt out of paying their employee's disability insurance, unemployment insurance, or social security.

However, where evidence supports an employee/employer relationship, the label is not dispositive of the employee's status. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349.) Even when the worker is issued a 1099 form rather than a W-2 form, the method of payment is not determinative with respect to independent contractor status. (*Toyota Motor Sales v. Superior Court* (1990) 220 Cal.App.3d 864, 877.) Bottom line if you come up against this defense: just calling someone an independent contractor and paying them as such does not necessarily make them one.

Labor Code Section 3357 creates a presumption that a service provider is presumed to be an employee unless the principal affirmatively proves otherwise. (*Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1294.) "The determination of employee or independent-contractor status is one of fact." (*S. G. Borello & Sons, Inc., supra.*) Thus, the

Continued on page 6

issue is a factual question left for the jury/the trier of fact to decide, whose determination may not be disturbed on appeal if supported by substantial evidence.” (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305.)

The existence of an agency relationship is determinative on a number of factors, control being the primary one. Restatement Second of Agency, section 220, outlines the following factors to consider when determining whether an agency relationship exists:

1. The extent of control exercised by the principal over the details of the work;
2. Whether the one employed is engaged in a distinct occupation or business;
3. The kind of occupation: whether the work is one usually done under the direction of the

employer or by a specialist without supervision;

4. The skill required in the particular occupation;
5. Whether the employer supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the person is employed;
7. The method of payment, whether by the time or by the job;
8. Whether the work is a part of the regular business of the employer;
9. Whether the parties believe they are creating the relation of master and servant; and
10. Whether the principal is or is not in business.

As phrased in the Restatement, no individual factor is determinative. The factors were drafted in a way to suggest whether an employment relationship exists. As such, the

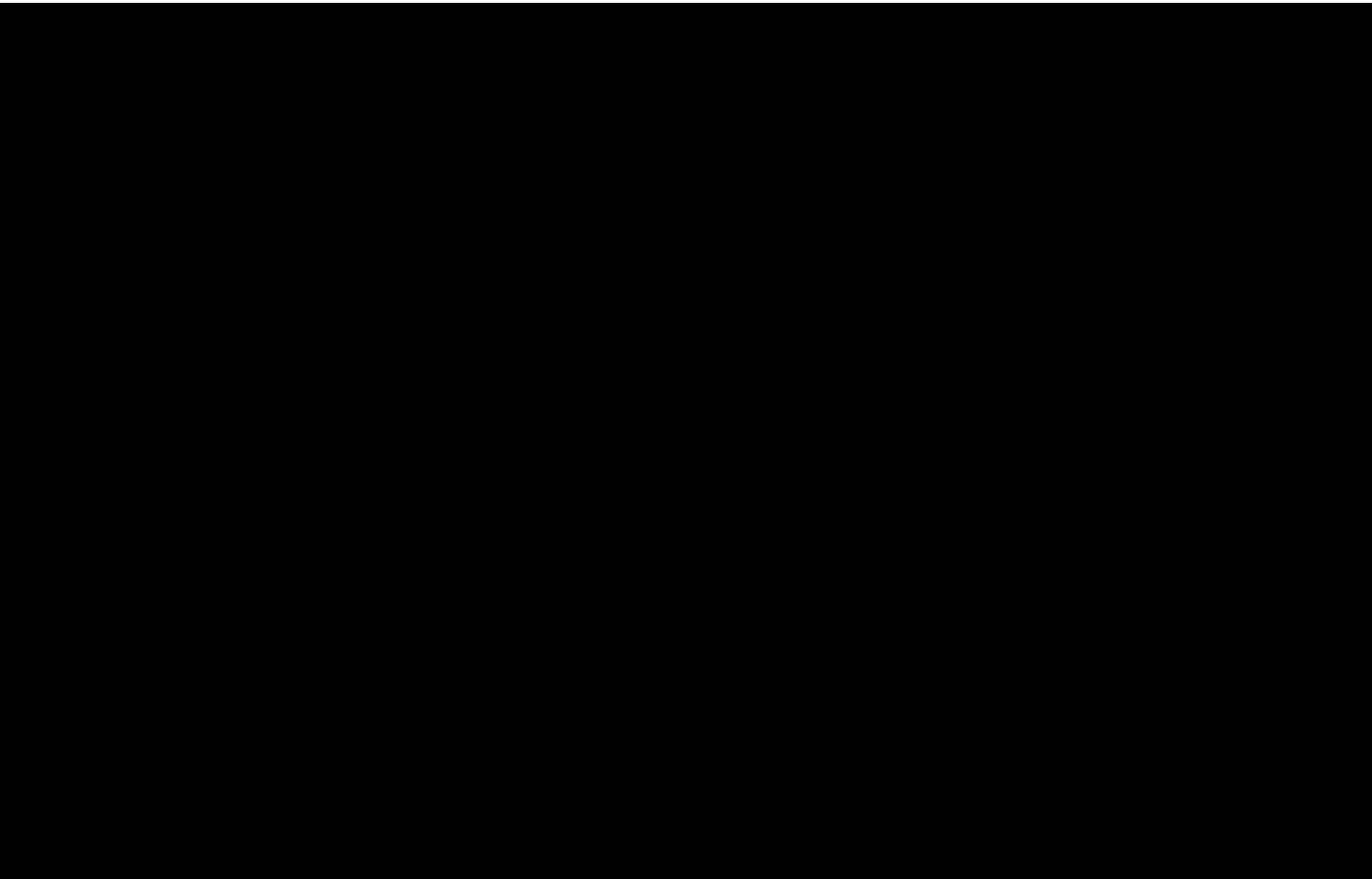
presumption created through Lab. Code section 3357 is a rebuttable presumption. It is necessary to closely examine the facts of each service relationship.

When attempting to establish an agency relationship in your case consider the following issues: 1) Does the company/employer have the right to control what the worker/employee does during his job, 2) Does the company/employer control the business aspects of the worker/employee (i.e. provide tools/supplies, how worker is paid, whether his expenses are reimbursed, 3) Is the worker/employee employed at will or for a specific duration?

Some additional information you will want to discover to determine whether an agency relationship exists may be:

- How does the worker receive work assignments?

Continued on page 19



Torts Continued

- Who determines the methods by which the assignments are performed?
- What are the workers' daily routine
- In case of an accident, who is the worker required to contact
- In case of taxi cabs/uber drivers where does the worker service his car (i.e. the company's body shop, or a designated shop)
- Whether the worker is required to attend any meetings
- If the worker does not attend meetings, are there any penalties
- List the supplies, equipment and property used by the worker to complete the job
- Who provides each of the supplies, equipment and property listed above
- If the equipments are leased, what are the term of the lease
- Whether the company carries worker's compensation insurance, or disability insurance on the worker?

- Who determines the payment for the services provided
- Can each side terminate the relationship without any penalty
- If the worker is no longer with the company, how did the relationship end (ie. was worker fired, job completed, contract ended.)

This, of course, is not an exhaustive list, but intended to get you thinking of the type of information you need to establish or support an employee-employer relationship or vice versa. There is no magic or set number of factors that makes the worker an employee or an independent contractor, and no one factor stands alone in making this determination.

In addition to the restatement and common law rules, there are a number of agencies who also regulate and/or determine the status of independent contractors including Employment Development Department (EDD), Division of Labor

Standards Enforcement (DLSE), Franchise Tax Board (FTB), Division of Workers' Compensation (DWC), and Contractors State Licensing Board (CSLB). You may use the guidelines set out by these agencies as an additional resource.

While there is no set legal definition for what makes a worker an independent contractor or employee, labels alone are not determinative of the true worker status. If you have a case involving the question of employee v. independent contractor get familiar with the factors outlined by the restatement and apply the facts to support the existence or non-existence of an agency relationship. **TBN**