

Choose wisely in classifying your independent contractors

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Is a non-exclusive insurance agent an independent contractor or an employee?

Insurance agents and salespeople with the discretion to determine when, how, and whether to sell a company's products may properly be classified as independent contractors, according to the California Court of Appeal's recent holding in *Arnold v. Mutual of Omaha Insurance Company*.

In arguing that *Arnold* was an independent contract, the insurance company relied on the California Supreme Court decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, which restated the “[p]rincipal test of an employment relationship” under common law to be “[w]hether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired....”

The control test in *Borello* was the “principal” factor, but was not exclusive. That court set out additional factors: “whether the principal has the right to discharge at will, without cause; whether the one performing services is engaged in a distinct occupation or business; 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; the skill required in the particular occupation; whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the services are to be performed; the method of payment, whether by the time or by the job; whether or not the work is a part of the regular business of the principal; and, whether or not the parties believe they are creating the relationship of employer-employee.” Further, the *Borello* court cautioned that “such ‘individual factors’ were not to be ‘applied mechanically as separate tests,’ but were ‘intertwined,’ and often given weight depending on the particular combination of factors.”

Evidence in the case showed that the agent was licensed as an independent agent, and was authorized to offer products to prospective clients from different companies. The agent agreed that she used her own judgment with regard to her sales and determined her prospects—when and where she sell for Mutual and the time she spent selling. In light of the *Arnold* decision, courts are more focused on the question of if the individual has the ability to make determinations as to when, how, and whether to sell the products; and if the company imposed minimal direct supervision and established results-oriented performance standards.

Since the *Arnold* court determined that the common law *Borello* control test was the appropriate standard to analyze employment status, California and many other jurisdictions around the country with similar control tests have created far-reaching implications for industries that employ independent contractor salespeople. Post-*Arnold*, companies that utilize independent contractors to sell their products in such states may apply the analysis in *Arnold* as a benchmark to assess and review these relationships in order to determine whether changes should be made.

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