

Applying the Common Law Test for Employment, California Court of Appeal Finds That Insurance Agent is Independent Contractor

By [Michael A. S. Newman](#) on January 11th, 2012

In [Arnold v Mutual of Omaha](#), Plaintiff Arnold, an insurance agent for Defendant Mutual of Omaha, after terminating her contract with Defendant, sued for unpaid employee entitlements under the [Labor Code](#). Arnold claimed that the contract she had entered into with Mutual had improperly classified her as an independent contractor, and that under applicable law she was in fact an employee.

On Mutual's summary judgment motion, the trial court, applying the [common law test for employment](#), determined that Arnold was in fact an [independent contractor](#). Arnold appealed, claiming that the trial court erred in concluding that the common law test for employment was applicable, rather than the broader statutory definition of employee under [Labor Code section 2750](#). Alternatively, she argued that even if the common law test was appropriate, the trial court misapplied the test and should have determined that she was an employee as a matter of law.

The First Appellate District affirmed the trial court's ruling, finding that the common law test applied, and that the trial court had applied the test correctly.

The Common Law Test Applies

The Court of Appeal dealt first with the question of whether the common law test or section 2750 of the Labor Code provided the definition of employee. Section 2750 provides that "[t]he contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person." As the Court concluded, this section does not attempt to define employee, but merely uses the term "employee" in defining "contract of employment." As such, it was to be viewed *with*, and not instead of, the common law test for employment.

Under the Common Law Test, Arnold was an Independent Contractor, and NOT an Employee

As the Court explained, under the common law test, the "principal test of an employment relationship" is "[w]hether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." In addition, there are other, less essential factors in the common law analysis, including:

- whether the principal has the right to discharge at will;
- 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 part of the regular business of the principal; and,
- whether the parties believe they are creating the relationship of employer-employee.

Applying this test, the Court noted the following “telling characteristics” of the relationship between Mutual and Arnold:

- Mutual had no significant right to control the manner and means by which Arnold accomplished the results of the services she performed as one of Mutual’s soliciting agents.
- Mutual managers make themselves available to assist agents, as distinguished from supervising them.
- Training is generally not mandatory and is offered chiefly for the guidance of “new” agents.
- Training is required only with respect to compliance with state law directives.
- Managers provide assistance with sales or clients when an agent “wants them to assist.”
- Software is provided by Mutual as a “best practice” to enable agents to sell its products more successfully.
- Conference rooms are provided as a courtesy to agents seeking to set up a meeting and have no other space in the office.
- Mutual policy does not otherwise reimburse agents for regular business expenses, such as entertaining a client, although it does provide certain “prospecting” credits, which must be used and have no separate compensatory value.
- While Mutual pays agents in two-week periods, payments are comprised of commissions and bonuses established by policy, and there is no guaranteed compensation.
- Her appointment was non-exclusive.
- Advances may be authorized only by a general manager in the event an agent has submitted an application for which a policy is likely to be issued.

- Arnold used her own judgment in determining whom she would solicit for applications for Mutual's products, the time, place, and manner in which she would solicit, and the amount of time she spent soliciting for Mutual's products.
- Arnold was engaged in a distinct occupation requiring a license from the Department of Insurance, and was responsible for her own instrumentalities or tools with the exception of limited resources offered by Mutual to enhance the solicitation of Mutual's products.
- Arnold's minimal performance requirement to avoid automatic termination of her appointment was to submit one application for Mutual's products within each 180-day period.
- Arnold was required to pay a fee for the use of Mutual's office space and telephone service.
- Both Arnold and Mutual believed, at the time of her appointment, they were creating an independent contractor relationship and not an employee relationship.

Based on these facts, the Court found that, pursuant to the common law test for employment, Arnold was an independent contractor, not an employee. Furthermore, the fact that Mutual could terminate the appointment at will did not negate this conclusion, since a "termination at-will clause for both parties may properly be included in an independent contractor agreement" Rather, all the factors weighed and considered as a whole established that Arnold was an independent contractor and not an employee.