

California Pool Company Contests EDD Findings; Fight Continues on Independent Contractor Status

Recently CPSA became aware of an Employment Development Department enforcement action against a pool company that also provided monthly consumer pool service. This company had 20 plus independent contractors that it used to provide monthly pool service. The EDD determined that these contractors were employees and that the pool company owed the state employment taxes, the cost of unemployment insurance and disability insurance benefits, the cost of providing workers' compensation coverage and all investigation costs.

The pool company contested the findings of EDD and an administrative dispute ensued.

CPSA has previously reported about organized labor's assault on independent contractor status. Labor organizations believe everyone should be an employee and have the various social insurance benefits that accompany that status. The Democratic administration now in power at EDD, Department of Industrial Relations, Division of Labor Standards Enforcement, and other agencies of the state have adopted this same position and actively seek to enforce their view on California employers. Probably the most high profile employer currently fighting this battle is Uber.

There is no clear-cut definition of what qualifies as an independent contractor. Whether a person is an employee or an independent contractor depends on the totality of the circumstances, which makes the determination of employee or independent contractor very subjective and can result in second guessing by regulators. Regulators start with the presumption that workers are employees under Labor Code 3357. This is a rebuttable presumption, however, and the actual determination of whether a worker is an employee or independent contractor depends on a number of facts, none of which is controlling. Regulators and courts utilize an 11 point test adopted by the California Supreme Court in the case of *S.G. Borello & Sons, Inc. vs Department of Industrial Relations*. These factors are:

1. Whether the person is performing services in an occupation or business distinct from that of the principal;
2. Whether or not the work is part of the regular business of the principal or alleged employer;
3. Whether the principal or the worker supplies the instruments, tools and the place for the person doing the work;
4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;
5. Whether the services provided require a particular skill;
6. Whether the kind of occupation in that locality is typically done under the direction of a principal or by a specialist without supervision;
7. The alleged employer's opportunity for profit or loss depending on his or her managerial skills;
8. The length of time for which services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment whether by time or by the job;

11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative.

Direction and control of the work is probably weighed most heavily, but other factors include who provides the tools used in the business, who provides the training of the worker, how the worker is paid, does the worker have additional work from outside sources, and whether the work provided is the business the employer conducts to the public.

In the end the pool company above was able to prevail in its dispute with the EDD. However, this company had to institute a number of changes that allowed them to continue with their current mode of operation. Each of their service personnel had to obtain their own business license and insurance. The contract for services was changed to be between the pool company and the service company, not the individual, and a monthly invoice must be submitted for services. Service personnel must provide their own truck and tools, as well as purchasing their chemicals from an independent source. They had to obtain their own training through a pool service organization, and must bid on pool jobs and additional routes. The pool company conducts no meetings and provides no work or storage space for chemicals or equipment, and no uniforms are provided. Most contractors have additional accounts or have employees and carry their own workers' compensation insurance. In this case, the pool company built and remodeled pools and spa so the service business was not exclusively the business of the alleged employer.

Bottom line – this is a very dangerous and potentially expensive area of the law. The current situation is bad enough. CPSA shows up every day at the Capitol along with other employer and contractor organizations to fight against labor bills on this and other employment topic that could seriously affect the swimming pool and spa business. To better position our ability to defend the industry we need to grow the membership and financial support so we can compete in this field against better funded opponents. We need to build a grassroots organization in the swimming pool and spa industry that is substantially beyond the meager 300 plus members who currently support CPSA to the benefit of everyone else who makes a living in this industry.

For more information, contact CPSA's [Brittany Trudeau](#).