

Employee or Independent Contractor?

Knowing the rules and differences about whether an individual is an employee or independent contractor is important in determining CalPERS membership eligibility. This overview will help you understand the rules under the Public Employees' Retirement Law (PERL) to avoid potential penalties.*

Individuals who are the "common-law employees" of a participating public agency or school employers¹ must, with some exceptions, be enrolled in CalPERS.

Independent contractors and consultants do not fall within the definition of a common-law employee and, therefore, should not be reported to CalPERS. As we describe below, the common-law employment test involves several factors that require a case-by-case review when questions about employment status arise.

The Test

The Common-Law Employment Test—Not a New Rule

The Common-Law Employment Test is not a new rule and is used to determine whether to classify an individual as an employee or an independent contractor. This test has been used by CalPERS to make these determinations as a result of previous court rulings.² Generally, if you have the right to control and, in fact, exercise considerable control over the manner and means of accomplishing the result desired, an employer-employee relationship exists. While the control test is the most important factor, other factors are also taken into consideration:

- Whether the individual 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 employer seeking to have the services performed or by a specialist without supervision

- The skill required in the particular occupation
- Who supplies the instrumentalities, tools, and the place of work for the individual performing the services
- The length of time on the job
- The method of payment, whether by time or the job
- Whether the work is part of the regular business of the entity seeking services
- Whether or not the parties believe they are creating the relationship of employer-employee

Examples of Factors to Consider When Hiring

This table illustrates how we may apply the applicable factors when determining if the individual is an employee or an independent contractor. However, each determination is made based on the totality of the facts and circumstances and generally no one factor is used to make that determination.

Category	Employee	Independent Contractor
Pay	Hourly or Salary	Paid per project
Length of Time on Job	Continuing	Temporary. Work ends when project is completed
Equipment/Property	Uses employer's	Uses their own

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ABC Test

The ABC test as enacted by Assembly Bill (AB) 5 in September 2019 looks at three factors to determine whether a worker is an employee for certain purposes. However, AB 5 did not impact who is considered to be an employee under the PERL for purposes of pension benefits, because AB 5 did not amend any of the definitions of an employee under the PERL.

Penalties

Misclassifying a worker will result in non-compliance and penalties. Retired annuitant restrictions will always apply to common-law employer-employee relationships. Penalties may include:

For the Retired Member

- Reinstatement to active membership
- Repayment of retirement benefits during the unlawful employment time period
- Payment of member contributions on salary earned during the unlawful employment time period
- Cost-of-living adjustment (COLA) and health benefits could be impacted

For the Employer

- Administrative fee of \$500 per member if member is not enrolled within 90 days of membership
- Arrears costs for member contributions
- Payment of employer contributions on a member's salary
 - Applies to the retired annuitants during the unlawful employment time period
 - Applies to members when they were not enrolled into membership within 90 days of enrollment eligibility during the late enrollment period
- Cannot pass on any costs assessed to the employee

Questions?

We will review the proposed independent contractor service agreement within 60 days. Please check with us before services begin.

Contact us

Send the complete agreement by email to Employer Account Management Division:
Membership_Reporting@calpers.ca.gov

¹In certain circumstances, for example in the case of employees of the County Offices of Education, additional criteria apply for purposes of eligibility for retirement benefits under the PERL.

²California Supreme Court case, *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, which was cited with approval in *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491; see also *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard*, Precedential Decision No. 05-01, effective April 22, 2005; *In the Matter of the Application to Contract with CalPERS by Galt Services Authority*, Precedential Decision No. 08-01, effective October 22, 2008.

* The statements in this overview are general. If there is a conflict between the law and this document, any decisions will be based on the law and not this document.