

3704. Existence of “Employee” Status Disputed

[*Name of plaintiff*] must prove that [*name of agent*] was [*name of defendant*]'s employee.

In deciding whether [*name of agent*] was [*name of defendant*]'s employee, the most important factor is whether [*name of defendant*] had the right to control how [*name of agent*] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [*name of defendant*] exercised the right to control.

In deciding whether [*name of defendant*] was [*name of agent*]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [*name of defendant*] was the employer of [*name of agent*]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.

- (a) [*Name of defendant*] supplied the equipment, tools, and place of work;
- (b) [*Name of agent*] was paid by the hour rather than by the job;
- (c) [*Name of defendant*] was in business;
- (d) The work being done by [*name of agent*] was part of the regular business of [*name of defendant*];
- (e) [*Name of agent*] was not engaged in a distinct occupation or business;
- (f) The kind of work performed by [*name of agent*] is usually done under the direction of a supervisor rather than by a specialist working without supervision;
- (g) The kind of work performed by [*name of agent*] does not require specialized or professional skill;
- (h) The services performed by [*name of agent*] were to be performed over a long period of time; [and]
- (i) [*Name of defendant*] and [*name of agent*] believed that they had an employer-employee relationship[./; and]
- (j) [*Specify other factor*].

New September 2003; Revised December 2010, June 2015, December 2015, November 2018, May 2020, May 2021

Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rptr.3d 1, 416 P.3d 1].) It is intended to address the employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee's acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed*.

Secondary factors (a)–(i) come from the Restatement section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f.) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc.*, *supra*, 48 Cal.3d at pp. 354–355.) Therefore, an “other” option (j) has been included.

Borello was a workers' compensation case. In *Dynamex*, *supra*, the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that “it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue.” (*Dynamex*, *supra*, 4 Cal.5th at p. 934.) The court also said that “[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation.” (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered. (Cf. Lab. Code, § 2775 [codifying *Dynamex* for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, with limited exceptions for specified occupations].)

A different test for the existence of “independent contractor” status applies to app-based rideshare and delivery drivers. (See Bus. & Prof. Code, § 7451.)

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- “[S]ubject to certain policy considerations, a hirer . . . cannot be held vicariously liable for the negligence of his independent contractors.” (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)