

## Construction Industry

In the construction industry, a person performing services may be a statutory employee, an employee under the ABC Test, an employee under *Borello* Test, or an independent contractor. This information sheet provides guidance when determining if the worker is performing services as an employee or an independent contractor. Having a valid contractor's license does not automatically make the worker an independent contractor.

Under California law, a contractor, licensed or unlicensed, who engages the services of unlicensed subcontractors or construction workers is the employer of those unlicensed subcontractors or workers.

### Definitions

The terms *construction industry* and *contractor* are not defined in the California Unemployment Insurance Code (CUIC) or the Labor Code (LC).

However, section 7026 of the [California Business and Professions Code](http://leginfo.ca.gov/faces/codes.xhtml) (BPC) ([leginfo.legislature.ca.gov/faces/codes.xhtml](http://leginfo.ca.gov/faces/codes.xhtml)), which governs construction contractor licensing, defines a contractor as "any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, and whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise."

For purposes of section 2781 of the LC, *construction trucking services* means "hauling and trucking services provided in the construction industry pursuant to a contract with a licensed contractor utilizing vehicles that require a commercial driver's license to operate or have a gross vehicle weight rating of 26,001 or more pounds."

## Determining Worker Status

### Step 1: Is there an employment relationship under sections 621.5 and 13004.5 of the CUIC?

Under sections 621.5 and 13004.5 of the CUIC (in conjunction with section 2750.5 of the LC), a contractor, either licensed or unlicensed, who engages a worker or subcontractor to perform services for which a contractor's license is required, is the employer of that worker or subcontractor, unless the hiring contractor can demonstrate that all of the following criteria are satisfied:

1. The worker has the right to control and discretion as to the manner in which services are performed, so that the primary factor bargained for is the result of the work and not the means by which it is accomplished.
2. The worker is customarily engaged in an independently established business.
3. The worker's independent contractor status is bona fide and not a subterfuge to avoid employment status.
4. The worker holds a valid contractor's license for the type of service performed.

Workers or subcontractors may be employees under sections 621.5 and 13004.5 of the CUIC (in conjunction with section 2750.5 of the LC) even if they would otherwise be independent contractors under either the ABC Test or the *Borello* test, pursuant to section 621(b) of the CUIC and section 2781 of the LC (Steps 2 and 3 below). If a worker is an employee under the above analysis, the inquiry ends and the worker must be treated as an employee. If an employment relationship is not established under sections 621.5 and 13004.5 of the CUIC (in conjunction with section 2750.5 of the LC), then proceed to Steps 2 and 3 to determine whether an employment relationship exists under section 621(b) of the CUIC (ABC Test) or the *Borello* test pursuant to section 2781 of the LC, as applicable.

### Step 2: Does the ABC Test exception apply under section 2781 of the LC?

In certain circumstances, section 2781 of the LC requires the *Borello* test instead of the ABC Test (section 621[b] of the CUIC) to be used in determining employment status in the construction industry.

Unless there is an exception, all of the following criteria must be satisfied to apply the *Borello* test instead of the ABC test:

1. The subcontract is in writing.
2. The subcontractor is licensed by the [Contractors State License Board](https://www.cslb.ca.gov) (CSLB) (cslb.ca.gov) and the work being performed is within the scope of that license.

**Note:** For the construction trucking services previously defined, a CSLB license is not required. Please refer to the section below for additional information on the additional required criteria.

3. The subcontractor has a business license or business tax registration, if required.
4. The subcontractor has a separate business location from the contractor's business or work locations.
5. The subcontractor has the authority to hire and fire people who provide or assist in providing the services.
6. The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, indemnity obligations, performance bonds, or warranties relating to the work being performed.
7. The subcontractor is customarily engaged in an independently established business of the same nature as services provided to the contractor.

If all the criteria have been satisfied, then the *Borello* test will apply in Step 3. If the criteria have not been satisfied, then the ABC Test under Step 3 will apply instead.

### **Step 3: Apply either the ABC Test or the *Borello* test to determine employment status.**

If the ABC Test is applicable (see Step 2), then workers or subcontractors are presumed to be employees instead of independent contractors, unless the hiring entity can demonstrate that all three of the following criteria are satisfied under section 621(b) of the CUIIC:

- A. The individual is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- B. The individual performs work that is outside the usual course of the employers' business.
- C. The individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

If the *Borello* test applies instead of the ABC Test (see Step 2), then workers or subcontractors are presumed to be employees, unless the hiring entity can demonstrate that the workers are independent contractors under the *Borello* test. The test relies upon multiple factors to make a determination, including whether the hiring entity has all necessary control over the manner and means of accomplishing the result desired, although such control does not need be direct, actually exercised, or detailed. This factor, which is not definitive, must be considered along with other relevant factors.

### **Construction Trucking Services**

For a subcontractor providing construction trucking services for which a CSLB license is not required, the subcontractor must meet all the following criteria to meet the exception under the ABC Test:

- a. The subcontractor is a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.
- b. The subcontractor is registered with the Department of Industrial Relations as a public works contractor regardless of whether the subcontract involves public work.
- c. The subcontractor utilizes its own employees to perform the construction trucking services or is a sole proprietor who operates their own truck to perform the services and holds a valid motor carrier permit issued by the Department of Motor Vehicles.
- d. The subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.

The exception for the construction trucking services expires on January 1, 2025, unless extended by the Legislature.

If all the criteria for the ABC Test exception are met, the *Borello* test will determine whether the individual is an employee or an independent contractor. If any criteria is not met, the ABC Test will determine whether the individual is an employee or an independent contractor.

For information on the ABC Test, *Borello* test, and other ABC Test exceptions, refer to [Information Sheet: Employment \(DE 231\) \(PDF\)](https://edd.ca.gov/pdf_pub_ctr/de231.pdf) (edd.ca.gov/pdf\_pub\_ctr/de231.pdf).

## Owner-Builder Responsibilities

An owner-builder is a person who owns the property where the work is performed and acts as their own general contractor. They either perform the work themselves or engage employees or licensed subcontractors. Under certain circumstances, an owner-builder is exempt from the contractor licensing requirements of the BPC (see section 7044 of the BPC) and thus sections 621.5 and 13004.5 of the CUIIC (Step 1 above) would not apply. However, an owner-builder who meets the requirements of section 7044 of the BPC may nonetheless be considered an employer under the ABC Test or *Borello* test (see Steps 2 and 3 above), unless certain conditions are met under section 640 of the CUIIC.

## Examples

1. A general contractor who holds a valid California contractor's license hires an out-of-state subcontractor to perform services in California for which a license is required. The subcontractor has a license issued by another state but is not licensed in California. The workers services were determined to be localized within California. In this instance, the subcontractor and all their workers are statutory employees of the general contractor under sections 621.5 and 13004.5 of the CUIIC because the subcontractor does not hold a valid California contractor's license.
2. A licensed roofing contractor hires an unlicensed subcontractor. Since the subcontractor does not hold a contractor's license to perform roofing services, the subcontractor is a statutory employee of the roofing contractor under sections 621.5 and 13004.5 of the CUIIC (Step 1 above).
3. A licensed general contractor hires an unlicensed subcontractor that is formed as a business; for example, partnership, corporation, or LLC to install carpets. All workers performing the carpet installation, including partners, officers, or members, are statutory employees of the general contractor under sections 621.5 and 13004.5 of the CUIIC because the subcontracted business does not hold a contractor's license for carpet installation. Each subcontractor must be separately licensed and satisfy all other requirements to be an independent contractor under sections 621.5 and 13004.5 of the CUIIC.
4. An owner of residential rental property hires unlicensed construction workers to perform construction work on their own buildings. Based on certain conditions the owner is not always required to be licensed by the CSLB. If the owner is required to be licensed, any unlicensed workers hired by the owner would be statutory employees under sections 621.5 and 13004.5 of the CUIIC. If the owner is not required to be licensed, the status of the unlicensed workers would be determined by the ABC Test under section 621(b) of the CUIIC.

## Additional Information

Contact the Taxpayer Assistance Center at 1-888-745-3886.

Visit the nearest Employment Tax Office listed on the [Office Locator](http://edd.ca.gov/office_locator) (edd.ca.gov/office\_locator).

Attend a no-cost [Payroll Tax Seminars](http://seminars.edd.ca.gov/payroll_tax_seminars) (seminars.edd.ca.gov/payroll\_tax\_seminars).

The EDD is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Requests for services, aids, and alternate formats need to be made by calling 1-888-745-3886 (voice) or TTY 1-800-547-9565.

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