

## CONSTRUCTION INDUSTRY

Under California law, a contractor, licensed or unlicensed, who engages the services of unlicensed subcontractors or construction workers is, by specific statute, the employer of those unlicensed subcontractors or workers, even if the subcontractors or workers are independent contractors under the usual common law rules.

Section 7026 of the Business and Profession Code defines a contractor as any person who constructs, alters, repairs, adds to, subtracts from, improves, moves, wrecks, or demolishes any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or does any part thereof, including the erection of scaffolding or other structures or works or the cleaning of grounds or structures in connection therewith. The term *contractor* includes subcontractor and specialty contractor.

### WHO IS A STATUTORY EMPLOYEE IN THE CONSTRUCTION INDUSTRY?

Sections 621.5 and 13004.5 of the California Unemployment Insurance Code (CUIC) were written in identical language and state:

(a) "Employee" also means any individual who is an employee, pursuant to Section 2750.5 of the Labor Code, of a person who holds a valid state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

(b) When subdivision (a) does not apply, "employee" shall also mean any individual who is an employee, pursuant to Section 2750.5 of the Labor Code, of a person who is required to obtain a valid state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

Section 2750.5 of the Labor Code states in pertinent part:

"There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor..."

Section 2750.5 states that the following factors support an independent contractor status:

- (a) The individual directs and controls how the services contracted for are accomplished.
- (b) The individual is customarily engaged in an independently established business.
- (c) The individual's independent contractor status is bona fide and not a subterfuge to avoid employee status.

In addition to the above factors, the individual must have a valid contractor's license to perform the work.

In summary, without a valid contractor's license a person performing services in the construction trade is an employee of the contractor who either holds a license or is required to be licensed.

The term "valid license" means the license was issued to the correct individual or entity, the license was for the type of service being provided, and the license was current and active for the entire period of the job.

The Contractors State License Board (CSLB) determines who must be licensed to perform services in the construction industry within California. A contractor or a worker should contact the CSLB to determine if the services performed require a license. The contractor or worker should request a written determination and/or should document the CSLB determination. The documentation may include the following:

- 1) The date of the contact and name of the person making the inquiry.
- 2) The name of the CSLB representative who made the determination, if contacted by telephone.
- 3) The information provided during the contact to determine whether a contractor's license is required, such as:
  - a) If a license is not required, why?
  - b) How do the services being performed not qualify under various license classifications (Class A, B, or C)?

**Caution:** Possession of a valid contractor's license does not automatically make the worker an independent contractor. The worker must also be performing services under conditions and circumstances which would support an independent contractor relationship under Section 2750.5 of the Labor Code.

If the subcontractor or worker is found to be a statutory employee as defined by Sections 621.5 and 13004.5 of the CUIIC, the employer is responsible for reporting the wages paid to the employees and paying Unemployment Insurance (UI) and Employment Training Tax (ETT) on those wages. Additionally, the employer is required to withhold and remit State Disability Insurance (SDI)\* and California Personal Income Tax (PIT) due on the wages paid.

### EXAMPLES OF EMPLOYMENT IN THE CONSTRUCTION INDUSTRY

- 1) A general contractor who holds a valid California contractor's license hires an out-of-state subcontractor to perform services for which a license is required.  
The subcontractor has a license issued by another state but is not licensed in California. In this instance, the subcontractor and all of his 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 roofing contractor (licensed or unlicensed) hires a subcontractor who is determined to be an independent contractor under factors (a), (b), and (c) of Section 2750.5 of the Labor Code; however, that subcontractor does not hold a valid contractor's license. The subcontractor and his/her workers are statutory employees of the roofing contractor under Sections 621.5 and 13004.5 of the CUIIC because he/she does not hold a valid contractor's license.
- 3) A general contractor who holds a valid contractor's license hires a subcontractor that is a partnership, to install carpets. One of the partners holds a valid contractor's license; however, the partnership is unlicensed. All workers including the partners and their employees are statutory employees of the general contractor under Sections 621.5 and 13004.5 of the CUIIC because the partnership does

\* Includes Paid Family Leave (PFL)

not hold a valid contractor's license. The CSLB must have issued a separate license for the partnership in order for the license to be considered valid. This concept also applies to corporations and joint ventures as the entities must be separately licensed.

- 4) An owner of commercial or residential rental property, or a property manager acting as the owner's agent, hires unlicensed construction workers to perform construction work on his/her own buildings. Such owners are not typically required to be licensed, so the workers may not be statutory employees under Section 621.5 and 13004.5 of the CUIIC. The common law tests would be applied to determine if they are employees under Section 621(b) of the CUIIC (refer to Information Sheet: *Employment* [DE 231]).
- 5) A general contractor, either licensed or unlicensed, subcontracts work out to an individual who has a valid contractor's license. The individual is told by the general contractor how to accomplish his/her work and is paid by the hour. The individual has no investment in the business and does not provide his/her own tools. The individual is not engaged in an independently established business. The general contractor controls the time and place the work is performed and can sever the relationship at will.

The individual would not be an independent contractor simply because he or she holds a valid contractor's license. In this case, the individual would be an employee because he/she does not meet the (a), (b), and (c) tests set forth in Section 2750.5 of the Labor Code.

### ADDITIONAL INFORMATION

For further assistance, please contact the Taxpayer Assistance Center at (888) 745-3886 or visit the nearest Employment Tax Office listed in the *California Employer's Guide* (DE 44) or access EDD's Web site at [www.edd.ca.gov/Office\\_Locator/](http://www.edd.ca.gov/Office_Locator/).

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

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