

One Minute Memo[®]



California Court Of Appeal Provides Roadmap On The Proper Classification Of Independent Contractors

Insurance agents and other types of salespeople with the discretion to determine when, how, and whether to sell a company's products may properly be classified as independent contractors, according to the California Court of Appeal's recent holding in *Arnold v. Mutual of Omaha Insurance Company* — the first California decision to detail the circumstances under which insurance agents, and potentially other types of salespeople, may be classified as independent contractors. The *Arnold* court utilized California's *Borello* "control test" -- a test similar to other control tests used in jurisdictions around the country -- to determine whether the plaintiff was correctly classified as an independent contractor. The court's analysis provides a checklist of relevant factors for employers to consider when determining whether a particular worker should be classified as an independent contractor or an employee, as well as a roadmap for summary judgment in cases where the independent contractor status is challenged.

The Facts

Plaintiff Kimbly Arnold, a former insurance agent for Mutual of Omaha, brought a putative class action seeking the reimbursement of necessary business expenses, and penalties for the untimely payment of final wages upon termination of her relationship with Mutual of Omaha. Arnold also asserted a derivative cause of action for unfair competition.

Mutual moved for summary judgment, arguing that Arnold could not recover for the Labor Code violations alleged because those provisions applied only to "employees," and Arnold was properly classified as an independent contractor. The lower court applied the common law test for independent contractor/employee status set forth in *S. G. Borello & Sons, Inc. v. Dept. of Industrial Rel.*, 48 Cal.3d 341 (1989), found that Arnold was properly classified as an "independent contractor," and granted Mutual's motion for summary judgment. Arnold appealed.

The Court's Decision in Arnold

The Court of Appeal rejected Arnold's argument that division 3 of the Labor Code provides a statutory definition of the term "employee." Instead, the court agreed with the trial court and held that the common law *Borello* test (also known as the "control test") should be used to determine whether Arnold was an employee or an independent contractor.

Applying *Borello*, the Court of Appeal affirmed that Arnold was properly classified as an independent contractor because "Mutual had no significant right to control the manner and means by which Arnold" sold its products. As the court explained, "Arnold used her own judgment in determining *whom* she would solicit for applications for Mutual's products, the *time, place, and manner* in which she would solicit, and the *amount of time* she spent soliciting for Mutual's products." Moreover, while Mutual offered several resources to its agents (such as training, office space, and prospecting accounts), agents were *not required* to take advantage of them. The court also was persuaded by the fact that Arnold's appointment was non-exclusive, as she simultaneously contracted with multiple insurance companies to offer her clients competing

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products.

Analyzing the secondary *Borello* factors, the court found that several factors weighed in favor of finding that Arnold was an independent contractor and not an employee: she was engaged in a “distinct profession” and was responsible for maintaining her own license with the California Department of Insurance; she was responsible for providing most of her own instrumentalities or tools needed to sell insurance; and was paid a commission “based on her results and not the amount of time she spent working on Mutual’s behalf.” The court also noted that the inclusion of an at-will provision in an independent contractor agreement “is not by itself a basis for changing that relationship to one of an employee,” particularly where both parties believed that they were creating an independent contractor relationship.

Lastly, the court brushed aside Arnold’s argument that summary judgment was inappropriate unless the *Borello* factors *unanimously* established that she was an independent contractor (*i.e.*, that summary judgment must be denied if a single factor weighed in favor of an employment relationship). As the court explained, it had “little difficulty” affirming summary judgment in Mutual’s favor because “while the existence and degree of each factor is a question of fact, ... the legal conclusion to be drawn from those facts is a question of law.”

What *Arnold* Means for Employers

Although the court in *Arnold* did not indicate whether any single factor tipped its analysis, it is clear that Mutual’s agent program — which permitted agents to determine when, how, and whether to sell Mutual’s products, and imposed minimal direct supervision and established results-oriented performance standards — was critical in leading the court to conclude that the plaintiff was properly classified as an independent contractor. Because the *Arnold* court determined that the common law *Borello* control test was the appropriate test to analyze employment status in California—and many jurisdictions around the country employ similar control tests—this decision should have far-reaching implications for the insurance and other industries that employ independent contractor salespeople outside California. Post-*Arnold*, companies that utilize independent contractors to sell their products in such states may apply the analysis in *Arnold* as a benchmark to assess and review these relationships in order to determine whether changes should be made.

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