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DYNAMEX / AB5 / LABOR CODE SECTION 2750.3

EDUCATIONAL HANDOUT

(Published February 2020 for CCRA Members by Karen Tynan, Esq.)

INDEPENDENT CONTRACTOR OR EMPLOYEE?

CALIFORNIA DYNAMEX TEST

For purposes of the provisions of the California Labor Code, the Unemployment Insurance Code, and wage orders, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

- (A) The person 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 person performs work that is outside the usual course of the hiring entity's business.
- (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

ANALYSIS FOR CCRA MEMBERS

Prong TWO is problematic, as most firms or agencies are in the deposition business or transcription business, which is the work that the freelance deposition person will perform.

Based on feedback provided by the CCRA AB5 Task Force, the following B2B exception is likely the best strategy for 2020:

BUSINESS TO BUSINESS CONTRACTING - CALIFORNIA SUPER BORELLO TEST

- (A) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- (B) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.
- (C) The contract with the business service provider is in writing.
- (D) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.
- (E) The business service provider maintains a business location that is separate from the business or work location of the contracting business.
- (F) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.
- (G) The business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.
- (H) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.
- (I) The business service provider provides its own tools, vehicles, and equipment to perform the services.
- (J) The business service provider can negotiate its own rates.
- (K) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

Section	Discussion of Criteria	Comments for 2020 Activities
(A)	Control and Direction are a cornerstone of IC versus EE. Think about what control looks like to the worker and ask "Who, What, Where, When, and Why?" Who is controlling the job? What elements of a job are controlled? Where is the control coming from? Is it customer preferences or from the firm or agency? What aspects of timing are controlled? Why is the control exerted? Is it for quality control? Are there regulatory or statutory reasons for control?	We foresee firms and agencies creating and utilizing documents and processes to show less "control" over the work.
(B)	This is problematic for many areas of reporting. The services are provided to the customers of firms. Typically, the parties arrange with the firm for services that meet the needs of the parties. This element is challenging, as the parties to a lawsuit receive the services directly in a typical deposition transcript.	It is a bit of a tortured analysis to claim that the freelance reporter is providing services to the firm and not the client of the firm.
(C)	Contracts in writing are an absolute requirement.	Firms and reporters are utilizing written contracts in 2020. Whether or not arbitration or class action waivers are enforceable depends on the contract. The written contract will have no impact on PAGA claims.
(D)	Business license requirement is simple and straightforward.	Reporters are obtaining business licenses associated with their entity.
(E)	Location, Location, Location! Is the firm providing a location for the deposition reporting activities? Is the firm arranging a location for the deposition parties? Deposition reporters have not traditionally maintained their own conference rooms or rentals as part of their freelance work. Where is the reporter working on any other aspects of a transcript?	Evaluation of the way locations are used when parties wish to use a central firm location has to happen. Use of third-party locations may become the norm.
(F)	Service providers are customarily engaged in an established business that is the same as the work being performed.	Not a huge issue.
(G)	Contracting with a variety of businesses is important. Exclusivity will kill this element.	Whether or not a freelance worker works for many different firms is important.
(H)	See (G). Understand that one must hold oneself out as open to accept work for other businesses. No exclusivity.	See (G).
(I)	Tools of the trade are used regularly by workers associated with CCRA. Computers, equipment, and software reflect substantial investments.	No change in 2020.
(J)	Are rates sheets exchanged between the worker and the firm, and is there true negotiation regarding fees and rates?	Documentation of, true negotiations of, and the exchange of rate information will continue to be important.
(K)	The type of work done by members of CCRA typically has hours and location set by clients or the firm. However, the additional preparation of the transcript and other associated work can be done remotely.	Freelancers do take direction on location and hours of work for that work that is directly with clients, but some of the work may be done remotely and at another location.

SUMMARY

Borello citation and reminder with a few **unfavorable notes** and **favorable notes**:

S. G. Borello & Sons, Inc. v Dept. of Industrial Relations (1989) 48 Cal.3d 341

In applying the economic realities test, the most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed. Additional factors that may be considered depending on the issue involved are:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal - **not favorable to the present system of reporters and firms**;
2. Whether or not the work is a part of the regular business of the principal or alleged employer - **not favorable to the present system of reporters and firms**;
3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work - **favorable to the present system**;
4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers - **favorable to the present system**;
5. Whether the service rendered requires a special skill - **favorable to the present system**;
6. The kind of occupation, with reference to whether (in the locality) the work is usually done under the direction of the principal or by a specialist without supervision;
7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill - **not favorable to the present system of reporters and firms**;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job; and
11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

LASTLY – FACTORS AND CRITERIA THAT DO NOT MATTER IN 2020!

1. Historical practices – It does not matter if this is how the work was done in previous years;
2. Success in prior EDD audits – This is not precedential and is irrelevant;
3. Success in prior Labor Commissioner cases – This is not precedential and is irrelevant;
4. Flexibility – Whether workers want flexibility to take or refuse jobs is not determinative;
5. Gender bias – Whether or not AB5 impacts working women more than men is irrelevant; and
6. Referral Service – Reporting services are not exempted under the new Labor Code's referral agency exception, so claiming a referral agency doesn't work.