

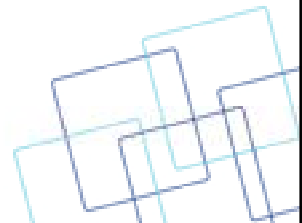


The Essentials of Independent Contractor Agreements: Key Terms, Clauses and Best Practices

Presented by: Eleanor M. Welke

Tulare County Office of Education – Law Seminars 2022-2023

October 12, 2023



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Presenter

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Overview

- **Part 1:** The Big Picture – Independent Contractor or Employee?
 - Why should I care?
 - How do you determine if a person is an independent contractor or employee?
- **Part 2:** How do we negotiate an effective Independent Contractor Agreement?
- **Part 3:** What are the Key Terms, Clauses, and Best Practices?

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What are some
examples of
Independent Contractor
Agreements?

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PART 1:



Who is an Independent Contractor?

Why should I care?

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The Big Picture:
Independent Contractor or Employee? Why should you care?

- Possibilities of penalties
- Possibility of litigation
- Entanglement with the IRS
- Political repercussions



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The Old Rules...

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The Old Rule: Defining Independent Contractors Pre-Dynamex

- The Term independent contractor had no rigid definition under California Law
- Courts previously used the “control test”
 - Not a mechanical/rigid test.
 - Weighed various factors in combination on the basis of the particular circumstances.



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Current Law: The Dynamex Case and the ABC Test...

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The Facts: The Dynamex Case



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The Dynamex Case: The Court's Analysis



- *Rejected* Dynamex's argument
- *Noted* that a worker is an employee if he or she is "employed by an employer"
- *Redefined* "employed" to differentiate between an employee and an independent contractor for the purposes of wage orders adopted by the California Industrial Welfare Commission



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The Dynamex Case: The ABC Test

- Under the ABC test, a worker is now, by law, presumed to be an employee unless the employer can prove that the worker:
 - A. 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. Performs work that is outside the usual course of the hiring entities business; **and**
 - C. Is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed



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A. Free from Control and Direction

- A worker is an employee when the hiring entity has a right to direct and control the worker
- Required training by the employer = strong evidence that the worker is an employee
 - More detailed instruction = employee
 - Less detailed instruction = independent contractor



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B. Work Outside the Usual Course of Business

- Provision of services that are key aspect of the hiring entities business = strong evidence that the worker is an employee
 - Example: School District hires a grounds keeper
- Problematic for public entities which conduct wide range of businesses
 - Example: Maintenance, IT, Grounds, Custodial,
 - Can we distinguish how the function is not presently being provided by the public entity's forces?



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B. Work Outside the Usual Course of Business Cont.

- Ensure that the Worker is Customarily Engaged in an Independently Established Trade, Occupation, or Business of the Same nature as the Worker Performed
- Consider:
 - Whether the worker is free to seek out other business opportunities
 - Whether the worker maintains separate business and is available for work in the relevant market
 - The permanency of the relationship



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Hypo 1

District wants to hire an extra instructional aide with specialized behavioral experience to perform one on one services for a special education student? The individual will work eight hours a day at the same school site and does not work for any other school districts? The student is a third grader and the District would like the instructional aide to follow the student for the next three years until middle school.



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C. Independently Established Business

- A worker is an employee when the hiring entity has a right to direct and control the worker
- Required training by the employer = strong evidence that the worker is an employee
 - More detailed instruction = employee
 - Less detailed instruction = independent contractor



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Hypo 2

District wants to hire an air conditioning technician to come out and service its air conditioning units as well as install new units in additional classrooms during the summer months. The contractor owns his own company and he has come highly recommended by a neighboring district.



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Going Back to Hypo 1

What if the District wanted to hire a deaf and hard of hearing interpreter instead of an instructional aide for a special education student?

Does that change your analysis?

What information would you want to know?



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Best Practices



Limited terms of employment



Do not provide tools, supplies, or workplaces



Give worker autonomy



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Best Practices Cont.



Carefully review contract language



Use clear language to support a worker's status as an independent contractor



Don't forget why you should care



PART 2: How do we negotiate an effective Independent Contractor Agreement?

Contract Writing Roadblocks

How do you feel when you have to prepare an independent contractor agreement?

What are the roadblocks you experience?

Do you always have all the information you need to prepare the contract?

Why would it be important to know all of the facts?



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Contract Interpretation

“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

(Civil Code, § 1641)

“The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.”

(Civil Code, § 1644)



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Controlling the Drafting Process



- Bargaining power
- Bias
- Substantive knowledge & competence



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Contract Procurement Generally

What am I buying? What do I need?

- Goods
- Services
- Maintenance

What's the difference?



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Education Code section 45103.1

Allows for personal services contracting when the services contracted are not available within the district, cannot be performed satisfactorily by school district employees, or of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the school district.



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Special Services

“The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the ... district special services and advice in financial, economic, accounting, engineering, legal or administrative matters if such persons are specially trained and experienced and competent to perform such special services required.”

(Gov. Code § 53060)



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Goods and Services

Bid Threshold for Competitively Bid Contracts
(for 2023; amount adjusted annually): **\$109,300**

Public Contract Code section 20111(a)

- Equipment, materials, supplies
- Services except construction services
- Repairs, including maintenance (not public work)



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Bidding Exception - Professional Services

“[Bidding requirements] shall not apply to professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section . . .”

(Public Cont. Code, § 20111(d))



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Authority to Enter Into Contract - School District

Board may delegate by majority vote to District Superintendent (or to “any persons that he or she may designate”). However, no contract made pursuant to this delegation is valid unless “the same shall have been approved or ratified” by the Board by a motion duly passed and adopted.

(Ed. Code § 17604)



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Authority to Enter Into Contract - School District

Governing board may delegate authority to purchase supplies, material and services not in excess of amounts under section 20111 of Public Contract Code. (Ed. Code § 17605)



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Policy & Constitutional Issues

Contract cannot bind future Board's legislative decision-making

Contract cannot bind future budgets (exceptions)



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PART 3: What are the Key Terms, Clauses, and Best Practices

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Key Contract Provisions: A Closer Look



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Overview of Key Contract Provisions

Contractor Services	Fingerprinting & Background Checks / TB Certification	Attorneys Fees & Dispute Resolution	Insurance
Indemnification / Limitations on Liability	Term	Contractor Qualifications / Independent Contractor Status	Notices
Governing Law	Payment and Payment Schedule	Confidential Information	Termination



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Independent Contractor Status Acknowledgement

Independent Contractor Status. While engaged in carrying out the terms and conditions of the Agreement, Contractor is an independent contractor, and not an officer, employee, agent, partner, or joint venturer of the District.

- Clearly define the role of the independent contractor in the agreement.
- Is this alone enough?



Contractor Services Contract Provision



Must clearly define the scope of the services of the contractor.

1. Contractor Services. Contractor agrees to provide the following services to District (collectively, the "Services"):



Examples of Contractor Services Provisions

Vague

Contractor agrees to provide photography services for the District.

Better

Contractor agrees that it will provide photography services for an event taking place at District A on October 12, 2023.

Even Better

Contractor agrees to provide photography services to District A on October 12, 2023 at the Homecoming Football Game and Dance taking place at District A, located at 123 Front Street, City B. The photography services will be provided between 5:00 p.m. and 11:00 p.m. on October 12, 2023, and will include:

- 1 photographer taking candid photographs at the Football Game and at the Dance following the Football Game;
- 1 photographer taking formal photographs at the Dance; and
- Operation of a Photo booth at the Dance.



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Term & Renewal Contract Provisions

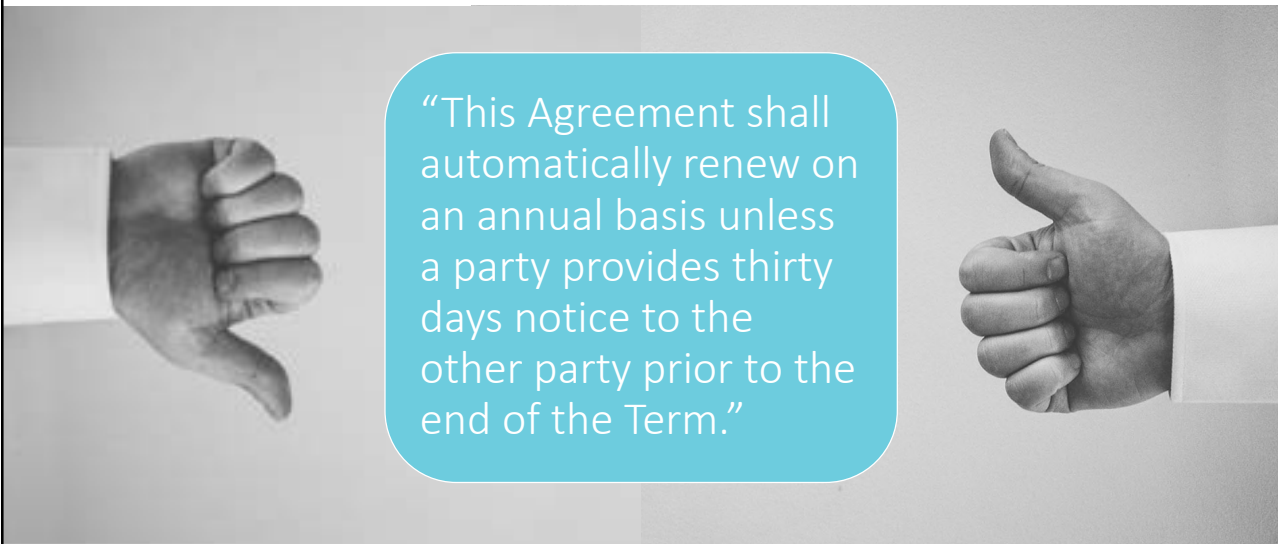
Three considerations:

- 1) Statutory limits
- 2) Notice of renewal
- 3) Board action



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“This Agreement shall automatically renew on an annual basis unless a party provides thirty days notice to the other party prior to the end of the Term.”

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Examples of Term Provisions



A. Term: This Agreement shall begin on October 12, 2023 and shall terminate upon completion of the Services (“Term”).

B. Term. The term of this Agreement shall be October 12, 2023, through October 11, 2024 (“Term”), unless earlier terminated as provided hereunder. There shall be no extension of the Term of this Agreement without the express written consent of all Parties.

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Examples of Term Provisions, Cont.

Which one is a better Term provision?
Why?

- Fixed Term for the agreement.
- Clear Termination Date for the agreement.
- Does not automatically renew and allows for board approval if parties agree in writing to extend.



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Termination Provisions



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Termination Provisions - Considerations

- What works for the District? What do you need?
- Termination for convenience by either party on 30 days' notice?
- Do we *want* flexibility? Do we *not want* flexibility?
- What if the contract requires investment, hiring, or other significant cost to the school district?
- What if we are under a strict timeline?
- What if this is the only person in the State of California that provides this service?
- What if we are concerned about how well the contract is going to be performed?
- Carefully consider whether a time to cure provision should be included as a condition to termination.



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Termination Provisions - Examples

Termination.

- a. Either Party may terminate this Agreement ***for breach of any material term or condition of this Agreement*** by the other Party ***and failure of the breaching Party to cure such breach within three (3) business days of written notice*** from the non-breaching Party unless an extension to this cure period is agreed to by the Parties.
- b. District may immediately terminate this Agreement upon any of the following:
 - i. Contractor's failure to obtain or maintain all required permits and certifications necessary to provide the Services; or
 - ii. Contractor's failure to obtain or maintain the insurance coverage as specified in this Agreement; or
 - iii. Contractor's violation of any Law as set forth in this Agreement; or
 - iv. District's determination, in its sole discretion, that the Services pose a risk to the health and safety of students.



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Hypos: Termination Provisions

The Independent contractor hired to build District A's gymnasium never obtained the required insurance coverage. Is that enough to terminate the contract under the prior termination provision?

- What if the independent contractor failed to meet the timelines set forth in the services provisions of the contract?
- What if the independent contractor was harassing students as they walked by the gym?
- What if the independent contractor was doing a good job but is difficult to work with and rude to you in every interaction.
- What if you needed the contractor to finish the job but the termination provision allowed either party to terminate on 30 days notice?



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Payment Terms and Schedule Provisions



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Payment Terms and Schedule Considerations

- When will the contractor be paid?
- How will the contractor be paid?
- Who much will the contractor be paid? Consider “not to exceed” language?
- For what services will the contractor be paid?
- What about reimbursements? Prior approval?
- Will the payment require documentation of completion of services before payment?
- Will payment only be made upon “satisfactory performance as determined by the client?”
- How will payment be handled if the contract is terminated early? Prorated?
- Does the entire contract have to be performed prior to payment?
- Do portions of the contract have to be completed prior to payment?
- Is payment made on a monthly basis?



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Indemnity Provisions

You always want to obtain indemnity for another party's actions.

An indemnity provision is: “A contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.”

(Civ. Code, § 2772)



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Indemnity Provisions - Considerations

- *What are the potential risks that could arise out of the contract?*
- If the contract is one where another party is providing services to the District as a part of the agreement:
 - It should have an indemnity provision.
 - The indemnity provision should provide protection to the school district from the contracting party.
- If the contract is one the District is providing services in return for payment:
 - It should have a mutual indemnity provision.
 - The indemnity provision would provide that the District and the contracting party agree to indemnify each other.



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Indemnity Provisions – Examples of Key Words

Indemnification: Contractor shall *defend*, indemnify, and hold harmless the School District A and its agents, employees, contractors, Board of Education, and members of the Board of Education (“*District Indemnified Parties*”), from and against claims, damages, losses, and expenses (including, but not limited to *attorney’s fees* and costs including fees of consultants) *arising out of* or resulting from performance of this Agreement including, but not limited to Contractor’s completion of its duties under this Agreement; *Contractor’s provision of the Services*; or injury to or death of persons or damage to property or delay or damage to District or District Indemnified Parties for any act, omission, *negligence, or willful misconduct of Contractor* or its respective employees, volunteers, agents, invitees, or licensees. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity, which would otherwise exist as to a party, person, or entity described in this Section. This indemnification provision shall survive the expiration or termination of the Agreement.



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Limitations of Liability Provisions



A contractual clause limiting the amount of damages that may be recovered for the negligent acts of a party.



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Attorneys Fees Provisions



- Good or bad?
- Limited scope
- Mutual vs. unilateral
- Defining “prevailing party”



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Alternative Dispute Resolution Provisions

Options:

- Informal discussion?
- Mediation?
- Non-binding arbitration?
- Arbitration?
- Judicial reference?
- Condition precedent to litigation?



Which is right for you?



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Insurance Provisions

- Insurance requirements should be reviewed with risk management, the District's JPA, or the District's insurance broker before it is approved and before sending for legal review of approval by the Board.
- Must consider the nature of the contract and the risks of the contract.



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Insurance Provisions - Example

Insurance. Without limiting Contractor's indemnification obligations as set forth in this Agreement, Contractor shall secure and maintain in force during the term of this Agreement the following:

- a. A comprehensive general liability insurance with limits of not less than \$[INSERT NUMBER] each occurrence and \$[INSERT NUMBER] in the aggregate. Such policy shall specifically state: "Coverage does not contain limitations of coverage or exclusions for molestation, sexual abuse, child abuse, or child endangerment."
- b. Commercial automobile liability insurance with limits not less than \$[INSERT NUMBER] each occurrence and \$[INSERT NUMBER] in the aggregate.
- c. District shall be named as an additional insured on the above policies by endorsements. The policies shall provide that they are primary such that insurance maintained by District, if any, shall be excess and not co-primary. A copy of the declarations pages of Contractor's policies shall be attached to this Agreement as proof of insurance. Contractor shall not alter or terminate said insurance policies without at least thirty (30) prior days' notice to District. Any altered or terminated insurance policy shall be replaced with an insurance policy meeting the requirements of this Section, so that the terms of the replacement policy become effective no later than the termination or alteration of the prior policy.
- d. Worker's Compensation Insurance as required by Law.



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Fingerprinting & Background Checks & TB Certification Provisions

Effective January 1, 2022, all contracting entities that have contracts with a school district, county office of education, or charter school, where the entity or its employees will interact with students outside of the immediate supervision and control of the student's parent or guardian or a school employee, must:

- Ensure that they have a valid criminal records summary for the contracting entity and any of its employees who may interact with students outside of the immediate supervision and control of a parent, guardian or school employee.
- Provide any information about arrests and convictions immediately to the LEA.
- Not permit an employee to interact with students until it is determined that the employee has not been convicted of a violent or serious felony
- Certify in writing to the LEA that neither the contracting entity nor its employees, who are required to have background checks and who may interact with students, have been convicted of a violent or serious felony.



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Fingerprinting & Background Checks & TB Certification Provisions – Best Practices

- Include a fingerprinting certification process as a part of your independent contractor agreement process.
- Consider including a separate Fingerprinting Notice and Acknowledgement form with the required certification as an Exhibit to the independent contractor agreement, which the Contractor must execute and return prior to providing services.
- Include tuberculosis certification process as a part of your independent contractor agreement process.
- Ensure that contracting entity submits the required certification prior to commencing performance.



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Miscellaneous provisions

- Notice Provisions
- Confidential Information and Access to Pupil Records (Pupil Records Rider Required?)
- Assignment
- Amendment
- Taxes
- Execution in Counterparts
- Entire Agreement
- Severability
- Governing Law
- Warranty of Authority
- Compliance with laws
- Non-Discrimination Policy



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Take Aways

- *Remember* the ABC's of analyzing whether someone is an independent contractor in the first place.
- *Remember* to always think about the big picture and get all facts. Remember to think about District's bargaining power and position, what the District needs out of the contract, and the risks the District need to be protected against if things go wrong.
- *Remember* to include the essential terms of an independent contractor agreement.
- *But don't forget* that individual words matter and *remember* to think about the big picture and the facts that you gathered when drafting the specific language of each essential term.



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Questions



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CLIENT NEWS BRIEF

AB 5: New Law Further Limits Employers' Ability To Classify Workers As Independent Contractors

Governor Newsom signed Assembly Bill 5 (AB 5) on September 18, 2019, which takes effect on January 1, 2020. AB 5 codifies the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles (Dynamex)* ([see 2018 Client News Brief No. 20](#)), which made it more difficult to classify a worker as an independent contractor. This new legislation also creates additional protections for workers.

In *Dynamex*, the Court held that, for purposes of Industrial Welfare Commission (IWC) wage orders, a worker is presumed to be an employee unless the hiring entity is able to demonstrate that:

- (A) The person is free from their control and direction 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; and
- (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.

AB 5 expands the applicability of this three-part test, commonly referred to as the "ABC test," to specific sections of the California Labor Code and Unemployment Insurance Code. The bill exempts specific occupations such as licensed architects, lawyers, and private investigators from the ABC test. Instead, those professionals will be governed by the *Borello* test, which does not contain a rebuttable presumption that a worker is an employee. The *Borello* test has nine factors and focuses on the amount of "control" the hiring entity has over a worker. Hiring entities are not required to meet all nine factors to show that a worker is an independent contractor. Therefore, it is easier to classify a worker as an independent contractor under *Borello*. AB 5 provides that, in addition to the specific exemptions, *Borello* can also be applied when a court determines that the ABC test cannot be applied in a particular circumstance.

AB 5 authorizes the California Attorney General and certain local government officials to seek injunctions against hiring entities on behalf of misclassified workers. Additionally, some of the changes to the Labor Code apply retroactively to existing claims to the extent permitted by law.

Takeaways

AB 5 extends the applicability of *Dynamex* and the ABC test from IWC wage orders to provisions of the Labor and Unemployment Insurance Codes. The legislation has the potential to increase employer liability because it is partially retroactive to existing claims and creates a new right to seek injunctive relief.

Precisely what impact AB 5 will have on public entities is yet to be determined. First, while most IWC wage orders do not apply in full to public entities, sections of the Labor Code and the Unemployment Insurance Code do apply.

October 2019
Number 53



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As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

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Number 53

Second, AB 5 does not contain an exemption for public entities. Third, adopting the ABC test could lead to greater use of the test by other agencies that have historically relied on the *Borello* test such as the California Public Employees' Retirement System (CalPERS). If this occurs, the change may have a significant impact on CalPERS membership rules, including post-retirement work implications for CalPERS retirees attempting to return to work as independent contractors. Therefore, public entity employers with independent contractors should review their classification decisions to ensure workers are correctly classified under the appropriate test.

For more information about AB 5, worker classification, or CalPERS post-employment work restrictions, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#), and [LinkedIn](#) or download our [mobile app](#).

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

REMINDER: New Fingerprinting Requirements for All Contracts Became Effective January 1, 2022

May 24, 2022
Number 21

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Due to lingering questions in the education community, we are sending this Client News Brief as a reminder concerning new fingerprinting and criminal background check criteria for employees of any entity that has a contract with a local educational agency (“LEA”). The 2021-2022 Education Omnibus Budget Trailer Bill (AB 130) was signed by Governor Newsom on July 9, 2021. Effective January 1, 2022, the requirements of Education Code section 45125.1 were broadened and, with limited exceptions, now apply to all contracts.

Background

Formerly, Education Code section 45125.1 required contracting entities to submit employee fingerprints to the Department of Justice (DOJ) if the entity or its employees may have contact with students. However, background checks were not required if a school district determined that the entity or its employees would have only “limited contact” with students. In addition, the statute only applied to a few types of contracts.

New Legal Requirements

Effective January 1, 2022, all contracting entities that have contracts with a school district, county office of education, or charter school (each an LEA), where the entity or its employees will *interact with students outside of the immediate supervision and control of the student’s parent or guardian or a school employee*, must ensure that they have a valid criminal records summary for the contracting entity and any of its employees who may interact with students outside of the immediate supervision and control of a parent, guardian or school employee. The contracting entity must provide any information about arrests and convictions immediately to the LEA.

The contracting entity may not permit an employee to interact with students until it is determined that the employee has not been convicted of a violent or serious felony. The contracting entity must also certify in writing to the LEA

that neither the contracting entity nor its employees, who are required to have background checks and who may interact with students, have been convicted of a violent or serious felony.

This new broader legal standard of “interaction” replaces the former standard of “more than limited contact.” However, limited exceptions remain for emergency or exceptional situations, such as when the health or safety of students is endangered or when repairs are needed to make a school facility safe and habitable.

Additionally, Education Code section 45125.2 still uses the “limited contact” standard for construction, reconstruction, rehabilitation, and repair contracts, exempting construction contractors from Education Code section 45125.1, so long as the contracting entity uses one of the three specified methods outlined in Education Code section 45125.2.

Takeaways

Except for contracts for construction, reconstruction, rehabilitation and repairs, LEAs must ensure that all contracts entered on or after January 1, 2022, where the contracting entity or its employees interact with students outside the immediate supervision of a parent/guardian or school employee, meet the new fingerprinting/criminal background check requirements in Education Code section 45125.1. Furthermore, LEAs must ensure that the contracting entity submits the required certification prior to commencing performance.

If you have any questions about AB 130 or would like to discuss any legal matters pertaining to the new fingerprinting requirements, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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