



YOU CAN (MOSTLY) PROTECT YOURSELF FROM *DYNAMEX!*

AB 5, *DYNAMEX* ABCs, & SAMPLE AGREEMENT PROVISIONS BETWEEN COURT REPORTING FIRMS AND THEIR COURT REPORTER INDEPENDENT CONTRACTORS

PRELIMINARY BUT IMPORTANT NOTES:

- This agreement sample is meant to be informative only. It is akin to an article in a legal journal explaining a judicial decision. It is no substitute for legal advice tailored to your individual and business needs for which you should retain and seek the advice of your own counsel.
- Similarly, the law in this area is in flux and litigation is always unpredictable and based on multiple factors. Use of the ideas in this sample agreement therefore cannot guarantee any particular outcome.

THE ABCs OF *DYNAMEX*

The California Supreme Court in *Dynamex Operations West v. Superior Court*, Cal. Supreme Ct. no. S222732, 2018 WL 1999120 (Cal. Apr. 30, 2018) held that **it is the burden of the hiring entity** to establish that a worker is an independent contractor who was not intended to be included within the applicable wage order's coverage; i.e., an employee.

The so-called ABC Test assumes that all workers are employees and places the burden on the business to establish that the worker is an independent contractor. To meet this burden, the hiring entity must establish each of the following three factors, commonly known as the "ABC Test." **The most important of the tests – where everyone flunks -- is B.**

(A) that the worker 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.

- *This factor can turn on a variety of factors evidencing control of the firm over the reporter's work performance such as whether the reporter supplies her own tools or controls the specific details of his work, without interference by firm.*

and

(B) that the worker performs work that is outside the usual course of the hiring entity's business.

- *This is the big one. To be an independent contractor, a reporter must perform work that is outside the usual course of the firm’s business. The Supreme Court offered the following example of when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store’s usual course of business and the store would not reasonably be seen as having employed the plumber or electrician to be working as its employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes,” the works are part of the hiring entity’s usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees” and not as independent contractors.*

and

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

- *This factor requires that reporters must usually be engaged in an independently established trade, occupation or business of the same nature as the work performed and it also requires a showing that the worker has “independently made the decision to go into business for himself or herself.” As reporters are licensed professionals, this factor is the least worrisome, but still an issue. To the extent a reporter works for multiple firms and promotes herself, this factor is not a problem.*

AB 5 (GONZALEZ)

AB 5 is a complicated bill that (i) codifies the case of *Dynamex* but (ii) offers a laundry list of exemptions. Most professions including court reporters were not expressly exempted by the bill notwithstanding DRA’s efforts to obtain such an exemption; efforts that will be renewed next year. The absence of an exemption means that the court reporting industry will continue to be governed by *Dynamex* until and unless an exemption is secured.

AB 5 contains two catch-all exemptions that could be available to you as a defense. Key words are underscored:

CATCH-ALL NUMBER 1: WHO ISN’T AN EMPLOYEE?

SEC. 2.

Section 2750.3 is added to the Labor Code, to read:

2750.3.

(a) (1) For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, 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. **[The more a firm micro-manages a reporter, the less this will apply.]**

(B) The person performs work that is **outside the usual course of the hiring entity's business**. **[If the firm can be described as a referral agency matching reporters with willing clients, this would be satisfied BUT such a description is hurt if you bill clients and maintain the relationship.]**

(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**. **[Check!]**

(2) Notwithstanding paragraph (1), any exceptions to the terms “employee,” “employer,” “employ,” or “independent contractor,” and any extensions of employer status or liability, that are expressly made by a provision of this code, **the Unemployment Insurance Code**, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of “employee” in subdivision 2(E) of Wage Order No. 2, **shall remain in effect for the purposes set forth therein**.

Key Provision of the Unemployment Insurance Code Exempts Court Reporters

1. Unemployment Insurance Code 630.

Notwithstanding subparagraph (C) of paragraph (1) of subdivision (c) of Section 621 or Section 13004, “employment” **does not include service as a transcriber of depositions, court proceedings, and hearings performed away from the office of the person, firm, or association obligated to produce a transcript of these proceedings.**

[Cross-referenced statutes.]

UIC section 13004 states: “Employee means a resident individual who receives remuneration for services performed within or without this state or a nonresident individual who receives remuneration for services performed within this state and includes an officer, employee, or elected official of the United States, a state, territory, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing. Employee also includes an officer of a corporation. Whether an individual provides equipment in the performance of services for remuneration shall not be considered in a determination of whether that individual is an employee.”]

UIC section 621 states:

“Employee” means all of the following:

(c) (1) Any individual, other than an individual who is an employee under subdivision (a) or (b), who performs services for remuneration for any employing unit if the contract of service contemplates that substantially all of those services are to be performed personally by that individual either:

(C) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by that person that are required to be returned to that person or a person designated by him or her.]

CATCH-ALL NUMBER 2: BUSINESS-TO-BUSINESS

SEC. 2.

Section 2750.3 is added to the Labor Code, to read:

2750.3.

*(e) Subdivision (a) and the holding in *Dynamex* do not apply to **a bona fide business-to-business contracting relationship, as defined below**, under the following conditions:*

*(1) If a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation (“business service provider”) contracts to provide services to another **such business** (“contracting business”),*

[Translation: here, the “business service provider” would be the reporter, the “contracting business” the firm. **Note the “provider” – the court reporter -- must in some way be operating as a formalized business for this exemption to apply.** Here, that the reporter and the firm are both engaged in court reporting is helpful in satisfying the words “to another such business,” especially if the reporter has their own clients.]

*the determination of employee or independent contractor status of the business services provider **shall be governed by *Borello***,*

[Translation: a firm owner wants *Borello* to apply. It is the case that determined independent contractor status before *Dynamex*.]

*if the **contracting business** [meaning the reporting firm] demonstrates that **all of the following criteria are satisfied**:*

*(A) The business service provider [meaning the reporter] 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. [The more a firm micro-manages a reporter, the less the firm will satisfy this requirement.]*

*(B) The business service provider is providing services **directly to the contracting business** rather than to customers of the contracting business. [Meaning, does the reporter provide services “directly” to the reporting firm or to, say, a law firm? Likely, check! Here is why.*

When a court reporting firm is involved, it is common for there to be no relationship at all between the client of the firm (e.g., law firm) and the individual reporter. The firm takes the order from the client. The firm then retains the reporter, the reporter shows up and reports and transcribes the depo, but the firm bills the client and the firm pays the reporter. Many firms even handle all the production of the transcript after the depo even though the CCP tasks some of those duties to "the" deposition officer. In fewer words, the reporter is commonly and literally a "business service provider" to the firm/"contracting business." The reporter is providing a service “directly” to the firm (“contracting business”) that allows the firm to fulfill the firm's obligations to what are the firm’s customers, not the customer of the reporter.

Put another way, and even more simply, if the reporter who was retained by a court reporting firm were to try and collect an unpaid bill not from the firm but from a lawyer in this scenario, she would fail. In a business sense under this scenario, the lawyer wasn't actually the reporter's “customer.” The lawyer didn't hire the reporter, agree upon a payment, or tell the reporter when to show up. All that is commonly done by the firm.

Observe, however, because of the ambiguity of the word “directly,” a court could rule that as the law firm is the ultimate beneficiary of a reporter’s work, the law firm is the reporter’s “customer” not the firm’s and the reporter is “providing services directly” to the “customer” of the firm not the firm itself, making this catch-all exemption inapplicable.

How a court would rule is anybody’s guess which is why DRA will continue to seek an exemption legislatively. However, this exemption can be used and we offer a strategy for using it below.]

(C) The contract with the business service provider is in writing. [Emails may suffice. Likely, check!]

(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. [Likely, check!]

(E) The business service provider maintains a business location that is separate from the business or work location of the contracting business. [Likely, check!]

*(F) The business service provider is customarily engaged in an independently established business **of the same nature as that involved in the work performed.** [Likely, check!]*

(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. [Likely, check!]

(H) The business service provider advertises and holds itself out to the public as available to provide the same or similar services. **[Unknown how much reporters “advertise” but any self-promotion such as even business cards would likely suffice.]**

(I) The business service provider provides its own tools, vehicles, and equipment to perform the services. **[Likely, check!]**

(J) The business service provider can negotiate its own rates. **[Likely, check!]**

(K) Consistent with the nature of the work, the business service provider can set its own hours and location of work. **[Likely, check!]**

(L) The business service provider is not performing the type of work for which a license from the Contractor’s State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code. **[Check!]**

(2) This subdivision does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business. **[A reiteration that for this to be applicable, the reporter must be operating through some form of formalized business.]**

(3) The determination of whether an individual working for a business service provider is an employee or independent contractor of the business service provider is governed by paragraph (1) of subdivision (a).

(4) This subdivision does not alter or supersede any existing rights under Section 2810.3.

SAMPLE CONTRACT LANGUAGE

Option 1: Waiver Of Class Action, Mandatory Arbitration.

Until the statutes are changed, a court reporting firm cannot entirely insulate itself from being sued under *Dynamex* by an individual reporter on an individual basis, but a firm can insulate itself from (1) class-action lawsuits (2) brought in court.

WAIVER OF RIGHT TO BRING INDEPENDENT CONTRACTOR-RELATED CLASS-ACTION LAWSUITS. As a condition of FIRM agreeing to use the services of CONTRACTOR under this Agreement, CONTRACTOR and FIRM agree to all of the following:

- To waive their rights to bring a class-action lawsuits in any **court, tribunal, or arbitration proceeding, where the class-action lawsuit** in whole or in part is based upon any controversy or claim related to CONTRACTOR’s status as an independent contractor.
- That this waiver applies to **class-action lawsuits based upon acts that have occurred in the past as well as class-action lawsuits based upon acts that occur in the present or will occur in the future.**
- That any dispute about CONTRACTOR’s status as an independent contractor shall solely and exclusively be litigated on an individualized basis **and solely in arbitration where the arbitrator shall be a neutral third party mutually agreed upon by the FIRM and CONTRACTOR..**

- To submit any controversy or claim related to CONTRACTOR's status as an independent contractor to non-binding mediation before a mutually-agreed upon neutral and impartial third party at FIRM's expense before arbitration.
- That this waiver governs CONTRACTOR in his or her individual capacity and any corporation or partnership CONTRACTOR may, in whole or in part, own, own shares, or for which CONTRACTOR serves as an officer or director.
- That this waiver also applies to **lawsuits brought by or against FIRM's individual owners**, partners, shareholders, or officers and directors.

Option 2: Waiver Of Class Action, But Individualized Lawsuits Permitted In Court.

WAIVER OF RIGHT TO BRING INDEPENDENT CONTRACTOR-RELATED CLASS-ACTION LAWSUITS. As a condition of FIRM agreeing to use the services of CONTRACTOR under this Agreement, CONTRACTOR agrees to all of the following:

- To waive their rights to bring a class-action lawsuits in any court, tribunal, or arbitration proceeding, where the class-action lawsuit in whole or in part is based upon any controversy or claim related to CONTRACTOR's status as an independent contractor.
- That this waiver applies to class-action lawsuits based upon acts that have occurred in the past as well as class-action lawsuits based upon acts that occur in the present or will occur in the future.
- To submit any controversy or claim related to CONTRACTOR's status as an independent contractor to non-binding mediation before a mutually-agreed upon neutral and impartial third party at FIRM's expense before any lawsuit is filed.
- That this waiver governs CONTRACTOR in his or her individual capacity and any corporation or partnership that CONTRACTOR may, in whole or in part, own, own shares, or for which CONTRACTOR serves as an officer or director.
- That this waiver also applies to lawsuits brought by or against FIRM's individual owners, partners, shareholders, or officers and directors.

Option 3: Memorialize That Your Business Is To Arrange For Court Reporting Services, Not Providing Them.

CONTRACTOR and FIRM acknowledge that FIRM's usual course of business is to offer shorthand reporting work opportunities to licensed shorthand reporters by extending to such reporters information about and the **opportunity to** perform work for law firms, parties to litigation, and those who may pay for legal representation for parties to litigation.

Memorialize That The Reporter Is Formally Incorporated And Has Business Licenses To Permit Catch-all 2 To Apply.

CONTRACTOR warrants and promises to FIRM that CONTRACTOR is a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation, that CONTRACTOR has all business licenses or business tax registrations legally required, and that CONTRACTOR has its own clients or is free to obtain them.¹

OTHER RESOURCES

Independent Contractor Checklist

- Is the agreement between a firm (corporation) and another firm (corporation) or between a firm (corporation) and an individual?
- Does the firm take custody of the rough draft and/or handle post deposition or appearance production?
- Does the firm exclude the reporter's name or other reporter-identifying information from products or bills delivered to clients?
- Is the reporter required to use a firm's brand or name promotionally (e.g., required to use firm-provided business cards, identify themselves as from the firm).
- Does the firm instruct reporters prior to a job to dress a particular way, behave in a particular way, submit work in a particular way? Said differently, does the firm try to force behavior on a reporter in any way other than, after-the-fact, no longer deciding to do business with the reporter?
- Is the reporter to use or obey policies, practices, procedures, or manuals beyond the minimum necessary to fulfill the reason the client hired the firm?
- Does the reporter promote her business through incorporation, advertisements, a business name, a business license, routine offerings to provide the services of the independent business to the public or to a number of potential customers?
- Does the reporter hire independent contractors themselves?

The "Olivas" Factors: Firm Owner Todd Olivas Offers These Pre-Dynamex tips

Our custom and practice (and our IC agreements clearly state) the reporter is not under our control or direction. See my [EDD audit blog post](#) about why I am 100% sure about this. Remember, you can't contract your way around labor law, so it only matters how you ACTUALLY treat the reporters using employer-like controls or

¹ You will want to consult with an attorney regarding whether to select Option 3 or 4 as they are somewhat incompatible. Option 3 presumes a firm can say it is in the referral businesses to try and take advantage of the first catch-all exemption. Option 4 presumes that the firm and the reporter can be described as being in the same line of business (recall the reference to "such businesses"). Reporters cannot easily describe their businesses as referral-based. So, if a firm describes itself as a referral businesses to try and take advantage of option 3 that could preclude option 4 because the firm and the reporter could be seen as in different businesses.

not. I do not. Still, my written contracts now reiterate my custom and practice which is to exert zero employer controls.

The deposition reporters we use perform deposition services. Todd Olivas & Associates does not perform deposition services. (I am a licensed CSR but I do not do depositions.) Todd Olivas & Associates merely matches freelance Independent Contractor reporters with attorneys who need that service. I refer again to my EDD audit blog post wherein the Administrative Law Judge wrote something profound about me:

'...The employer was simply a matching service for court reporters and did not employ any in-house court reporters.'

Our service is NOT performing court reporting duties -- in fact we never have -- but rather our service is simply MATCHING up court reporters with attorneys. I suppose if we had some [employed] staff reporters and some independent contractor reporters, that argument would be eroded. But we do not.

Our ruling request went on to describe the nature of the court reporting industry in general -- that 90% of court reporters are independent contractors unless they work at a courthouse. And then we listed 16 DE 38 factors in my favor. Here are some of them:

- I exercised no control over the work outcome. (Merely where and when to appear at a deposition.)
- I have no employees who perform the same type of work.
- I furnish no training, tools, equipment or supplies.
- Reporter was free to perform the work as she would like in accordance with her own training.
- Reporter purchased all her own equipment.
- Reporter paid for all of her own training.
- Reporter made her own business decisions.
- Reporter hired her own staff members (scopists and proofreaders).

Findings of Fact: The claimant was paid as a 1099 contractor. The claimant was offered job assignments by the employer that she was given discretion to accept or reject. If the claimant chose to reject an assignment, she could continue to receive other assignments from the employer. On more than one occasion, the claimant did, in fact, reject assignments from the employer because she was still finishing other assignments. The claimant was also free to accept work from any other source, for the same type of work, without the [firm's] permission.

The only directions the claimant was given for a job was where and when she needed to show for an assignment. After the scheduled deposition or hearing to which the

claimant was assigned concluded, the claimant would prepare a transcript of the deposition or hearing. The transcript could be completed on the claimant's own time, in her own location and manner with only an expected deadline set by the employer.

The claimant supplied her own equipment, which she brought to each job, that she paid for and maintained herself. The claimant also had a professional license that she maintained herself, with no monitoring or funding by the employer.

The employer was simply a matching service for court reporters and did not employ any in-house court reporters. Each assignment was paid on a job-by-job basis.

BUT NOTE: THIS WAS A PRE-DYNAMEX EDD CASE.