



(Revised October 15, 2020)

AB 5, AB 2257, DYNAMEX COMPLIANCE BASICS

SAMPLE AGREEMENT PROVISIONS BETWEEN COURT REPORTING FIRMS AND THEIR COURT REPORTER INDEPENDENT CONTRACTORS

PRELIMINARY BUT IMPORTANT NOTES:

- This document, including sample agreement language, is meant to be informative and explanatory only. It is the same as 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* (2018) 4 Cal.5th 903 (“*Dynamex*”) 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”¹ required by *Dynamex* 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.*

¹ “There’s nothing new about the ABC test. It’s been used by about 20 states for various purposes for many years.” <https://www.nolo.com/legal-encyclopedia/california-gig-worker-law-AB-5.html>

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.*

THE KEY DYNAMEX-RELATED LAWS FOR COURT REPORTERS AND COURT REPORTING FIRMS ARE NO LONGER FOUND IN AB 5 (GONZELEZ) BUT IN AB 2257(GONZALEZ)

AB 2257 WAS AN URGENCY MEASURE ENACTED IN 2020. URGENCY MEASURES GO INTO EFFECT IMMEDIATELY.

AB 2257: THE THREE STATUTES TO KNOW

1) AB 2257 REVISED BUSINESS-TO-BUSINESS ('B2B') EXEMPTION

CRITICAL DIFFERENCE BETWEEN AB 5 AND AB 2257! "ACTING AS A SOLE PROPRIETOR" VS "FORMED AS A SOLE PROPRIETOR".

FOR A COURT REPORTING FIRM TO COME UNDER AB 5'S B2B EXEMPTION, THE LAW USED TO REQUIRE THE COURT REPORTERS WITH WHICH THE

FIRM DOES BUSINESS BE FORMALIZED AS SOLE PROPRIETORS; THAT THEY FILE REQUIRED PAPERWORK.

THAT IS NO LONGER REQUIRED!

HERE IS WHAT THE LAW USED TO REQUIRE FOR THE BUSINESS-TO-BUSINESS EXEMPTION TO APPLY:

OLD LAW Labor Code section 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”) ...*

HERE IS THE NEW LAW Labor Code section 2776:

Section 2775 and the holding in Dynamex do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions:

*(a) If an individual **acting as a sole proprietor**, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation (“business service provider”) contracts to provide services to another such business or to a public agency or quasi-public corporation (“contracting business”), the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied:*

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

[Translation: here, the “business service provider” would be the reporter, the “contracting business” the firm.]

WHY DOES ONE WORD MATTER???

When an individual, as just a regular old individual, is doing business, they are, without doing anything more formal, *acting as a sole proprietor*. Here is a good definition of what we are talking about:

"The sole proprietorship is the simplest business form under which one can operate a business. The sole proprietorship is not a legal entity. It simply refers to a person who owns the business and is personally responsible for its debts. A sole

proprietorship can operate under the name of its owner or it can do business under a fictitious name, such as Nancy's Nail Salon."²

See? The biggest impediment to however few freelance court reporters who are both independently contracting and who have failed to adopt any corporate/sole proprietor formality (they should, as we have discussed, really be formalized as corporations!) qualifying for the old AB 5 B2B exemption when working for a firm was the requirement that the individual freelancer formalize through paperwork their status as a "sole proprietor" or corporation, etc.. ***That is not required under the new law and, so, provided that a court reporter contracting relationship satisfies the other parts of the B2B test (and as we discussed if it is a legit independent contracting arrangement it should) the biggest impediment to independent contracting and the biggest threat of being sued or audited has been removed, with the old independent contracting law now applicable in such situations.***



HERE ARE THE REST OF THE B2B REQUIREMENTS IN THE NEW LAW. THEY ARE VIRTUALLY IDENTICAL TO AB5'S B2B REQUIREMENTS. LEGITIMATE INDEPENDENT CONTRACTING RELATIONSHIPS SHOULD SATISFY ALL OF THEM

(a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ("business service provider") contracts to provide services to another such business or to a public agency or quasi-public corporation ("contracting business"), the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied:

(1) 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.

[The more a firm micro-manages a reporter, the less this will apply.]

(2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses. [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

² <https://www.entrepreneur.com/encyclopedia/sole-proprietorship#:~:text=The%20sole%20proprietorship%20is%20not,such%20as%20Nancy's%20Nail%20Salon.>

the order from the client. The firm then retains the reporter, the reporter shows up and reports and transcribes the deposition, 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 "client" or "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.]

(3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services. [Emails may suffice. Likely, check! BEST ADVICE USE MASTER CONTRACTS!]

(4) 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! BE LEGAL AND GET LICENSES!]

(5) The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business. [Likely, check!]

(6) 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!]

(7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity. [Likely, check!]

(8) *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.]*

(9) *Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract. [Likely, check!]*

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

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

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

(b) *When two bona fide businesses are contracting with one another under the conditions set forth in subdivision (a), the determination of whether an individual worker who is not acting as a sole proprietor or formed as a business entity, is an employee or independent contractor of the business service provider or contracting business is governed by Section 2775.*

SUMMARY: A court reporting firm can operate within the B2B exemption even if the individual reporter is not formally a sole proprietor or corporation if all the other conditions are met. Checks can be made out to individual reporters in their names. Contracts can be made with individual reporters. It still makes sense to have a master contract, described below, that memorializes all these things.

2) AB 2257 “SINGLE ENGAGEMENT” EXEMPTION

Labor Code section 2779:

(a) *Section 2775 and the holding in Dynamex do not apply to the relationship between two individuals wherein each individual is acting as a sole proprietor or separate business entity formed as a partnership, limited liability company, limited liability partnership, or corporation performing work pursuant to a contract for purposes of providing services at the location of a single-engagement event, as defined below, under the following conditions:*

(1) *Neither individual is subject to control and direction by the other, in connection with the performance of the work, both under the contract for the performance of the work and in fact.*

[“Work in fact” likely means while the work is actually being done.]

(2) *Each individual has the ability to negotiate their rate of pay with the other individual.*

(3) The written contract between both individuals specifies **the total payment for services** provided by both individuals at the single-engagement event, and the specific rate paid to each individual. **[Likely means flat fee.]**

(4) Each individual maintains their own business location, which may include the individual's personal residence.

(5) Each individual provides their own tools, vehicles, and equipment to perform the services under the contract.

(6) If the work is performed in a jurisdiction that requires an individual to have a business license or business tax registration, then each individual has the required business license or business tax registration.

(7) Each individual is customarily engaged in the same or similar type of work performed under the contract or each individual separately holds themselves out to other potential customers as available to perform the same type of work.

(8) Each individual can contract with other businesses to provide the same or similar services and maintain their own clientele without restrictions.

(b) "Single-engagement event" means a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week. [One day depo or court appearance could qualify!]

3) REFERRAL AGENCY EXEMPTION LIKELY INAPPLICABLE!

Labor Code section 2777:

Section 2775 and the holding in *Dynamex* do not apply to the relationship **between a referral agency and a service provider, as defined below**, under the following conditions:

(a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ("service provider") **[the reporter]** provides services **to clients** **[see below!]** through a referral agency **[the firm]**, the determination of whether the service provider is an employee or independent contractor of the referral agency shall be governed by *Borello*, if the referral agency demonstrates that all of the following criteria are satisfied:

(1) The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.

(2) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration in order to provide the services under the contract, the service provider shall certify to the referral agency that they have the required business license or business tax registration. The referral agency shall keep the certifications for a period of at least three years. As used in this paragraph:

(A) “Business license” includes a license, tax certificate, fee, or equivalent payment that is required or collected by a local jurisdiction annually, or on some other fixed cycle, as a condition of providing services in the local jurisdiction.

(B) “Local jurisdiction” means a city, county, or city and county, including charter cities.

(3) If the work for the client requires the service provider to hold a state contractor’s license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor’s license.

(4) If there is an applicable professional licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, the service provider shall certify to the referral agency that they have the appropriate professional licensure, permit, certification, or registration. The referral agency shall keep the certifications for a period of at least three years.

(5) The service provider [reporter] delivers services to the client under the service provider’s name, without being required to deliver the services under the name of the referral agency. [This means a court reporting firm could not require an individual reporter to say, “hi, I am from ABC Agency.” This is consistent with how a true referral agency would work.]

(6) The service provider provides its own tools and supplies to perform the services.

(7) The service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed for the client.

(8) The referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.

(9) The service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client.

(10) Without deduction by the referral agency, **the service provider sets their own rates, negotiates their rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client.** [Most court reporting firms determine what is charged. The clients are the clients of the firm not the individual reporter.]

(11) The service provider is free to accept or reject clients and contracts, without being penalized in any form by the referral agency. This paragraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

(b) For purposes of this section, the following definitions apply:

(1) “Client” means:

(A) A person who utilizes a referral agency to contract for services from a service provider [the contract most likely must be between the client – e.g., law firm – and the individual reporter “service provider”], or

(B) A business [example, a law firm] that utilizes a referral agency to contract for services from a service provider [again, contract contemplated here is apparently between the individual reporter “service provider” and the business, i.e., law firm] that are otherwise not provided on a regular basis by employees at the client’s business location, or to contract for services that are outside of the client’s usual course of business. Notwithstanding subdivision (a), it is the responsibility of a business that utilizes a referral agency to contract for services, to meet the conditions outlined in this subparagraph.

(2) (A) “Referral agency” is a business that provides clients with referrals for service providers to provide services under a contract, with the exception of services in subparagraph (C). [Again, the most likely meaning of “contract” is a contract between an individual reporter and a law firm. That is how referral agencies operate. But, most court reporting firms do not operate as referral agencies, simply matching willing reporters with (for example) lawyers. Most court reporting firms interject themselves between the reporter and the client: the firm not the reporter bills the client, the firm not the reporter establishes when and where the reporter will show up, the firm not the reporter takes possession and delivers the work product, the firm not the reporter is responsible for collecting payment.]

,,, (3) (A) “Referral agency contract” is the agency’s contract with clients and service providers governing the use of its intermediary services described in paragraph (2). The intermediary services provided to the service provider by the referral agency are limited to client referrals and other administrative services ancillary to the service provider’s business operation. [Court reporting firms traditionally do not operate as intermediaries.]

(B) A referral agency’s contract may include a fee or fees to be paid by the client for utilizing the referral agency. [Law firms do not pay for a referral. They pay for a product.] This fee shall not be deducted from the rate set or negotiated by the service provider as set forth in paragraph (10) of subdivision (a).

(4) “Service provider” means an individual acting as a sole proprietor or business entity that agrees to the referral agency’s contract and uses the referral agency to connect with clients....

FOR THESE MANY REASONS THE REFERRAL AGENCY EXEMPTION IS LIKELY UNAVAILABLE TO COURT REPORTING FIRMS AND COURT REPORTERS.

California Wage and Hour Laws

Workers who must be classified as employees under the ABC test are covered by wage orders issued by the California Department of Industrial Relations, Industrial Welfare Commission. The most common wage order involves the California minimum wage. As of 2019, the minimum hourly wage in California for businesses with more than 25 employees is \$12.00. For businesses with 25 or fewer employees it is \$11.00 per hour. Further rate increases are scheduled annually through 2022. Some California cities have higher minimum wages.

Other wage orders require employers to:

- provide a minimum amount of annual paid sick leave
- pay employees time-and-a-half for overtime over eight hours per day or 40 hours per week (but administrative, executive, or professional employees are exempt)
- reimburse employees for out-of-pocket expenses necessarily incurred on the job, such as driving expenses
- provide meal and rest breaks
- pay employees for unused vacation time when employment ends, and
- comply with California paycheck rules. ...

California Unemployment Insurance

As employees, the workers must be provided with California unemployment insurance. Their employers must register with the California Employment Development Department and pay unemployment insurance premiums. ... [BUT SEE BELOW!]

California Workers' Compensation Insurance

California law requires all employers with at least one employee to have workers' compensation insurance. Such insurance can be obtained from private carriers or the State Compensation Insurance Fund. ...

California Paid Family Leave

California Paid Family Leave provides up to six weeks of partial pay to employees who take time off from work to care for a seriously ill family member or to bond with a new child entering the family through birth, adoption, or foster care placement. ...

California Short-Term Disability Benefits

California requires all employees to pay into its short-term disability insurance (SDI) program through payroll deductions. Employers make no contributions, but must make payroll deductions and send the money to California's Employment Development Department (EDD)''³

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,**

³ <https://www.nolo.com/legal-encyclopedia/california-gig-worker-law-AB-5.html>

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.]

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 for **single engagements**, 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 As A Referral Agency, 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.

Option 4: Memorialize That The Reporter Is Acting As A Sole Proprietor Or Formally Incorporated And Has Business Licenses To Permit B2B To Apply.

CONTRACTOR warrants and promises to FIRM that CONTRACTOR is a business entity **acting or** 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.⁴

Option 5: Memorialize If True That Work Is “Single Engagement” Work

“CONTRACTOR acknowledges to FIRM that this contract is for a stand-alone non-recurring event in a single location ...”

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?

⁴ You will want to consult with an attorney on all of what is covered here but especially regarding these options as they are somewhat incompatible.

- 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 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/AB 5 EDD CASE.