

## CHECKLISTS: KEY AB-5 INDEPENDENT CONTRACTOR EXCEPTIONS

### **Business-to-Business Contracting Relationship:**

Pursuant to California Labor Code § 2750.3 (e), a bona fide business-to-business contracting relationship is exempt from the *Dynamex* test and (*Borello* applies), so long as the relationship meets the following conditions:

- ☐ Business 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.
- ☐ Business is providing services directly to the contracting business rather than to customers of the contracting business.
- ☐ The contract with Business is in writing.
- ☐ If the work is performed in a jurisdiction that requires the Business to have a business license or business tax registration, Business has the required business license or business tax registration.
- ☐ Business maintains a business location that is separate from the business or work location of the contracting business.
- ☐ Business is customarily engaged in an independently established business of the same nature as that involved in the work performed.
- ☐ Business actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.
- ☐ Business advertises and holds itself out to the public as available to provide the same or similar services.
- ☐ Business provides its own tools, vehicles, and equipment to perform the services.
- ☐ Business can negotiate its own rates.
- ☐ Consistent with the nature of the work, Business can set its own hours and location of work.
- ☐ Business 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.

## **Contract for Professional Services**

Pursuant to California Labor Code § 2750.3 (c)(2)(B)(v), a "professional service provider" is exempt from the Dynamex test (and *Borello* applies), so long as the individual meets the following conditions:

- ☐ Consultant maintains a business location, which may include the individual's residence, that is separate from the hiring entity (although Consultant may choose to perform services at the hiring entity's place of business).
- ☐ If work is performed after January 1, 2020, Consultant has a business license, in addition to any required professional licenses or permits for Consultant to practice in his/her/its profession.
- ☐ Consultant has the ability to set or negotiate his/her/its own rates for the services performed.
- ☐ Outside of project completion dates and reasonable business hours, Consultant has the ability to set Consultant's own hours.
- ☐ Consultant is customarily engaged in the same type of work performed under contract with another hiring entity or holds itself out to other potential customers as available to perform the same type of work.
- ☐ Consultant customarily and regularly exercises discretion and independent judgment in the performance of the services.

### **"Professional Services" means services that meet any of the following:**

1. Marketing (with conditions)
2. Human Resources Administrator (with conditions)
3. Travel agent services (with conditions)
4. Graphic design.
5. Grant writer.
6. Fine artist.
7. An enrolled agent licensed to practice before the Internal Revenue Service
8. Payment processing agent through an independent sales organization.
9. Services provided by a still photographer or photojournalist who does not license more than 35 submissions per year (with additional exclusions and conditions).
10. Services provided by a freelance writer, editor, or newspaper cartoonist who does not license more than 35 submissions per year (with additional exclusions and conditions).
11. Services provided by a licensed esthetician, electrologist, manicurist (2-years only), barber, or cosmetologist provided that the individual meets certain conditions.

## **Borello Balancing Test**

- ☐ Is the person performing services engaged in an occupation or business distinct from that of the hiring entity?
- ☐ Is the work part of the regular business of the hiring entity?
- ☐ Does the hiring entity or worker supply the instrumentalities, tools, and the place for the person to do the work?
- ☐ Is the worker required to make his/her own investment in the equipment/materials required to perform the work?
- ☐ How much skill is required to perform the work?
- ☐ In the industry is the work usually done under the direction of the hiring entity or by a specialist without supervision?
- ☐ The worker's opportunity for profit or loss depending on his/her managerial skill (e.g. if the task is project based, a more efficient worker can make more of a profit).
- ☐ The length of time for which the services are to be performed
- ☐ The degree of permanence of the working relationship
- ☐ The method of payment, whether by time or by the job.
- ☐ Whether or not the parties believe they're creating an employer-employee relationship.