



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

Presented by: Eleanor M. Welke

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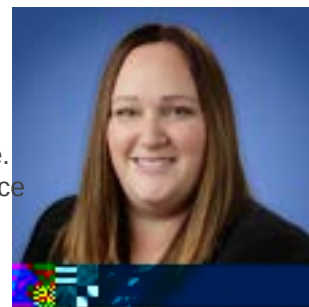
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Presenter

Eleanor M. Welke

AT LOZANO SMITH

Eleanor M. Welke is a Partner in Lozano Smith's Los Angeles office. She is a member of the Labor and Employment and Student Practice Groups. Ms. Welke provides legal advice to administration on personnel matters, including discrimination, retaliation, sexual harassment, disability accommodations, and the Americans with Disabilities Act. Ms. Welke has extensive experience representing clients in both California State and Federal Courts and in front of administrative bodies, including the Equal Employment Opportunity Commission, Department of Fair Employment and Housing, and the California Labor Commissioner.



CONNECT

ewelke@lozanosmith.com
213.929.1066

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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:**
-

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

- ¾ The Term independent contractor had no rigid definition under California Law
- ¾ 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



- f Rejected Dynamex's argument
- f Noted that a worker is an employee if he or she is "employed by an employer"
- f 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 entity's 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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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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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 si1.3 (pa1Se a18.48)4nooidoesi1.3 (1.8 (e)7yo)2 (t)1.7 (

C. Independently Established Business

- A worker is an employee when the hiring entity as 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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Best Practices Cont.



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



- f* Bargaining power
- f* Bias
- f* Substantive knowledge & competence

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Contract Procurement Generally



What am I buying? What do I need?

- f* Goods
- f* Services
- f* Maintenance

What's the difference?

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Goods and Services

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

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

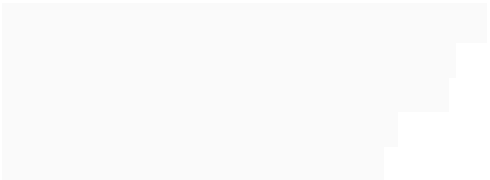
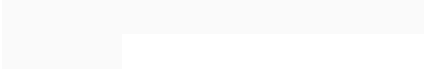


“This Agreement shall automatically renew on an annual basis unless a party provides thirty days notice to the other party prior to the end of the Term.”

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Examples of Term Provisions

A. Term: This Agreement shall begin on October 12, 2023 and shall terminate



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?
 -
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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?
 -
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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



Alternative Dispute Resolution Provisions

Options:

- f* Informal discussion?
 - f* Mediation?
 - f* Non-binding arbitration?
 - f*
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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."

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

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

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Take Aways

- f Remember the ABC's of analyzing whether someone is an independent contractor in the first place.
 - f 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.
 - f Remember to include the essential terms of an independent contractor agreement.
 - f But don't forget that individual words matter and
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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 worre(i)3.005 (n)9.60-2.701 (9u)1.194 ()-238.8097 (ih)8.701 (o)-61-5 9uW3-1.4069.005 (

Due to lingering questions in the education community, we are sending this Client News Brief as a reminder concerning new fingerprinting and criminal

