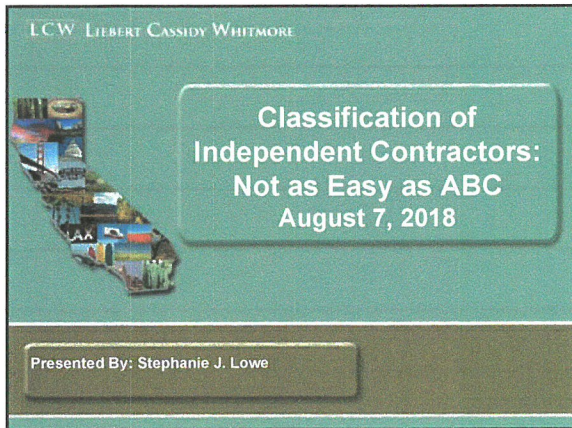
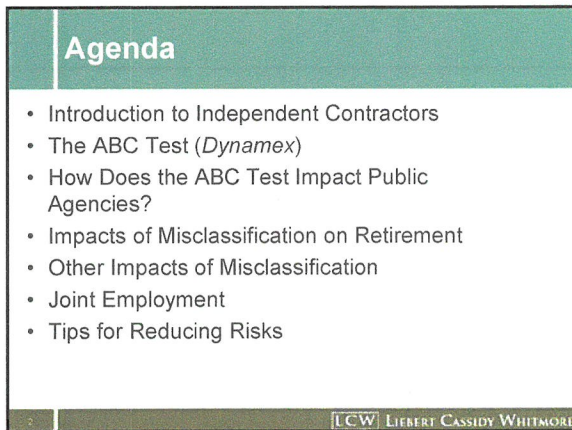


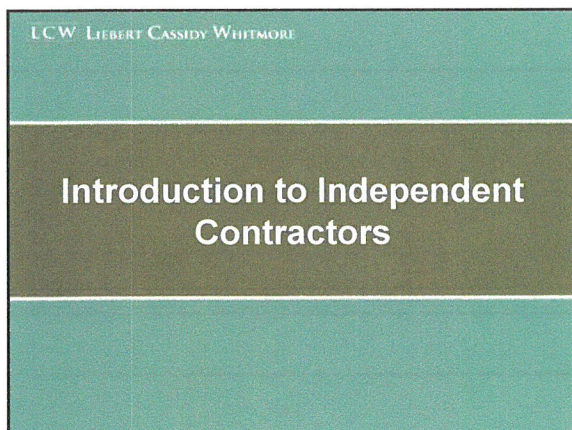
Classification of Independent Contractors: Not As Easy As ABC

Liebert Cassidy Whitmore | August 7, 2018

Presented by: Stephanie J. Lowe







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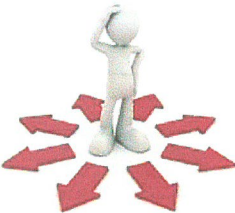
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Reasons for Hiring Independent Contractors

- Specialized expertise.
- Fewer rights than employees.
- Flexibility in hiring and separation.
- Cost effective:
 - No medical benefits, unemployment insurance, or workers' comp.
 - No need to provide training, work space, equipment, or paid leave.

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Who is an Independent Contractor?



There are no easy answers!

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Who is an Independent Contractor?

- There are multiple definitions and tests:
 - Depends on the particular area of law to be applied.
 - Certain laws have their own definitions.
 - Other laws rely on the common law definition.
 - Worker may be an independent contractor under one law, but an employee under another.

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The History of Independent Contractors

- Arose in the tort context
 - Should hirer be held vicariously liable for an injury caused by worker's actions?
- Child Labor
 - Who is liable for a minor's industrial injuries when:
 - Minor's father hired minor to oil machinery in a factory?
 - Coal miners paid minor to carry their water?

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Common Law I.C. Tests *Before Dynamex*

- **S.G. Borello & Sons** (1989) decision regarding whether farmworkers were employees for workers' compensation purposes.
- **Borello Multifactor Test:**
 1. "Right to control"
 2. Plus secondary factors
- Arrangement between worker and hirer must be examined within the context of the statute at issue.

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Common Law I.C. Tests *Before Dynamex*

- **Borello Multifactor Test's Secondary Factors:**
 - Whether worker is engaged in a distinct occupation;
 - Whether work is usually done under agency's direction;
 - The skill required;
 - Whether principal or worker supplies instrumentalities, tools, and place of work;
 - Length of time for services;
 - Method of payment - whether by time or by job;
 - Whether work is part of agency's regular business; and
 - Belief of creating an employer-employee relationship.

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Common Law I.C. Tests Before Dynamex

- **Martinez** (2010) decision regarding whether strawberry growers were employees for minimum wage and overtime pay purposes under the Wage Orders.
- **Martinez Test:**
 1. Exercise control over wages, hours or other working conditions; *or*
 2. Suffer or permit to work; *or*
 3. Engage, thereby creating a common law employment relationship (using **Borello** Multifactor Test).

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The ABC Test
Dynamex Operations West v. Sup. Ct.

Dynamex Operations West v. Sup. Ct. (2018)

- **Facts:**
 - California Supreme Court case.
 - Dynamex is a same-day delivery service.
 - Pre-2004, Dynamex classified drivers as employees.
 - In 2004, Dynamex converted drivers to independent contractors for economic savings.
 - Plaintiff Charles Lee worked for Dynamex for 15 days
 - Sued Dynamex on behalf of himself and similarly situated drivers.
 - Alleged improper classification as independent contractors in violation of Labor Code and wage orders.

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Dynamex Operations West v. Sup. Ct. (2018)

- **Dynamex:**
 - Obtained customers
 - Set delivery rates
 - Assigned deliveries to drivers
- **Drivers:**
 - Provided their own vehicles and paid transportation expenses
 - Set own schedules
 - Chose route for deliveries
 - Permitted to hire other persons to make deliveries
 - Could make deliveries for other companies or own company
 - Expected to wear Dynamex shirts and badges
 - Sometimes required to attach Dynamex decals to vehicle

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Dynamex Operations West v. Sup. Ct. (2018)

- Case interprets “suffer or permit to work” standard for CA Wage Orders.
 - Note: Wage Orders do not generally apply to public agencies; some provisions apply.
- Presumption that all workers are employees, ***unless the employer can prove all 3 parts of the ABC Test.***
 - ***Employer has the burden of proof***

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The ABC Test

- **The ABC Test:**
 - A. Worker is free from the control and direction of agency in connection with performance of work; ***and***
 - B. Work performed is outside the usual course of the agency’s business; ***and***
 - C. Worker is customarily engaged in an independently established trade.



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Part A – Degree of Control

- Is the worker free from the control and direction of the agency in the performance of work?
 - Both contractually *and actually*.
- Typically agency tells independent contractor *what* work to perform, and independent contractor decides *how* to perform work.
- Does agency exercise same type and degree of control over worker as its employees?

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Case Study

The City of Kingswood hires a "seasonal" independent contractor to direct the City's summer production. The City and Director enter into a contract that states the Director has full creative freedom, can choose the dates of the play, and cast the actors. A month into rehearsals, the City tells the Director to cut a specific scene, to have at least two matinee performances, and to provide daily reports to the Community Services Department about the progress of the play. The City also says there can be no more than 10 hours of rehearsal per week.

How much control does the director have over the performance of the work?

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Part B – Work Outside Usual Course of Business

- Does the worker perform work that is outside the agency's usual course of business?
- Individuals are employees if they are reasonably viewed as providing services to the business in a role comparable to that of employees.

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Examples

- **Within or outside the usual course of business?**
 - County hires social worker to handle overflow of elder abuse cases?
 - Fire Protection District hires plumber?
 - Art instructor who taught art classes at a City-owned museum, where the museum offered art classes on a regular basis?
 - County uses a worker for specialized historical restoration work that requires specialized equipment the county does not have?

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Part C – Worker Has Own Business

- Is the worker customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the agency?
 - Does worker have multiple clients?
 - Incorporated as a business?
 - Markets to other entities?
 - Own office? Business cards?
 - Uses own tools and equipment?

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When Does Dynamex Decision Take Effect?

- Decision became effective April 30, 2018.
- No further appeals.
- Does decision have retroactive effect?
 - 3 or 4 year statute of limitations for most wage claims.
 - Employers have asked court to clarify.

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How Does the ABC Test Impact Public Agencies?

The ABC is Guidance for Public Agencies

Dynamex is limited to an analysis of CA Wage Orders, which do not generally apply to public agencies.


BUT...

Dynamex provides broad protection and an easier standard to establish employee status which could impact public agencies.

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The ABC is Guidance for Public Agencies

- *Dynamex* provides guidance for applying the independent contractor test to public agencies.
 - The ABC Test sets a new common law definition.
 - May be used as the primary standard by future courts.
- Everyone is going to take a closer look at independent contractors.



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The ABC is Guidance for Public Agencies

- The effects of *Dynamex* may eventually reach public agencies through legal challenges in state or federal court or before an administrative tribunal.
 - WCAB or CalPERS
- Misclassifying a worker creates high risk for public agencies.
 - Best protection is to use the most stringent standards to determine classification.

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Positions Potentially Impacted

• Building Inspectors	• I.T. Staff
• Permit Technicians	• Custodians
• Plan Checkers	• Electricians
• Engineers	• Mechanics
• Parks and Recreation Instructors	• Attorneys
• Crossing Guards	• Administrative Support Staff
• Lifeguards	• Temps
• Election Poll Workers	• Consultants

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Impacts of Misclassification on Retirement

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Retirement Impacts

- The greatest *Dynamex* impact is potentially on retirement:
 - May breath new life into *Cargill* case, which applies to public agencies.

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Retirement Impacts

- ***Metropolitan Water District v. Superior Court (Cargill)*** (2004) decision holding that the common law definition of “employee” applies for CalPERS membership purposes.
 - In 2004, *Borello* Multifactor Test was the common law definition.
 - Now, the ABC Test is the common law definition.
 - Courts may start applying the easier ABC Test.

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Retirement Impacts

- **Risk #1:** Misclassifying CalPERS retirees as independent contractors.
 - Retiree meets common law definition of employee (and is not a true independent contractor).
 - Without reinstatement of employment.
 - Not enrolled in CalPERS.
 - Not complying with post-retirement work restrictions.

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Retirement Impacts

- **CalPERS Public Agency & Schools Reference Guide:**
 - True independent contractors are subject to post-retirement restrictions
- **Circular Letter No. 200-002-14:**
 - True independent contractors are **not** subject to post-retirement restrictions
- **CalPERS Website:**
 - Independent contractors are subject to post-retirement restrictions **if** it's a common law employer-employee relationship

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Independent Contractor Impacts

- **Risk #2: Misclassifying any worker (not just retirees) as an independent contractor:**
 - Worker meets common law definition of employee.
 - Not enrolled in CalPERS when eligible.
 - Penalties: Both member and agency must pay contributions and an administrative fee to CalPERS.

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Independent Contractor Impacts

- Agencies should err on the side of caution and apply the ABC Test.
- **Monitoring:**
 - CalPERS periodically audits agencies.
 - Workers' complaints to CalPERS.
- **Enforcement:**
 - Penalties for employment without reinstatement for both the agency and CalPERS retiree.

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Independent Contractor Impacts

Due to budget cuts, the County lays off six physicians. The County allows the physicians to continue their services on a contractual basis as "independent contractors." The contracts are renewed annually for 8 years. The physicians use the same exam rooms, supplies, and equipment as when they were employees. One physician files a request for service credit with CalPERS.

Is the physician an independent contractor for retirement purposes?

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Other Impacts of Misclassification

Impacts of Misclassification

- **Fair Labor Standards Act**
 - Employees are subject to the FLSA's requirements.
 - Must meet federal minimum wage requirements.
 - Employees must be paid overtime for working more than 40 hours in a work week.
 - Different FLSA overtime threshold for public safety under Section 207(k) exemption.

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FLSA

- **FLSA Definitions:**
 - “**Employ**” – includes to suffer or permit to work.
 - “**Employer**” – any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency.
 - “**Employee**” – any individual employed by an employer.
 - No definition of “**independent contractor.**”

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FLSA

- Independent contractors are not subject to FLSA’s requirements:
 - Minimum wage.
 - Overtime Pay.
- No single FLSA independent contractor test.
 - Courts and the DOL have used different tests.
 - July 2018 - DOL indicated use of the “right to **control**” multifactor test (DOL Field Assistant Bulletin 2018-4).

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Case Study

The County of Applewood sets up a contract with the City of Birchville’s Housing Authority for deputies to perform off-duty services as security guards. The Housing Authority has very little supervision over the deputies, allows them to travel between facilities at their discretion, and allows them to determine their work hours. The deputies believe their hours worked for the County and Housing Authority should be combined for purposes of calculating FLSA overtime hours.

Are the deputies employees of the Housing Authority for FLSA purposes?

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Impacts of Misclassification

- **Workers' Compensation Benefits**
 - Employers must provide workers' compensation benefits to employees (Lab. Code, § 3700).
 - "Independent contractor" – any person who renders service for a specified result, where hirer **controls** only the result and not the means of the work (Lab. Code, § 3353).

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Impacts of Misclassification

- **Health Benefit Coverage/Affordable Care Act**
 - ACA requires applicable large employers to offer minimum essential health coverage to "substantially all" full-time employees and their dependents.
 - ACA uses common law definition of "employee."
 - No definition of "independent contractor."
 - Potential penalties for non-compliance.

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Impacts of Misclassification

- **Unemployment Insurance**
 - Employers are required to pay UI for employees through tax contributions.
 - Short-term and part-time employees may file for UI.
 - "Employee" – uses common law definition.
 - "Independent Contractor" – rebuttable presumption that services provided by an individual engaged in work requiring special knowledge and skills.

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Impacts of Misclassification

- **Other Employee Rights**
 - Anti-Discrimination and Anti-Harassment Protections:
 - Title VII of Civil Rights Act of 1964.
 - Exception: Contractors are also entitled to protections under Fair Employment and Housing Act.
 - Right to Family and Medical Leave:
 - Family and Medical Lave Act.
 - California Family Rights Act.
 - Pregnancy Disability Leave Act.

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Labor Code Section 226.8

- Unlawful for any employer to willfully misclassify an individual as an independent contractor.
 - Penalty for each violation and higher penalty for engaging in pattern or practice of violations.
- However, Section 226.8 may not apply to public agencies.

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Joint Employment

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Joint Employers

- Joint employers are responsible, both individually and jointly, for compliance with wage and hour laws.
 - May include employment through one entity in service to another entity.
 - May include temp agencies or staffing agencies.

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Are Two Entities Joint Employers?

- Is employment by one entity not completely disassociated from employment by another entity? (29 C.F.R. § 791.2(a).)
 - Focuses on the relationship **between the entities**.
 - Whether worker is an independent contractor of one or more of the entities.
- Courts apply numerous multifactor joint employment tests.

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Joint Employment Factors

- Entities jointly direct, control, or supervise.
- Entities jointly hire or fire.
- Degree of permanency and duration of the relationship between the two entities.
- Whether one entity controls or is under common control of the other entity.
- Whether work location is controlled by one or more entity.
- Whether entities are jointly responsible for payroll, WC, taxes, providing facilities, tools, or materials.

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Is Staff Agency Worker an Employee of the Public Agency?

- The ABC Test does **not** apply to joint employment
 - *Curry v. Equilon Enterprises, LLC* (2018).
 - The ABC Test is uniquely relevant to alleged misclassifications of independent contractors.

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Staffing Agencies

- Using a staffing agency to hire temporary workers:
 - Inherent risk that workers are employees if public entity controls how they perform work.
 - Public entity and staffing agency may be joint employers.

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Vendor Contracting: Best Practices

- Goal: Avoid becoming joint employer.
 - Require workers providing service to be employees of vendor.
 - Indemnification by vendor for independent contractor misclassification.
- Statement that vendor's services are not part of agency's usual business operations.
- Do not provide direction or control to vendor's workers.
- Be very careful with use of staffing agencies.

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Case Study

Matt works for a community college district. He came to the district through a temp agency that has provided administrative staff for the past 7 years. The CCD pays the temp agency a monthly fee for Matt's services. The temp agency chose Matt for the assignments and it pays him. The CCD assigns Matt to an office and a district office manager supervises him. The temp agency asks the CCD to provide feedback on Matt's performance and can remove or reassign him at any time.

Are the CCD and the temp agency joint employers?

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Tips for Reducing Risk

What Steps Should We Take?

- Determining who is properly classified as an independent contractor can be daunting.
 - So many different tests.
 - Identify the potential laws at issue.
 - Contact legal counsel for an analysis.
 - Contact CalPERS for a determination for retirement purposes.

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What Steps Should We Take?

- Review classifications now.
 - Review for compliance under both the ABC Test and *Borello's* multifactor test.
 - If independent contractor will perform same work as employees, likely an employee.
 - Do not allow worker to supervise employees.
- Provide training to employees who hire contractors or use workers from temp agencies.

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What Steps Should We Take?

- Review vendor and contractor agreements.
 - Review what contractors do in reality; not just in contract.
 - Revise worker responsibilities.
 - Track and limit length of service.
 - Do not issue property or equipment to worker.
 - Consider payment structure.
 - Workers cannot waive right to CalPERS benefits through a contract.

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Common Pitfalls to Avoid

- Not fully analyzing whether CalPERS retiree can be an independent contractor.
- Relying on a contract that refers to a worker as a contractor.
- Indemnification language does not completely relieve liability.

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Common Pitfalls to Avoid

- 1099 is not enough.
- “Supervising” the independent contractor or treating the IC like an employee.
- Long-term use.
- Performing same work as employees.
- Holding the worker out to the public as an employee.

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How Do We Correct Misclassified Workers?

- Need to begin treating as an employee ASAP.
- Consult with legal counsel on retroactive effect and any penalties.
- Careful and sensitive messaging:
 - To affected worker.
 - To other employees.
- Cannot retaliate against worker for asserting rights.

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Questions?

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Thank You

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