

Contracts for Professional Services – ABC Test Exception

Effective January 1, 2020, section 621(b) of the [California Unemployment Insurance Code \(CUIC\)](http://leginfo.ca.gov/faces/codes.xhtml) (leginfo.ca.gov/faces/codes.xhtml) was amended to apply a new standard for classifying individuals as employees. Under the new standard (commonly referred to as the *ABC* test), an individual providing labor or services for remuneration is presumed to be an employee rather than an independent contractor, unless the hiring entity can demonstrate that all three conditions of the ABC test are satisfied.

The ABC test, as it specifically applies to the State of California has been codified as section 621(b)(1)(2)(3) of the CUIC, replacing the *common law standard* previously applied by the Employment Development Department. While the ABC test is the applicable test for most workers, sections 2776 through 2784 of the [Labor Code \(LC\)](http://leginfo.ca.gov/faces/codes.xhtml) (leginfo.ca.gov/faces/codes.xhtml), establish exceptions to the ABC test and instead require the application of the *S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341 (Borello)* test under certain exceptions.

In the context of a contract for professional services, section 2778(a) of the LC sets forth the criteria that must be satisfied in order to apply the *Borello* test instead of the ABC test. For information on the ABC test, *Borello* test, and other ABC test exceptions, please refer to [Information Sheet: Employment \(DE 231\) \(PDF\)](http://edd.ca.gov/pdf_pub_ctr/de231.pdf) (edd.ca.gov/pdf_pub_ctr/de231.pdf).

Requirements for the ABC Test Exception

Pursuant to section 2778(a) of the LC, a determination of whether an individual who provides services under a contract for *professional services* is an employee shall be determined by the *Borello* test if **all** of the following requirements are satisfied:

- The individual is performing one of the specific professional services identified in section 2778(b)(2) of the LC.
- The services performed meets industry-specific requirements, if any are stated.
- The six specific factors in section 2778(a) of the LC are **all** met.

If any requirement is not satisfied, the ABC test will be used to determine whether the individual is an employee or independent contractor.

Professional Services Included

The individual must be performing professional services in one of the following occupations:

- Marketing
- Administrator of human resources
- Travel agent
- Graphic designer*
- Grant writer*
- Fine artist
- Enrolled agent
- Payment processing agent
- Still photographer, photojournalist, videographer, photo editor
- Freelance writer, translator, editor, copy editor, illustrator, or newspaper cartoonist
- Content contributor, advisor, producer, narrator, cartographer
- Licensed: esthetician, electrologist, manicurist, barber, or cosmetologist
- Specialized performer
- Appraiser
- Registered professional foresters

If the professional services being performed are not on this list, then the exception does not apply.

*Graphic designer and grant writer do not have additional industry-specific requirements.

Industry-Specific Requirements

The industry-specific requirements for each type of professional service, not including graphic design and grant writer, are as follows:

Marketing: The contracted work is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the individual or work that is an essential part of or necessarily incident to any of the contracted work.

Administrator of human resources: The contracted work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

Travel agent: Travel agent services must be provided by either of the following:

- (i) A person regulated by the Attorney General under Article 2.6 (commencing with section

17550) of Chapter 1 of Part 3 of Division 7 of the [Business and Professions Code](#) ([leginfo.legislature.ca.gov/faces/codes.xhtml](http://leginfo.ca.gov/faces/codes.xhtml)), or

- (ii) An individual who is a seller of travel within the meaning of subdivision (a) of section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (g) of section 17550.20 of the Business and Professions Code.

Fine artist: An individual who creates works of art to be appreciated primarily or solely for their imaginative, aesthetic, or intellectual content, including drawings, paintings, sculptures, mosaics, works of calligraphy, works of graphic art, crafts, or mixed media.

Enrolled agent: The agent is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service pursuant to Part 10 of Subtitle A of Title 31 of the [Code of Federal Regulations](#) (govinfo.gov/app/collection/cfr).

Payment processing agent: The agent is providing services through an independent sales organization.

Still photographer, photojournalist, videographer, or photo editor:

- (i) Services provided by a still photographer, photojournalist, videographer, or photo editor who:
- Works under a written contract that specifies the rate of pay and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity;
 - The individual does not primarily perform the work at the hiring entity's business location, notwithstanding factor one of the Six Specific Factors; and
 - The individual is not restricted from working for more than one hiring entity.

This exception is not applicable to an individual performing these services who works on motion pictures, which includes, but is not limited to, theatrical or commercial productions, broadcast news, television, and music videos.

Nothing in this section restricts a still photographer, photojournalist, photo editor, or videographer from distributing, licensing, or selling their work product to another business, except as prohibited under copyright laws or workplace collective bargaining agreements.

- (ii) Services provided by a still photographer, photojournalist, videographer, or photo editor to a digital content aggregator.

- (iii) **Definitions:** The following definitions apply to (i) and (ii) above:

- **Photo editor:** An individual who performs services ancillary to the creation of digital content, such as retouching, editing, and key wording.
- **Digital content aggregator:** A licensing intermediary that obtains a license or assignment of copyright from a still photographer, photojournalist, videographer, or photo editor for the purposes of distributing that copyright by way of sublicense or assignment, to the intermediary's third party end users.

Freelance writer, translator, editor, copy editor, illustrator, or newspaper cartoonist:

- Works under a written contract that specifies the rate of pay, intellectual property rights, and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; and
- The individual does not primarily perform the work at the hiring entity's business location, notwithstanding factor one of the Six Specific Factors; and
- The individual is not restricted from working for more than one hiring entity.

Content contributor, advisor, producer, narrator, or cartographer:

- The individual provides services for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work in any format or media, who works under a written contract that specifies the rate of pay, intellectual property rights and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity, and
- The individual does not primarily perform the work at the hiring entity's business location notwithstanding factor one of the Six Specific Factors; and
- The individual is not restricted from working for more than one hiring entity.

Licensed: Esthetician, electrologist, manicurist, barber, or cosmetologist:

All of the following criteria must be met:

- (i) The individual sets their own rates, processes their own payments, and is paid directly by clients.

- (ii) The individual sets their own hours of work and has sole discretion to decide the number of clients and which clients for whom they will provide services.
- (iii) The individual has their own book of business and schedules their own appointments.
- (iv) The individual maintains their own business license for the services offered to clients.
- (v) If the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space.

Licensed manicurists will no longer be subject to this exception starting on January 1, 2025, unless extended by the Legislature.

For additional information in regards to the Barbering and Cosmetology Industry, refer to [Information Sheet: Barbering and Cosmetology Industry \(DE 231C\) \(PDF\)](http://edd.ca.gov/pdf_pub_ctr/de231c.pdf) (edd.ca.gov/pdf_pub_ctr/de231c.pdf).

Specialized performer: Hired by a performing arts company or organization to teach a master class for no more than one week. *Master class* means a specialized course for limited duration that is not regularly offered by the hiring entity and is taught by an expert in a recognized field of artistic endeavor who does not work for the hiring entity to teach on a regular basis.

Appraiser: As defined in Part 3 (commencing with section 11300) of Division 4 of the Business and Professions Code.

Registered professional foresters: Licensed pursuant to Article 3 (commencing with section 750) of Chapter 2.5 of Division 1 of the [Public Resources Code](http://leginfo.ca.gov/faces/codes.xhtml) (leginfo.ca.gov/faces/codes.xhtml).

Six Specific Factors

All six of the following **factors must be met:**

1. The individual maintains a business location, which may include the individual's residence that is separate from the hiring entity. However, the individual may choose to perform services at the location of the hiring entity.
2. If the work is performed more than six months after January 1, 2020, and the work is performed in a jurisdiction that requires the individual to have a business license or business tax registration, the individual has the required business license or

business tax registration in order to provide the services under the contract, in addition to any required professional licenses or permits for the individual to practice in their profession.

3. The individual has the ability to set or negotiate their own rates for services performed.
4. Outside of project completion dates and reasonable business hours, the individual has the ability to set their own hours.
5. The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.
6. The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

For purposes of this exception, an *individual* includes an individual providing services through a sole proprietorship or other business entity.

Additional Information

For further assistance, please contact the Taxpayer Assistance Center at 1-888-745-3886 or visit the nearest Employment Tax Office listed in the [California Employer's Guide \(DE 44\) \(PDF, 2.4 MB\)](http://edd.ca.gov/pdf_pub_ctr/de44.pdf) (edd.ca.gov/pdf_pub_ctr/de44.pdf) and on the [EDD](http://edd.ca.gov) (edd.ca.gov) website. Additional information is also available through the EDD's no-fee [payroll tax seminars](http://seminars.edd.ca.gov/payroll_tax_seminars) (seminars.edd.ca.gov/payroll_tax_seminars).

The EDD is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Requests for services, aids, and/or alternate formats need to be made by calling 1-888-745-3886 (voice) or TTY 1-800-547-9565.

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