

Worker Classification - ABC Test Exceptions



ABC Test - Workers will be classified as employees unless they:

- A) Work free from control and direction of hiring entity, both under contract and in fact
- B) Perform work outside the usual course of the hiring entity's business, and
- C) Customarily engage in independently established trade, occupation, or business of same nature

ABC Test does not apply to... if...

Insurance	• Licensed by Department of Insurance
Medical	
Physician Veterinarian	Podiatrist Psychologist
Surgeon Dentist	• Licensed by the State of CA • Services to or by a health care entity
Subject to Business & Professions Code	
Real estate licensee Repossession agency	• Licensed by State of CA • Free from control and direction of hiring entity
Professionals	
Lawyer Private investigator	Accountant Architect
Engineer	• Licensed by State of CA
Finance	
Investment advisor Agents	Securities broker-dealer Representatives
	• Registered with SEC or FINRA or licensed by State of CA
Professional Services	
Enrolled Agent	licensed by US Dept of Treasury
Marketing	original & creative work depending on invention, imagination, talent
HR Administrator	work is intellectual & varied, so cannot be standardized
Travel agent	regulated by CA Attorney General
Graphic design	
Grant writer	
Fine artist	painter, sculptor, drawer, glass blower of recognized quality, but not work for com'l use by purchaser
Payment processing	through independent sales org
Still photographer	
Photo journalist (NOT individuals who work on motion pictures, TV, internet streaming, live shows, etc. They WILL be employees.)	who does not license content submissions* to the putative employer > 35 times/year.
Freelance writer	who does not license content submissions** to the putative employer > 35 times / year
Editor	
Newspaper cartoonist	
Esthetician	• Sets own rates, processes own payments & paid directly by clients
Electrologist	• Sets own hours & sole discretion to
Manicurist (until 2022)	decide # of clients and who
Barber	• Has own book of business and schedules own appointments
Cosmetologist	• Maintains own business license • Issues Form 1099 to landlord
	<ul style="list-style-type: none"> • Business location separate from hiring entity, which may include individual's residence (but can choose to work at location of hiring entity) • Business license and any other professional licenses required (if work performed > 6 months after 1-1-20) • Ability to set or negotiate own rates • Ability to set own hours (outside of project completion dates and reasonable business hours) • Customarily engaged in same type of work with another hiring entity or holds themselves out to other potential customers as available to perform same type of work • Customarily and regularly exercises discretion and independent judgment in performance of services

* A "submission" is one or more items or forms of content (1) pertaining to a specific event or subject (2) provided for in a contract that defines the scope of work, and (3) accepted by and licensed to the customer and published or posted.
 ** A "submission" is one or more items or forms of content (1) pertaining to a specific event or topic (2) provided for in a contract that defines the scope of work, and (3) accepted by and licensed to the customer and published or posted for sale.
 Items of content produced on a recurring basis related to a general topic shall be considered separate submissions.

ABC Test does not apply to... if...

Business-to-Business Contracting Relationship	
<p>Sole Proprietor Partnership LLC LLP Corporation</p> <p style="text-align: center;">If a specific individual must do the work, they are usually an employee!</p>	<ul style="list-style-type: none"> • Free from control and direction of contracting business • Services direct to contracting business, not customers • Contract in writing • License/tax registration if required where work is done • Maintains business location separate from hiring entity • Customarily engaged in business of the same nature • Actually contracts with other businesses to provide same or similar services and maintains its own clientele without restriction from hiring entity • Advertises and holds itself out to the public as available to provide same or similar services • Provides its own tools and equipment • Can negotiate its own rates • Can set own hours and location of work • Not requiring license from Contractor's State License Bd

Construction Industry	
<p>Subcontractors</p> <p>Construction trucking (until 2022) Hauling/trucking services in const industry using vehicles req com'l driver's lic or GVW rating >26,000#</p> <p style="text-align: center;">Special rules</p> <p>Any entity that utilizes >1 truck will be deemed the employer for all drivers of those trucks Employee providing their own truck must be reimbursed by company for expenses incurred</p>	<ul style="list-style-type: none"> • Subcontract is in writing • Licensed by Cont's State Lic Bd (except certain truckers) • Has business license and tax registration (if required by jurisdiction where domiciled) • Maintains business location separate from hiring entity • Has authority to hire and fire others who assist • Assumes financial responsibility for errors & omissions (insurance, indemnity obligations, bonds, warranties) • Customarily engaged in business of same nature

Direct Sales	
<p>Direct sales person Real estate broker/salesman</p> <p>Mineral broker Cemetery broker/salesman</p> <p>Oil & gas broker Yacht broker/salesman</p>	<ul style="list-style-type: none"> • Primarily in person demonstration and sales • Compensation directly related to sales, not hrs worked • Contract provides worker is not an employee

Commercial Fisherman	
<ul style="list-style-type: none"> • Working on an American vessel 	

Referral Agency	
<p>Tutoring (not public school teacher) Graphic design Web design</p> <p>Event planning Home cleaning Photography</p> <p>Minor home repair Furniture assembly Moving</p> <p>Animal service Picture hanging Errands</p> <p>(inc boarding) Dog walking Pool cleaning</p> <p style="text-align: center;">Dog grooming Yard cleanup</p> <p>This exception does NOT apply to an individual worker, as opposed to a business entity, who performs services for a client through a referral agency.</p> <p style="text-align: center;">If a specific individual is required to do the work, they are generally an employee.</p>	<ul style="list-style-type: none"> • Free from control and direction of referral agency • Business license and tax registration (if required in jurisdiction where work performed) • State contractors license (if required) • Delivers services to client under service provider's name (not referral agency's name) • Provides own tools and supplies • Customarily engaged in independently established business of same nature • Maintains own clientele without restriction from agency & free to seek work elsewhere with competitors • Sets own hours & terms & free to accept or reject clients • Sets own rates without deduction by referral agency • Allowed to accept or reject clients/contracts and not penalized for doing so

Motor Club	
<p>Individual 3rd party Performing services utilizing employees & vehicles of 3rd party</p>	<ul style="list-style-type: none"> • Motor club demonstrates individual 3rd party is separate and independent business from motor club

Newspaper Distributors	
<p>Newspaper distributors under contract with publisher</p> <p>Newspaper carriers working w/ publisher or distributor</p>	

Borello (old law to apply if one of the ABC exceptions above applies)

Primary: Whether the person to whom services is rendered has the right to control the manner and means of accomplishing the result desired

Secondary: Right to discharge at will, engaged in a distinct occupation or business, work performed without supervision, requires skill, length of time, etc.

