

Independent Contractors and CalPERS: How to Prepare, What to Avoid

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City Managers Conference**

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Agenda

- History and Elements of Current Independent Contractor Test applied by CalPERS
- Legislative and Administrative Trends
- *Dynamex*
- AB 5
- Predictions for the Future
- Case Study: The Audit and Appeal Process
- Tips and Preventive Measures

Introduction – Who is Considered an Employee?

- Public Employees Retirement Law (“PERL”) includes a compulsory enrollment requirement for any person “in the employ” of the contracting agency.
- In the landmark case *Metropolitan Water District v. Superior Court (“Cargill”)*, 32 Cal. 4th 491 (2004) the Supreme Court held that the employer was required to enroll in CalPERS “common law employees,” despite these workers being supplied by private companies.
- Since then, employers continue to grapple with the issue of how to properly engage with independent contractors without having to enroll them in CalPERS.

Penalties

- Under California Government Code section 20283, if an employer fails to enroll a member within 90 days (which will always apply in these situations), the employer may be required to pay all employer and employee contributions associated with enrolling the contractor into the system retroactively to the time of initial hire.
- In addition, CalPERS may impose an additional \$500 administrative fee per member.

***Cargill* – Outcome**

- Because neither PERL nor CalPERS define what a “person in the employ” is, *Cargill* held that in the absence of a statutory definition, the common law employment test applies.

The *Tieberg* Test for Common Law Employees

- *Tieberg* involved the issue whether television writers were employees of the producer and, if so, whether the producer was liable for past unemployment insurance contributions.
- *Tieberg* sets forth the test that is currently used by CalPERS.
- The primary and most important factor is *whether the employer retains the right to control the manner and means of accomplishing the work. Tieberg, 2 Cal. 3d 943 at 950.*

The *Tieberg* Test for Common Law Employees

- Secondary factors to consider include:
 - Whether or not the one performing services is engaged in a distinct occupation or business;
 - The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
 - The skill required in the particular occupation;
 - Whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - The length of time for which the services are to be performed;
 - The method of payment, whether by the time or by the job;
 - Whether or not the work is a part of the regular business of the principal; and
 - Whether or not the parties believe they are creating the relationship of employer-employee.

Tieberg – Additional Factors

- *Tieberg* endorses two additional factors that included in the *Restatement of Agency* law:
 - 1) The extent of control which, by the agreement, the employer may exercise over the details of the work; and
 - 2) Whether the principal is or is not in business for him or herself.
- Utilizing these factors, *Tieberg* concluded:
 - The writers were subject to the control and discretion of the producers;
 - The other factors collectively did not tip the scale in favor of the producers; and
 - The writers were appropriately considered common law employees.

Legislative and Administrative Trends

Legislative Trends:

- AB 1250 17/18 session: Would have created a means test that would have virtually eliminated local government contracting (Measure Failed)
- AB 1912 17/18 session: Measures applies apportioned liability for retirement costs associated with local agencies who contract with a JPA for services (Measure Signed).
- AB 5 19/20 session: Codifies judicial precedent by creating a means test to determine an employee versus an independent contractor (Measure Signed).

Note: Given the ambiguity of AB 5's application to public sector entities look for a measure that will "clarify" AB 5's intent or a measure that resembles AB 1250.

Legislative and Administrative Trends Cont.

Administrative Trends:

- Tracy Fuller Precedential Decision (2019): Would have fundamentally changed the manner in which an agency could use a service contractor.
- Increase in employer audits: Since 2014 CalPERS has increased their employer audits and increases substantially. In 2014 there were 15 audits. In 2017 there were 279 and as of November of 2019 CalPERS has conducted 161 employee determination audits or inquires.
- **Note:** There may be an opportunity this year to pro-actively engage with CalPERS to establish clear "rules of the road" for contracting.

The Tracy Fuller Case

- *Tracy C. Fuller and Cambria Community College District*, Case No. 2016-1277; OAH No. 2017050780 (July 15, 2018)
- **Issue:** Should CalPERS make the decision a precedential decision?

Tracy Fuller Facts

- Interim Finance Manager supplied through Regional Government Services (“RGS”).
- Express acknowledgement that this was an independent contractor relationship.
- RGS issued Fuller a phone extension, email address and business cards.

Tracy Fuller Facts

- Fuller used the title “Interim Finance Manager.”
- Board minutes identified Fuller as a CCSD staff member.
- Fuller received assignments from the General Manager.
- Fuller set her own work schedule but was expected to work full time.

Fuller Outcome

- Applying *Tieberg* and *Cargill*, the ALJ concluded that she was a common law employee and subject to compulsory enrollment in CalPERS.

The *Fuller* Controversy

- The arrangement is attractive to public agencies.
- Must critical short-term needs entail the increased costs associated with CalPERS?
- Efforts to dissuade the Board from adopting the decision as precedential.

***Dynamex* – The Emerging “ABC” Test**

- Last year’s California Supreme Court ruling in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) endorsed a streamlined test for resolving common law employment versus independent contractor status.
- In *Dynamex*, a group of drivers brought a class action against their employers asserting they were misclassified as independent contractors instead of employees.
- The California Supreme Court adopted a three-part test that “presumptively considers all workers to be employees and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions.”

***Dynamex* – The Emerging “ABC” Test**

A. The hiring business has no control and direction over the performance of the work, both under the contract and in fact;

B. The work is outside the usual course of the hiring entity’s business; and

C. The worker customarily engages in an independent business of the same nature as the work performed for the hiring process.

- Although Part A of the test largely resembles the preexisting common-law standard for employee classification, Parts B and C constitute a major shift in the law.

AB 5

- Authored by San Diego Assembly Member Lorena Gonzalez.

- AB 5 codifies *Dynamex*.

- September 11, 2019 – AB 5 passed out of Senate on a party line vote, 29 to 11.

- Governor Newsom signed AB 5 into law on September 18, 2019.

- **Important Note:** As of now, CalPERS still utilizes the common law test and does not apply the “ABC” test when making *their* independent contractor determinations.



AB 5 – The Backstory

- A hotly contested piece of legislation.
- A flurry of lobbying efforts to gain exemptions: licensed insurance brokers, physicians, dentists, psychologists, podiatrists, lawyers, architects, engineers, private investigators, and more.
- All local government associations including the League took a “Watch” position.
- Public agencies not specifically exempted, but there are arguments that it does not apply to cities. More to follow . . .

Case Study

In the Matter of the Appeal of Membership Determination of

Mark R. Dana

v.

San Francisco Bay Area Rapid Transit District



Dana / BART Appeal – Facts of the Case

- Mark Dana was hired as an engineer in 1997 by EarthTech, a third-party construction consulting firm.
- EarthTech provided on-call construction management services for BART from mid-1990's to mid/late-2000's.
- Dana was assigned by EarthTech to support BART construction projects from 1997-2008.
- In 2008, Dana left EarthTech and joined BART as a full-time employee.
- In 2014, Dana applied to buy service credit for the 1997-2008 time – years he worked at BART through EarthTech.

The Appeal Process

- CalPERS “Final Determination”
- Agency can file an Appeal (or attempt to settle)
- CalPERS issues a “Statement of Issues”
- Office of Administrative Hearings handles the dispute

OAH Procedure

- Statement of Defenses
- Discovery
 - Public Records Act
 - Limited under the Administrative Procedure Act (Witness List and Documents)
- Hearing
- Proposed Decision

The Proposed Decision and Appeal Opportunity

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Appeal of Membership Determination

of:

MARK R. DANA,

Respondent,

and

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,

Respondent.¹

Agency Case No. 2018-0432

OAH No. 2018120359

ORDER

The appeal by BART in this matter is granted. Respondent Mark R. Dana was not a BART employee between July 1, 1997, and May 26, 2008. BART did not err by failing to enroll Dana in CalPERS before May 27, 2008.

DATE: December 17, 2019

Designated by:

JULIET E. COX

Administrative Law Judge
Office of Administrative Hearings

The Proposed Decision and Appeal Opportunity

- The proposed BART decision is currently subject to appeal.
- The CalPERS Board of Administration will take written arguments into consideration on February 19, 2020.

Observations and Preventive Measures

- Agencies should consider an internal audit, to catalog their independent contractor relationships and to gauge risk.
- Consider making the audit subject to the attorney client privilege, to ensure that it is not subject to later disclosure.
- When being audited by CalPERS, ensure accurate information is provided.
- CalPERS may send out “employment relationship questionnaires” to employees without the agency’s knowledge. Consider adopting a rule requiring that employees coordinate with the city attorney before unilaterally responding to outside agency. This can help ensure that CalPERS receives balanced and accurate information.

Employing Retired Annuities

When utilizing retired CalPERS annuitants, carefully observe the various requirements and limitations in the Government Code. There are two types of employment: (1) “extra help;” and (2) “interim (or acting) vacant position employment.” The limitations include:

- 960 hours per fiscal year maximum
- Compensation cannot be less than the minimum or more than the maximum paid to other employees performing comparable duties, as listed in the employer’s available pay schedule

See <https://www.calpers.ca.gov/docs/forms-publications/employment-after-retirement.pdf>

With Respect to Independent Contractor Relationships:

- Confirm the third-party relationship, and have the worker sign and acknowledge that they are working as an independent contractor, and not as an employee.
- Ensure all identification of the worker is as a contractor. Avoid providing the same email address or other identification that would suggest the worker is an employee.
- Confirm in writing that the local agency has no right to control the manner and means of performing the work at issue.

With Respect to Independent Contractor Relationships:

- Avoid requiring the worker to attend meetings.
- Do not supply dedicated office space. If space is provided, consider using “hotel” office space that is not dedicated to the worker.
- Do not supply the specific “tools” needed to perform the work.
- Consider requiring the contractor to indemnify the local agency for adverse determinations by CalPERS.
- Consider obtaining an advance opinion from CalPERS as to whether the relationship qualifies a bona fide independent contractor relationship.

Questions/ Discussion

Thank You!



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