

California Independent Contractor Law for Appraisers!



Where Are We Going Today?

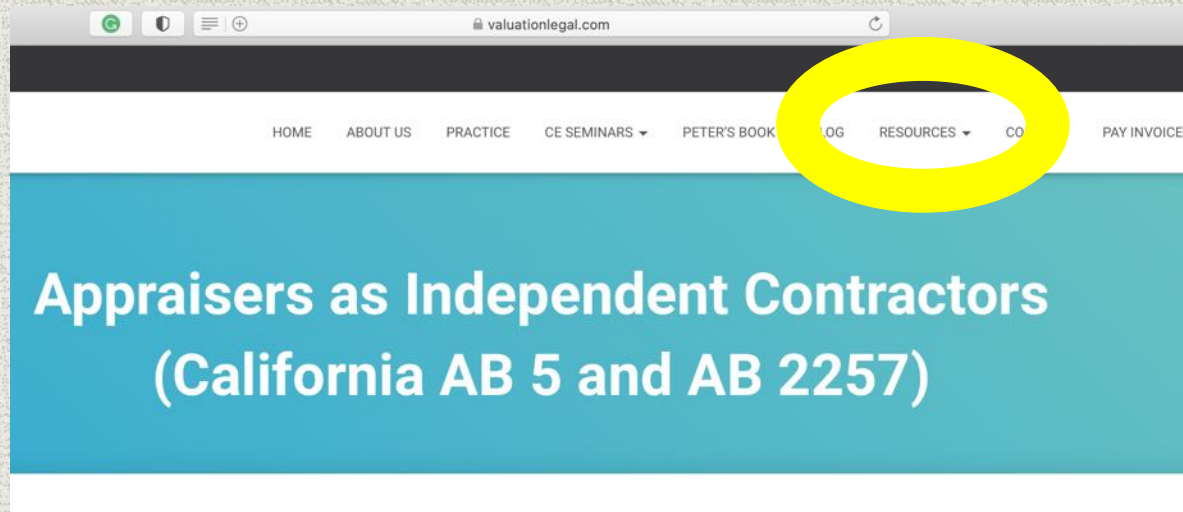


- Start with California legal update.
- Clarify for appraisers and mainly small appraisal firms California independent contractor law as it now exists after AB 2257.
- Talk about what should be in a contract between a firm and its contractor appraisers.
- Talk a tiny bit at the end about things developing at the federal level with the new Congress and Biden administration.
- Likely about 30 minutes.



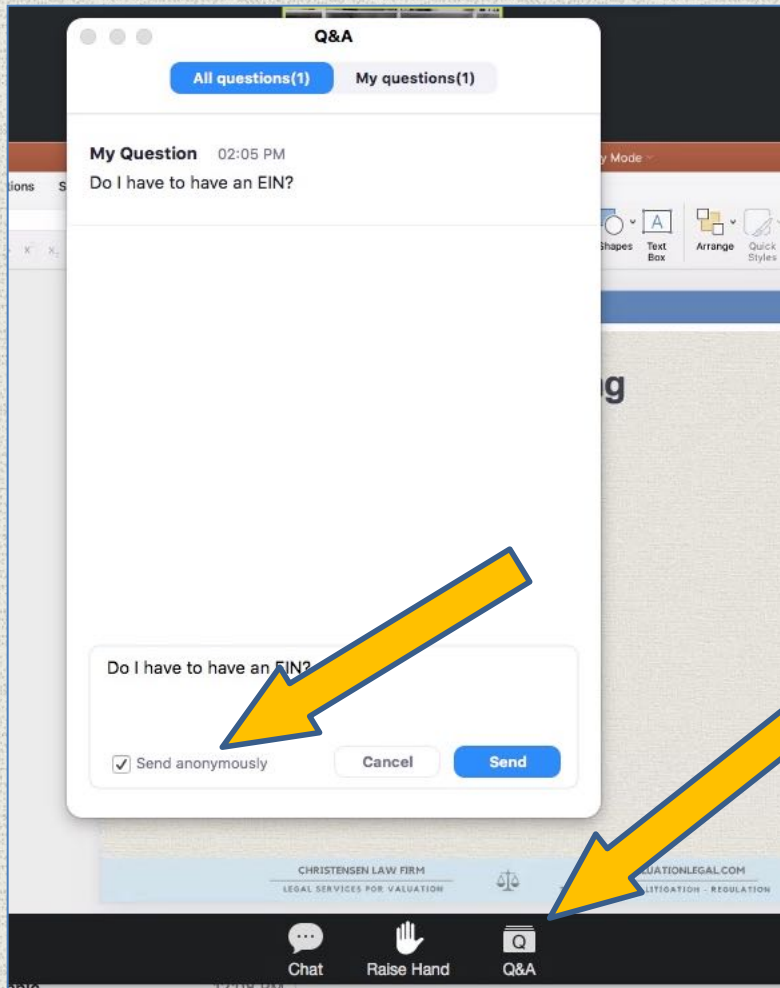
Light Housekeeping

- I will be the only speaker today.
- Don't worry. You can't be seen or heard – you're not on camera. (This is not a Zoom “meeting.”)
- Please use the Q&A button if you have a question.
- The slides and sample contract I am using today are available here on www.valuationlegal.com:



Q&A

- You can enter questions by moving your cursor to the bottom bar and revealing the Q&A button.
- You can make your Q's anonymous.
- I will try answer any Q's as we go.



A Message from Our “Sponsor”

That’s just me. I have no message for you, only gifts.
Consider:

- ❖ My 4-hour 24/7 online CE class “Appraiser Liability 101” – approved in CA, HI, ID, NV, OR, WA and MT.
- ❖ Live virtual 3-hour CE class “Six Recent Appraiser Lawsuits” – approved in CA, ID, NV, OR, WA and MT.
New class dates:
 - Another special date with guest **Jim Martin** will be announced soon – be on the email list if you want know about.
 - Meanwhile, I do have these presentations: **April 16** and **May 18** (benefits for ACOW).

- ❖ Find both here:

<https://www.valuationlegal.com/education/>



California Legal Update

Two new bills in the California Legislature – both responding to recent stories concerning racial bias in residential appraising.

With the most recent story being in the bay area, the situations described are all similar:

- An appraisal is performed for a loan on a home owned by a racial minority household. The appraisal is far lower than expected, and the borrowers believe that racial bias, whether conscious or unconscious, is the reason.
- A second appraisal is obtained from a different appraiser. In at least several situations, before the second appraisal, the household removes any visible indications of racial minority-connection in the house. And, the second appraisal's valuation is significantly higher than the first appraiser's.
- Complaints have been filed in at least three of these recent instances to HUD – which investigates allegations of discrimination and violations of the Fair Housing Act.

This subject is not one that appraisers can brush off.

Fair housing organizations and all federal housing finance regulators are looking at this issue closely.



California Legal Update

So, here are the new California bills:

Appraisers

AB948 has been introduced to amend the Real Estate Appraiser Act. It would require BREAs to collect demographic information about sellers and homeowners who file complaints against appraisers alleging low valuations and then report that information to the legislature by July 2024. It would also require appraisers to take 5 hours of anti-bias CE in every 4-year education cycle as part the current total hour requirements, not in addition.

Agents and Brokers

SB263 would require additional bias training and CE for agents and brokers (not appraisers). For renewals, it would require a new 2-hour implicit bias training class. And, the existing 3-hour fair housing class requirement would have to include instruction that “allows a licensee to experience role-play situations as both a consumer and a professional licensee.”



Now, Let's Discuss the Nature of Independent Contractors

There are key advantages to businesses (such as small appraisal firms or large AMCs) who classify appraisers as independent contractors:

- ICs not paid overtime for more than 8 hours in a day as required in California or 40 hours in a week (as required under both state and federal law).
- No withholding taxes or contributions for federal Social Security and Medicare.
- No unemployment or workers' compensation premiums for contractors (usually).
- ICs are only paid when there is work. "Layoffs" are easy.

Likewise for appraisers, there are also key advantages:

- ✓ Independence – running your own business.
- ✓ Lots of tax deductions not available to employees (including new exclusion of 20% of business income).



Appraisers as Independent Contractors

- There is no single standard for determining whether an appraiser is properly treated as an independent contractor – when working for an AMC or firm, or even a lender.
- Varies by state versus federal, and can vary by purpose (tax, overtime, union organizing, etc.).
- Nevertheless, there is a general theme that runs through most tests – it is the firm’s control over the worker.
- IRS has summarized in its regulations that a worker generally will be considered an employee when:

“the person for whom services are performed [the appraisal firm] has the right to control and direct the individual who performs the services [the appraiser], not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.”



The Old Test Under Borello

- For California employment law purposes, the applicable test under California historically has been a test described in a California Supreme Court case called Borello. It evaluates multiple factors of the relationship between the contractor and firm and gets at the economic realities of the relationship.
- We'll look into the Borello factors shortly.



Then Came the *Dynamex* Decision

- In April 2018, the California Supreme Court adopted a strict version of what is called the “ABC test” for determining whether a worker is an employee or contractor for purposes of California “Wage Orders.” *Dynamex Operations West, Inc. v. Superior Court*.
- As outlined by the Court, the test is actually more straightforward than the multifactor *Borello* test – but it’s a lot harder to pass.



Independent Contractor Status

To meet the burden, an “employer” must establish all three of the following:

(A) that the worker is free from the control and direction of the hiring firm in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

(B) that the worker performs work that is outside the usual course of the firm 's business; and

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.



Exceptions in AB 5

- **AB 5 had a number of specific exceptions – including “real estate licensees.”**
- **But these did not apply to appraisers or appraisal firms or AMC’s (in relation to appraisers).**



Then Came the Giant “Clean Up” Bill AB 2257

- Created a dozen new exceptions for different occupations and professions.
- It creates an exception for appraisers from the ABC test in Dynamex under the “professional services” exception, if the appraisal firm can satisfy a number of requirements.
- Let’s look at those requirements – and match them to wording in a sample appraiser contractor agreement.



Requirements for Exemption – Matched to an Agreement

AB 2257 – Professional Services Exception Requirement	Matching Provision in a Sample Contract
<p>2778. (a) Section 2775 and the holding in Dynamex do not apply to a contract for “professional services” as defined below ... if the hiring entity demonstrates that all of the following factors are satisfied:</p>	<p>The firm needs a <u>contract</u> with the appraiser contractor! Let’s call it: “Appraisal Services Independent Contractor Agreement.”</p>
<p>(1) The individual maintains a business location, which may include the individual’s residence, that is separate from the hiring entity. <i>Nothing in this paragraph prohibits an individual from choosing to perform services at the location of the hiring entity.</i></p>	<p>a. Business and Work Location. Jane maintains and will continue to maintain her own business location, which may include a residence, that is separate from California Appraisal’s business location(s) and will perform the appraisal services contracted under this Agreement at Jane’s own business location or other work locations separate from any business location(s) of California Appraisal.</p>
<p>(2) If work is performed more than six months after the effective date of this section 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.</p>	<p>b. Responsibility for Required Business Licenses or Tax Registrations. If Jane is required by law, regulation or ordinance to have a business license ...in any ... jurisdiction to perform the appraisal services contracted under this Agreement, Jane agrees ... to maintain any such required business licenses ... for the duration of this Agreement.... Jane will provide evidence of such licenses ... to California Appraisal. If a business license ... is not required in an applicable jurisdiction, Jane will provide documentation substantiating that no such license ... is required (such as a printout or link to local business license requirements).</p>



Requirements for Exemption – Matched to an Agreement

AB 2257 – Professional Services Exception Requirement	Matching Provision in a Sample Contract
<p>(3) The individual has the ability to set or negotiate their own rates for the services performed.</p>	<p>c. Negotiation of Appraisal Rates/Fees. Regardless of whether an Appraisal Request may offer an appraisal fee for a specific assignment, Jane is free to negotiate different fees for appraisal services in any Appraisal Request, to inform California Appraisal that an offered fee is not acceptable, and/or to decline any Appraisal Requests.</p>
<p>(4) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.</p>	<p>d. Days and Hours of Work. Jane is free to set the days and hours for performing appraisal services contracted under this Agreement, consistent with the nature of such appraisal services in terms of setting appropriate times for inspection of subject properties and similar activities and consistent with meeting agreed completion dates for Appraisal Requests.</p>
<p>(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.</p>	<p>e. Offering Services to Other Parties. Jane understands and agrees that Jane is free, and expected, to offer professional appraisal services to parties other than California Appraisal and will be available to the public in general to perform such services.</p>
<p>(6) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.</p>	<p>f. Jane Is Free from the Control and Direction of California Appraisal. California Appraisal does not and will not control or direct performance of the appraisal services rendered by Jane. Jane is solely responsible for determining the manner and means in which Jane performs the contracted appraisal services in compliance with USPAP, in accordance with applicable laws, regulations and guidelines, and in satisfaction of industry-standard service level standards implemented by California Appraisal.</p>

California AB 5 – Some Keys for New Contractor Agreements

Has your firm met those 6 basic requirements? **Congrats!**

- That means that the old standard under *Borello*, rather than the ABC test under *Dynamex*, will apply to determining whether your appraiser contractor is properly treated as a contractor, rather than as an employee.
- So, now we have to see if your firm passes the real test.



The *Borello* Test

The Borello test looks first at whether the potential employer has control over the manner and means of accomplishing the work and evaluates a number of additional factors (none of which are themselves determinative, including such things as:

- Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
- Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
- Whether the service provided requires a special skill;
- The worker's opportunity for profit or loss depending on their managerial skill;
- Whether the worker hires their own employees . . .

In real-world practice a lot details come up – business cards, hours, websites, how much work is done for the firm?



The *Borello* Test

- Neither the IRS nor historic Borello tests generally have presented problems for the AMC model of using “panelist” appraisers as contractors, but most appraisal firms do not pass the test (even under the old standard in Borello) when actually put to the test in court or by the EDD.
- AMCs have been audited by the IRS, Franchise Tax Board, and the California Employment Development Department (EDD) and succeeded in showing that appraiser panelists were properly treated as contractors.
- But both appraisal firms and AMCs have lost when treating true “staff” appraisers as independent contractors.



Risks of Misclassifying

- Contractor files for unemployment.
- EDD audit.
- Unhappy former contractor files suit for overtime, unpaid break time, etc. – based on assertion they were really an employee.

- A party claiming damages caused by a contractor appraiser claims the appraiser was your employee.
 - This could be an appraisal negligence claim, or
 - Personal injury claim.

- The risk increases with the size of your independent contractor staff.
- If looking to sell a firm, it can be a real stumbling block for buyers.
- I don't want to overstate the risk – for small firms of just a few appraisers. It is a small risk for small firms.

Employment Development Department
PO Box 989059
West Sacramento, CA 95798-9059



NOTICE OF UNEMPLOYMENT INSURANCE CLAIM FILED

[REDACTED] APPRAISALS
[REDACTED]

Mail Date: [REDACTED]
New Claim: U
Additional Claim: X

ACTION REQUIRED

1. Gather the necessary facts for this claim.
2. Complete the reverse side of this form.
3. Mail this response within 10 calendar days of the above mail date to the address shown above.

Failure to respond within 10 calendar days may result in an increased employment tax rate and employer penalties.

You received this notice because the claimant shown below filed a claim for unemployment insurance benefits and listed you as his/her most recent employer. The claimant provided the following information:

Claimant's Name: [REDACTED] Social Security Number: [REDACTED]
Effective Date of Claim: [REDACTED] Last Date Worked: [REDACTED]
Reason for Separation: [REDACTED]

REPORTING FACTS

The law requires you to submit any facts in your possession which may affect a claimant's eligibility for benefits. These facts will be used in determining the claimant's eligibility for benefits. Provide information to the Employment Development Department (EDD) if this claimant:



Dealing with Real World Risks

- You've chosen to take a bit of risk and treat your "staff" appraisers as contractors, because that's what they and you both want.
- What steps can you take to mitigate your biggest risks?
 - Of course, use a good written agreement! It still covers a lot of your firm's risks.
 - Aside from employment/labor taxes and requirements, your firm's biggest real-world risks are: professional negligence claims and automobile accidents. Solutions:
 - ✓ Require that your contractor appraisers carry their own E&O insurance and proper automobile insurance.
 - ✓ Look for E&O insurance for your firm that includes "independent contractors" to your firm in the definition of insured.
 - ✓ Consider purchasing "non-owned auto liability" insurance.



E&O Comparison

Example policy definition that will insure appraisal firm in relation to claims from the work of independent contractors:

(I) “**Insured**” means only the following:

- (1) The Named **Insured** designated in Item 1 of the Declarations, or by endorsement to this Policy;
- (2) Any person who is, was or hereafter becomes a partner, principal, officer, director, manager, member, or employee of the Named **Insured**, but only while acting on behalf of the Named **Insured**;
- (3) Any independent contractors or temporary personnel who are natural persons, but only while acting under the direct supervision and on behalf of the Named **Insured**;

Example of policy exclusions that result in no coverage for firm in relation to contractor work:

X. **Professional Services** rendered by any person or entity other than the **Named Insured**;

Y. **Professional Services** rendered by the **Named Insured** if such claim was based on or arising out of such **Named Insured's** supervision, subcontracting, assignment or referral of any portion of any contract, project or engagement.



Common Questions

- Do lenders need to pay attention to these requirements if they have appraiser panels?
- Does this apply to firms or AMCs or lenders based outside California who use California appraisers?
- “Can a trainee be an independent contractor to my firm?”
- Can my firm require independent contractors to sign a non-compete?
- Are there any genuine ways around this?



Developing Federal Issues

- At the federal level, some of the lessons learned from California AB 5 experience are being ignored.
- Both Biden and Harris supported AB 5 and its aim to curb the classification of workers as independent contractor.
- Two things have occurred so far:
 1. A bill called the PRO Act – Protecting the Right to Organize – has been re-introduced by Democrats in the House and Senate. It applies the “ABC” test to determining whether a worker is an employee for purposes of union organizing.
 2. The Department of Labor had adopted new rules that were clearer and “contractor-friendly” for determining contractor classification that were set to go in effect on March 8. These rules concern determination for wage and hour requirements (overtime, breaks, etc.). They and all other new rules have been put on hold. The DOL could potentially move toward an ABC test.



Thank You

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