

Is a home tutor an employee or independent contractor?

By Dan Eaton

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In its Dynamex ruling, the state Supreme Court recognized that a worker may be considered an employee under some laws, but not others. (Getty Images)

When the pandemic forced the premature closure of school facilities and the transition to remote instruction this spring, many parents suddenly and involuntarily assumed the role of teacher's aide. With the fall term weeks away, some parents are considering bringing tutors into their home to support their school-aged children as they continue to learn remotely.

Would the parents be the tutor's employer, thereby assuming significant associated duties and expenses, or could a tutor be engaged as an independent contractor? The glib answer is yes.

Webster's defines "tutor" as "a person employed to instruct another, esp. privately." California wage order 15 says a "tutor" may be considered a household employee, along with other staff such as maids.

But may a tutor be treated as an independent contractor instead? Perhaps, but perhaps not, and maybe for some purposes, but not for others. Before proceeding, parents need to learn their ABCs.

Under AB 5, any worker performing compensated service for someone else is presumed to be an employee unless the hirer can meet all three parts of the "ABC" test. Part A requires that the worker be free from the control of the hirer in performing the work. Part B requires that the worker perform work that is "outside the usual course of the hiring entity's business." Part C requires that the worker be "customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."

Parents who relinquish control over the manner in which the tutoring is done would satisfy Part A. But, as suggested by the inclusion of tutors in the list of household occupations in the applicable wage order, a tutor's work may be considered among the household's core functions, Part B.

A parent may be unable to satisfy Part C, particularly if the tutor has no other clients. Merely allowing the tutor to have other clients is insufficient. Nor is Part C satisfied if the tutor has a day job that is not "of the same nature" as tutoring. And limiting the tutor to a handful of hours per week doesn't make the tutor an independent contractor; it may simply make her the parents' part-time employee.

The author of AB 5, San Diego Assemblywoman Lorena Gonzalez, has suggested that AB 5 has nothing to do with hiring a tutor. She said in a statement to NBC 7 that: "AB 5 does not prevent a family from contracting directly with a tutor. However, if a parent or guardian is bringing a childcare provider or governess into their home, then requirements in our state and federal tax codes that govern who is considered a household employee applies. These are long-standing rules that pre-date AB 5 by decades."

Well, yes, a parent may contract directly with a tutor, but that begs the question of whether that tutor must be classified as an employee. Relying on the treatment of other kinds of household staff under state and federal tax law to determine the proper classification of a tutor under the state's wage laws is risky. In its landmark

Dynamex ruling on which AB 5 is based, the California Supreme Court recognized that a worker may be considered an employee under some laws, but not others.

More to the point, while AB 5 does not explicitly extend the ABC test to the treatment of workers under the state's tax code, the California Franchise Tax Board takes the position that "The determination of whether a worker is an employee or independent contractor under AB 5 is relevant for California income tax purposes."

Complicating matters further, the IRS Household Employer's Tax Guide does not treat a tutor as a household employee, even when the tutoring is done in the home.

The analysis is different if a tutor is obtained through a referral agency, but the outcome may be the same. Under AB 5, a more flexible independent contractor test -- not the strict ABC test -- applies where a referral agency connects tutors to clients. The tutor must, among other things, set his or her own rates and be free to work with other clients, including through competing referral agencies.

Beyond these requirements, the term "tutor" for purposes of the referral agency exception includes only a "person who develops and teaches their own curriculum. A 'tutor' does not include a person who teaches a curriculum created by a public school. ..." The exception also does not apply "to an individual worker, as opposed to a business entity [such as a sole proprietor], who performs services for a client through a referral agency." A tutor who is an individual worker and provides services through a referral agency is treated as the referral agency's employee. That's not the referral agency's problem alone. A parent may be treated as the dual employer of a tutor misclassified as an independent contractor.

It turns out the answer to the question presented is not as easy as ABC.

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