

MEMORANDUM

TO: CCDRA
FROM: SUSAN ZEME
DATE: JANUARY 1, 2020
RE: PRACTICAL CHANGES, THINGS TO EMPHASIZE, FOLLOWING AB5

Following the passage of new California legislation, AB5, creating the new CA Labor Code section 2750.3, effective January 1, 2020, I suggest that domestic referral agencies (“DRAs”) implement the following changes to their businesses, or emphasize these issues, to the extent reasonably possible. Because the law is brand new, and we don’t yet have guidance from the courts in terms in of application and interpretation, I am making educated guesses about how DRAs may best to protect themselves and avoid being found the “employer” of the workers they register. As time passes and the courts, legislature and public agencies apply, interpret and likely amend Labor Code section 2750.3, our understanding, as well as probably the language of the statute, will evolve.

The statute expressly states that existing exceptions to the definition of “employee” and “employer” made by provisions of the Labor Code, Unemployment Insurance Code and IWC Wage Orders shall remain in effect. It is therefore more important than ever to be sure the agency complies strictly and as exactly as possible with every aspect of these codes. I anticipate that in the wake of AB5, DRAs may come under even stricter scrutiny than usual.

A careful reading of AB5 as well as some recent experience with auditors, indicates the following suggestions:

- All registered workers should have their own business entities. This may be a corporation, partnership or even a sole proprietorship, which does not require any special corporate filing. It does however require a business name and some evidence of a separate business. (For example, business cards, website, promotional materials, business license, etc.)
- All registered workers’ business entities should register with their cities and obtain a business license.
- All registered workers should hold themselves out to the public as offering services other than through the referral agency. (Business cards, website, word of mouth, advertising.)
- The DRA should specify clearly in its own advertising for workers that the workers must be able to work independently, have all necessary skills and experience, are able to choose and control their own work and schedule, types and locations of work, and must have their own equipment and transportation.
- The DRA should clearly communicate to its workers that they are able to negotiate their own rates with clients, and may be able to increase their profit by negotiating with clients for additional work or responsibility, to bring supplies, or otherwise. This should also be true in practice.
- It is very important that the DRA communicate to workers that they are paid a percentage of the total job fee, not by the hour. It is OK to give an hourly equivalent for better

understanding, but the codes specifically require that workers are paid a fixed percentage of the total job cost. Because this may be a challenge, it seems to be something auditors are focusing on.

- It would be great if the DRA could document that it is an administrative operation only, and that the workers but not the agency do the actual substantive work for clients, distinguishing the DRA's work from the substantive work performed by the registered workers.
- Of course, every DRA that accepts client payments must deposit them into a trust account and pay the workers from the trust account.
- Please do not run personal expenses through your business.
- Ideally, the workers should actually understand how the DRA works, that they are independent business people who are registered to receive job referrals but not employees, that they control their work, and that they can negotiate with clients for additional profit and fees. In the event of an audit, workers will be questioned, and they should be able to explain these things.
- While permitting workers to "hire assistants" or "use subcontractors" may present a challenge, the code specifically requires it, and auditors want to see it. Workers should understand that if they want to use an assistant, that is fine, so long as the assistant registers with the agency.
- Workers should understand, and this should be true in practice, that the worker does not get paid until the client pays the agency, and that in the event of a problem with service, client complaint, breakage, etc., the worker and not the agency is ultimately responsible to negotiate the remedy with the client.