



Addressing the Gray Area Between Freelancers and Full Time Exempt Employees

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The recent California Supreme Court ruling in [Dynamex Operations West, Inc. v. Superior Court of Los Angeles](#) has effectively eliminated the gray area between “employee” and “independent contractor” and has caused a notable disruption in the way many companies will do business going forward. Specifically, individual workers will be presumed to be employees unless three separate factors providing independent contractor status can be proven. However, knowing that workers are employees rather than independent contractors does not end the confusion for many employers.

Particularly in the creative industries, many companies have historically used temporary talent that is commonly referred to as “freelancers”. Because the term does not have a specific legal meaning in employment law, it has been loosely used to apply to everyone from a one-time composer, to a digital media project designer, to a location manager. Regardless of the specifics, the term is almost always referencing the inevitable use of the temporary employee, which is also an often-misunderstood category of employment.

There is no magic number of days that converts an employee from temporary to regular. Temporary employees are considered such because they are expressly hired for either a specific event, a specific project, or a specific limited duration. Therefore, it is important to specify in the hire documents that because the position is temporary, eligibility for benefits is impacted and an unexpected extension of the term does not convert the employee from temporary to regular. However, while some benefits may be affected by the temporary status, others will not be. For example, in California, practically all employees who have worked for an employer may use paid sick leave beginning with the 90th day of employment; even temporary and part-time employees. In addition, all employees are entitled to disability accommodation under both the federal and California state statutes. On the other hand, temporary employees are not legally entitled to vacation time off or paid holidays to the same extent as regular employees.

Another potentially tricky aspect of working with freelancers is getting their compensation right. This is a minefield for many productions and all-too-often results in a wage claim.

The most basic pay structure for freelancers is straight-forward hourly plus overtime model. However, some freelancers work at an obviously higher level and perform duties that are traditionally not viewed as hourly, but rather as “exempt.” While an exemption analysis applies equally to temporary and regular workers, the sticking point with temporary workers is that the

typical exemption that is likely to apply based on duties also requires a minimum monthly salary. An employee who is only hired for a week, for example, will not meet the salary basis test required to meet the exemption. There are options, of course, for how a situation like that would get handled. This is when it becomes important to discuss your needs and your alternatives with your legal advisor. This is when deep experience will really make the difference.

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