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# California Senate Passes AB 5, Codifying Dynamex Decision

September 13, 2019

On September 10, by a vote of 29–11, the California Senate passed legislation known as AB 5 – a law codifying the "ABC test" from the landmark *Dynamex v. Superior Court* case, 4. Cal. 5th 903 (2018), to determine whether a service provider is an independent contractor or employee. On September 11, the State Assembly passed the legislation by a vote of 56–15, so it will now go to California Gov. Gavin Newsom. Newsom recently expressed support for the legislation and is expected to sign AB 5 into law. Assuming Newsom signs the law, it will go into effect on January 1, 2020.

As a refresher, on April 30, 2018, the California Supreme Court, in *Dynamex,* adopted the ABC test to determine whether an individual is properly classified as an independent contractor for purposes of wage and hour law. The ABC test provides that, to classify a worker as a contractor, the hiring entity must prove *each* of the following three factors: (1) the worker is free of control from the company, both under contract and in fact; (2) the worker performs work outside the usual course of the hiring entities business; and (3) the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed. The failure to prove any one of the three above factors would render a worker an employee of the hiring entity.

AB 5 would add section 2750.3 to the California Labor Code, which would expressly adopt the ABC test set forth in *Dynamex* for purposes of the Labor Code (which includes, among other code sections that previously were not subject to *Dynamex*, reimbursement for costs incurred by employees in the course of employment), the Unemployment Insurance Code and the Wage Orders. As it stood before this legislation, the ABC test only applied to claims under the applicable Wage Orders. AB 5 would expand the scope of the ABC test to virtually all areas of the law relevant to determining employment status, except that the test for determining employment status under applicable workers' compensation provisions will be modified at a later time.

Additional details about the current draft of AB 5, as well as some exceptions and effects on particular businesses, are below.

## Immediate reaction and recommendations

Even if AB 5 goes into effect, it is not cause for panic. The California courts already changed the independent contractor test for California service providers with the *Dynamex* decision, and with AB 5, the California legislature is doubling down on the applicability of the ABC test. As we have recommended since *Dynamex*, companies should evaluate their independent contractor classifications for California service providers in light of the new test.

Special considerations exist for companies in the gig economy/on-demand space, where satisfying the second prong of the ABC test may present challenges. If you are a gig/on-demand business, please feel free to contact us with questions about worker classification matters.

## Additional details of AB 5

AB 5 provides that, in certain circumstances, the former test for determining whether a worker is an independent contractor or employee, known as the *Borello* test, would still apply. For instance, the *Borello* test would apply with the following professions and businesses: (1) insurance brokers; (2) physicians, surgeons, dentists, psychologists or veterinarians; (3) lawyers, architects, engineers, private investigators or accountants; (4) securities broker-dealers or investment advisers or their agents and representatives; (5) direct sales salespeople as described in section 650 of the Unemployment Insurance Code; and (6) commercial fisherman on American vessels.

In addition, AB 5 provides that the *Borello* test will apply to individuals providing certain professional services if certain criteria apply (e.g. HR administrator, marketing professional, graphic designer, grant writer, freelance photographer/writer, travel agent, esthetician, etc.). In order for the *Borello* test to apply to one of the enumerated professional services, the individual performing such services must: (1) maintain a business location (which could be the individual's residence) separate from the hiring entity; (2) maintain a business license in addition to any required professional license or permit (if work is performed more than six months after AB 5 becomes law); (3) be able to set or negotiate his or her own rates; (4) have the ability to set his or her own hours, outside of project completion dates and reasonable business hours; (5) be customarily engaged in the same type of work performed under contract with another hiring entity or hold themselves out to other potential customers to perform the same type of work; and (6) customarily exercise independent judgment and discretion.

AB 5 also provides that a bona fide business-to-business contracting relationship will be governed by the *Borello* test if certain criteria are satisfied. However, this exemption *does not apply to an individual worker*, as opposed to a business entity, who performs labor and services for a contracting business.

Under AB 5, the ABC test also would not apply to the relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry if certain criteria are met, nor to the relationship between a referral agency and service provider that provides certain specific services (graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning and/or yard cleanup). A service provider in this context means a person or business who agrees to the referral agency's contract and uses the referral agency to connect with clients.

AB 5 also specifically excludes real estate licensees and repossession agencies from the ABC test or *Borello* and instead specifies that real estate licensees and repossession agencies are subject to tests under Business and Professions Code 10032 and 7500.2, respectively.

Please feel free to contact us with any questions about AB 5 or any questions regarding worker classification matters.

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