

California AB 5 and the Status of Independent Contractors

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California employers continue to have complicated questions about the use of independent contractors in the state almost a year after adoption of Assembly Bill 5 (AB 5), which established more stringent standards for the classification of workers as independent contractors.

Background: *Dynamex* and AB 5

In 2018, the California Supreme Court drastically changed the standard in California when it adopted the “ABC Test” for determining whether an individual is an employee or independent contractor under the state Industrial Welfare Commission (IWC) Wage Orders. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal.5th 903, 416 P.3d 1. In doing so, the Court abandoned the less stringent multi-factor test established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 796 P.2d 399 (1989).

Then, in 2019, the Legislature passed AB 5 to add Section 2750.3 to the Labor Code, adopting and expanding the ABC Test to define “employee” not just for purposes of the Wage Orders, but also for purposes of the Labor Code and the Unemployment Insurance Code.

Under the AB 5 ABC Test, a worker is presumed to be an employee, unless the hiring entity can establish that:

- (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) The person performs work that is outside the usual course of the hiring entity’s business; and
- (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

A worker cannot be classified as an independent contractor under the ABC Test unless all three factors are met.

Current Exemptions in AB 5

When the Legislature passed AB 5, it included certain exemptions. If a worker falls within one of the existing exemptions, then the worker’s status as an employee or independent contractor is determined using the *Borello* test, instead of the ABC Test. Some of the exemptions in AB 5 apply to certain enumerated occupations; workers providing “professional services” (as defined in AB 5); certain business services providers; and referral agencies that connect certain types of service providers with clients. The exemptions contain specific requirements that must be met before an exemption will apply

to a worker.

Push for Legislative Change

When AB 5 passed, many businesses feared they would not be able to continue to effectively operate in California under the new requirements. As a result, a push to modify AB 5 is underway in the Legislature. A variety of bills have been introduced to expand the current exemptions. Some of the bills would provide carve-outs for specific industries and occupations that have historically operated using the independent contractor structure, such as [pharmacists](#) and [court interpreters](#). Other bills would modify AB 5 by changing the requirements for individuals who are classified as employees versus independent contractors. Many efforts have been unsuccessful, but numerous bills are pending.

Legal Challenges to AB 5, *Dynamex*

Legal challenges to AB 5 and *Dynamex* abound. For example, cases have been brought by California truckers, freelance journalists, and gig economy businesses challenging the application of AB 5 to their industries. In December 2019, the California Trucking Industry filed a motion for a temporary restraining order against the enforcement of AB 5 as to any motor carrier operating in California. The court granted the motion, but the state appealed the ruling, which is pending before the U.S. Court of Appeals for the Ninth Circuit.

The American Society of Journalists and Authors (ASJA) also filed a lawsuit in December 2019 challenging the application of AB 5 to journalists and authors on various constitutional grounds. The court denied the ASJA's motion for a preliminary injunction and later dismissed the ASJA's complaint with prejudice. The ASJA has appealed these decisions to the Ninth Circuit.

Other cases pending address the application of AB 5 to the gig economy and app-based companies. One lawsuit sought a preliminary injunction barring the enforcement of AB 5 against gig economy and app-based companies on the grounds that AB 5 is unconstitutional. The court denied the request for a preliminary injunction and an appeal is pending before the Ninth Circuit. The State of California recently obtained a preliminary injunction enjoining two gig-economy companies from classifying workers as independent contractors and ordering the companies to reclassify their workers as employees. The companies appealed and the court stayed the injunction pending resolution of the appeals.

Finally, two cases are pending before the California Supreme Court on whether *Dynamex* should apply retroactively.

Proposition 22: App-Based Drivers as Contractors

The November 2020 California ballot will include Proposition 22, "App-Based Drivers as Contractors and Labor Policies Initiative." Proposition 22 would define workers of app-based transportation, such as rideshare and delivery drivers, as independent contractors. It also would adopt novel labor and wage requirements specific to the gig economy.

If approved by California voters, Proposition 22 would modify application of AB 5 for app-based drivers and delivery drivers only.

We will continue to monitor and provide updates on AB 5 and potential changes to it. In addition, Jackson Lewis attorneys are available to assist employers in addressing the use

of independent contractors in their businesses.

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