

California Worker Misclassification Bill Closer to Enactment

By Susan E. Groff, Ted Kazaglis, Suellen Oswald, Cepideh Roufougar & Jonathan A. Siegel

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Meet the Authors



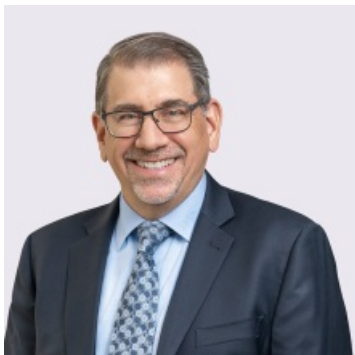
Susan E. Groff

(She/Her)

Principal

(213) 689-0404

Susan.Groff@jacksonlewis.com



Ted Kazaglis

Principal

919-760-6462

Ted.Kazaglis@jacksonlewis.com



Suellen Oswald

The California Assembly has passed a bill that would require workers to be classified as employees if the employer exerts control over how the workers perform their tasks or if their work is part of the employer's regular business.

Assembly Bill 5 (AB 5) passed by a vote of 61-16 in the Assembly. Governor Gavin Newsom has stated his support of the bill and is expected to sign it into law. Then the new law will go into effect on January 1, 2020.

Background

Section 1(e) of AB 5 declares:

the intent of the Legislature in enacting this act to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous Dynamex decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law.

AB 5 would codify and clarify the California Supreme Court's 2018 *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*. In *Dynamex*, the Court adopted the "ABC Test" for determining whether an individual is an employee or independent contractor under the Industrial Welfare Commission (IWC) Wage Orders, abandoning the multi-factor test established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989).

Under the ABC test, to establish that an individual is in fact an independent contractor, an employer must prove 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.

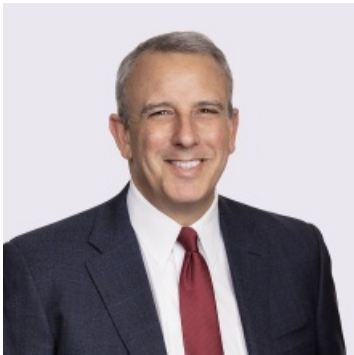
Part B of the test is particularly problematic for some industries, especially those with

Principal
216-750-4339
Suellen.Oswald@jacksonlewis.com



Cepideh Roufougar

(She/Her)
Principal
(415) 394-9400
Cepideh.Roufougar@jacksonlewis.com



Jonathan A. Siegel

(He/Him)
Principal
(949) 885-1360
Jonathan.Siegel@jacksonlewis.com

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established business models dependent on the use of contractors.

Bill Extends ABC Test

AB 5 extends the ABC test to the California Labor Code and the Unemployment Insurance Code. It also changes how an “employee” is defined in California. Under AB 5:

a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity’s business, and the person is customarily engaged in an independently established trade, occupation or business.

Exemptions from ABC Test for Certain Industries, Positions

The legislature has attempted to codify in AB 5 exemptions from the ABC test for certain industries, professions, and positions. (See our blog posts, [Assembly Bill Codifying Dynamex Moves Forward, with Notable Exemptions](#) and [AB 5 Returned to the CA Senate.](#))

AB 5 may provide that the multi-factor *Borello* test (and not the ABC test) applies to certain occupations. Exemptions from the ABC test could include:

1. A person or organization licensed by the Department of Insurance;
2. A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian licensed by the State of California pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation as defined in Section 13401 of the Corporations Code;
3. An individual who holds an active license from the State of California and is practicing one of the following recognized professions: lawyer, architect, engineer, private investigator, or accountant;
4. A securities broker-dealer or investment adviser or their agents and representatives that are registered with the SEC or FINRA or licensed by the state;
5. A direct salesperson under Unemployment Insurance Code § 650 (a licensed salesperson whose compensation is directly tied to the sale, such as a real estate salesperson);
6. A real estate licensee;
7. A commercial fisherman;
8. A worker providing licensed barber or cosmetology services; and
9. Others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry.

Under AB 5, the *Borello* test would govern any independent contractor who has a contract for “professional services” if:

1. The individual maintains a business location, which may include the individual’s residence, that is separate from the hiring entity;

2. The individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession;
3. The individual has the ability to set or negotiate their own rates for the services performed;
4. Outside of project completion dates and reasonable business hours, the individual has the ability to set their own hours;
5. The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work; and
6. The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

AB 5 outlines a list of services that include marketing, human resources, graphic design, among others.

AB 5 also states that if a court rules the ABC test cannot be applied to a certain situation, then the determination of employee or independent contractor status should be conducted under the *Borello* test.

AB 5 likely will make it harder for companies with business models that rely on “gig workers” and many other industries to continue to classify their workers as independent contractors. How employees and independent contractors are defined in California will undergo significant changes when AB 5 becomes law. These companies may have to consider changing their business models or adopting other creative options to avoid having to reclassify contractors as employees.

In addition, AB 5’s extensive definitions for “professional services” and other terms are worth a close reading to determine coverage or exemption. Finally, employers that have defined and branded themselves as technology or software companies, for example, and want to continue to rely on independent contractors may have to make their case in court.

We will continue to monitor and provide updates on AB 5. Jackson Lewis attorneys are available to discuss the bill and to assist employers in determining whether and how their particular business will be affected.

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