

California Legislature Passes Landmark Worker Classification Legislation

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Key Points:

- On September 10, 2019, the California State Legislature passed AB 5, which codifies the “ABC test” in *Dynamex Ops. West Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), for determining whether a worker is an employee or an independent contractor. The governor has indicated his support and intention to sign it.
- AB 5 extends the ABC test—which *Dynamex* applied only to the wage orders—to the Labor Code and Unemployment Insurance Code. The Legislature also explained that to the extent it applies to the wage orders, AB 5 is “declaratory of existing law,” indicating a potentially retroactive application.
- The law carves out a number of occupations, stating that the common law “*Borello*” test will still apply to those occupations where employment status is disputed.

On September 10, 2019, the California State Legislature passed AB 5, a highly anticipated bill regarding independent contractor status that follows on the heels of last year’s landmark decision in *Dynamex Ops. West Inc. v. Superior Court*, 4 Cal. 5th 903 (2018). Governor Gavin Newsom has previously expressed support for the measure and is expected to sign it into law.

Dynamex established a broad new test—commonly referred to as the “ABC test”—for determining whether an alleged independent contractor should be considered an employee under the Industrial Welfare Commission wage orders. Under the ABC test, a worker is presumed to be an employee of the “hiring entity” unless the hiring entity establishes: “(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.” *Id.* at 916-17.

AB 5 has widely been described as a game changer for businesses that use independent contractors in California. Although it largely codifies the ABC test already established in *Dynamex*, it is notable in several other respects.

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First, AB 5 extends the application of the ABC test to the Labor Code and Unemployment Insurance Code. The California Court of Appeal previously held that the ABC test is limited to claims under the wage orders, and it applied the common law *Borello* test to Labor Code claims. *Garcia v. Border Transp. Grp., LLC*, 28 Cal. App. 5th 558, 571 (2018).

Second, AB 5 states that its codification of the ABC test is “declaratory of existing law,” to the extent it applies to the wage orders or Labor Code violations based on the wage orders. This statement appears aimed at one of the open questions from the *Dynamex* case, which is whether the decision applies retroactively. The Legislature’s statement is not dispositive, but may be a factor supporting a finding of retroactivity.

Third, AB 5 contains a number of carve-outs that retroactively exempt certain occupations from the ABC test, including the following:

- Licensed insurance agents.
- Licensed health care professionals, including physicians, surgeons, dentists, podiatrists, psychologists and veterinarians.
- Licensed professional workers, including lawyers, architects, engineers, private investigators and accountants.
- Registered securities broker-dealers or investment advisers.
- Direct sales salespersons.
- Commercial fishermen.
- Individuals providing licensed barber or cosmetology services.
- Individuals performing work under a contract for professional services, including marketing, human resources, travel agent services, graphic design, grant writing, fine art, still photography or freelance writing.
- Licensed estheticians, electrologists, manicurists, barbers or cosmetologists.
- Real estate licensees.
- Certain subcontractors in the construction industry.

Such occupations will be governed by the common law *Borello* test, which will apply retroactively “to the maximum extent permitted by law.” The bill also specifies that the ABC test does not apply to bona fide business-to-business contracting relationships, or relationships between a referral agency and a service provider, as long as certain criteria are satisfied.

Just as significant, however, are the industries and occupations that did not receive carve-outs and will not get relief from AB 5, at least not at this time. Notably, there is no carve-out for ride hailing and other gig economy companies and workers. Uber, Lyft, and DoorDash have publicly pledged to address the classification of drivers through a ballot initiative.

Finally, AB 5 states that the bill does not permit “an employer to reclassify an individual who was an employee on January 1, 2019, to an independent contractor due to [the bill’s] enactment.” This provision—Section 6 of the bill—will not be codified anywhere in the Labor Code or Unemployment Insurance Code, and it leaves open questions about its enforcement and application.

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