

The New ABC Test (AB 5 & AB 2257)



Agenda



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- New “ABC” Test
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- Assembly Bill 5 & 2257
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- “Single Engagement” Exemption (AB 2257)
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The *Dynamex* Decision

California Supreme Court Case – April 30, 2018: (*Dynamex Operations West, Inc. v. Los Angeles County Superior Court* (2018) 4 Cal.5th 903

- Changed the (almost 30 year old) test on whether a worker is an employee or independent contractor ***as applied to wage orders***
 - Wage orders address minimum wages, overtime, mileage, basic working conditions (e.g. meal and rest breaks, etc.)
 - Wage orders do NOT govern/relate to worker's compensation requirements



The Prior Test- *Borello*



S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 351

- Multi-factor test to determine whether an individual was an independent contractor
- Principal factor was whether the “person to whom service is rendered has the **right to control the manner and means** of accomplishing the result desired.”

New "ABC Test"

Prong A

"Free from Control"

- The person (worker) 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.

Prong B

"Outside the usual course of business"

- The person (worker) performs work that is outside the usual course of the hiring entity's business.

Prong C

"Customarily engaged in business of the same nature"

- The person (worker) is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Assembly Bill 5 & 2257

- **AB 5 created Labor Code §2750.3**
 - Applied to work performed after January 1, 2020
 - **Effective for Workers' Compensation purposes on July 1, 2020**
- **AB 2257 repealed Labor Code §2750.3 and created Labor Codes §2775 to §2787**
 - **Emergency order effective immediately.**
 - Signed by Governor Newsom September 4, 2020





Original 39 Conditional Exemptions

AB 5

| | | | | |
|--|--------------------------------|--|---------------------------------|--|
| Accountants | Construction Trucking Services | Fine Artists | Newspaper Carriers | Psychologists |
| Administrator of HR | Cosmetologists | Freelance Writers/ Editors/ Cartoonists | Manicurists | Real Estate Licensees |
| Architects | Dentists | Grant Writers | Marketing | Repossession Agencies |
| Attorneys | Direct Salespersons | Graphic Designers | Motor Club Contracting Services | Securities Brokers & Dealers |
| Barbers | Engineers | Insurance Brokers & Agents | Payment Processing Agents | Still Photographers/ Photojournalists |
| Business-to-Business Contracting Relationships | Enrolled Agents | Investment Advisors & their agents/ reps | Physicians & Surgeons | Travel Agent Services |
| Commercial Fishermen | Estheticians | Job Referral Agencies | Podiatrists | Veterinarians |
| Construction Subcontractors | Electrologists | Newspaper Distributors | Private Investigators | |



Additional Conditional Exemptions

AB 2257

| | | | |
|---|---|--|--|
| Appraisers | Home inspectors | Master Class Instructors | Two Contracting Businesses/Single Engagement Services |
| Competition Judges | Individual Performance Artists | Music Industry | Videographers |
| Content Contributors, Advisors, Producers, Narrators, or Cartographers for a journal | Insurance Industry: Underwriting, Audit, Risk Management or Loss Control | Photo Editors | |
| Data Aggregators | International Exchange Program | Registered Professional Foresters | |
| Digital Content Aggregators | Manufactured Housing Sales | Specialized performers hired by a performing arts company | |

Example of How Qualifying Exemptions Work under Labor Code § 2778 (b)(2)

Additional criteria required by Labor Code. For example, *Borello* still applies to contracts for “**professional services**” as long as all conditions are met.

1. The individual maintains a business location (may be a personal residence) that is separate from the hiring entity;
2. If the work is performed more than six months after the law goes into effect, the individual is required to have a business license as well as any other required professional license;
3. The individual can set or negotiate their own rates;
4. Outside of project completion dates and reasonable business hours, the individual can set their own hours;
5. The individual must perform the same type of work under the contract for other hiring entities or hold themselves out to potential customers for the same work;
6. The individual regularly exercises discretion and independent judgment.

Business to Business Exemption

Exemption Criteria Labor Code §2776

Business relationships must be formed between sole proprietorships, partnerships, limited liability companies, limited liability partnerships, corporations, public agencies and quasi-public organizations.

1. Is free from control/direction of contracting business
2. Is providing services directly to contracting business, not customers of contracting business (with caveat)
3. Has entered into written contract with contracting business (specifies the due date and payment amount)
4. Has business license/tax registration if required in jurisdiction where work is performed
5. Maintains business location separate from business or work location of the contracting business (can be residence)
6. Is customarily engaged in an independently established business of the same nature as that involved in the work performed
7. The business provider can contract with other businesses to provide same/similar services. Maintains clientele without restrictions from hiring entity
8. Advertises and holds itself out to the public as available to provide the same or similar services
9. Provides its own tools, vehicles, and equipment
10. Can negotiate its own rates
11. Can set its own hours and location of work if consistent with the nature of the work
12. Is not performing work for which a CSLB license is required



“Single Engagement Event” Between Contracting Businesses Exemption

Exemption Criteria Labor Code §2779

Business relationship between two individuals that are acting as a sole proprietor or separate business entity formed as a partnership, limited liability company, limited liability partnership, or corporation performing work pursuant to a contract at the location of a single-engagement event

1. Neither individual is subject to control and direction by the other, in connection with the performance of the work, both under the contract for the performance of the work and in fact.
2. Each individual has the ability to negotiate their rate of pay with the other individual.
3. The written contract specifies the total payment and the specific rate paid to each individual.
4. Each individual maintains their own business location. (may include the individual's personal residence)
5. Each individual provides their own tools, vehicles, and equipment.
6. Each individual has the required business license or business tax registration if needed for the work
7. Each individual is customarily engaged in the same or similar type of work performed under the contract or each individual separately holds themselves out to other potential customers as available to perform the same type of work.
8. Each individual can contract with other businesses to provide the same or similar services and maintain their own clientele without restrictions.

“**Single Engagement Event**” is defined as “a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week.”

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Employment Status Resource Center

The ABC Test

The Borello Test

Policy Touchpoints

Audit Prep

Legislative Purpose-AB 5

Employment Status Resource Center



EMPLOYEE VS. INDEPENDENT CONTRACTOR (IC) – IT MATTERS TO YOU

Knowing whether an individual is an employee or an independent contractor (or subcontractor) is important. It ensures you have the correct coverage to protect your business.

Employment status affects your premium too. How much you pay for workers' compensation depends largely on how much employee payroll you have. ICs are not covered under workers' compensation so we don't include their payroll in the price of your policy. Correctly identifying the status of each individual working at your company can help you avoid unexpected insurance bills later.

DETERMINING EMPLOYMENT STATUS

For an in depth look at how AB5/AB2257 impacts your business, visit our **Employment Status Resource Center** on StateFundCA.com.



Employment Status Resource Center

Conditional Exemptions

[Employment Status Resource Center](#)

The ABC Test

[» Conditional Exemptions](#)

[The Borello Test](#)

[Policy Touchpoints](#)

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[AB5, Who Is An Employee? Webinar](#)

[Legislative Purpose-AB 5](#)

Conditional Exemptions

Most California employers must apply the ABC test (for workers' compensation), effective July 1, 2020. There are some conditional exemptions, however.

The following is a list of conditional exemptions for which the Borello test may still apply, even after July 1, 2020.

▶ Administrator of human resources

Business-to-business contracting relationship

| Condition of Exemption from ABC Test | Additional Conditions (if any) | Current Expiration of Exemption | Labor Code Reference* |
|---|--|---------------------------------|----------------------------|
| Business service provider must be formed as sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation (if individual worker, exemption does not apply) | Business provider: <ol style="list-style-type: none">is free from control/direction of contracting businessis providing services directly to contracting business, not customers of contracting businesshas entered into written contract with contracting businesshas business license/tax registration if required in jurisdiction where work | None | §2750.3(e) |

Potential Impacts of AB 5 & 2257

- Impacts over 2 million workers in gig economy
- Bill supported by 2 million members of California Labor Federation and other unions
- Worker protections, such as:
 - Guaranteed minimum wage
 - Overtime pay
 - Contribute to Social Security and Medicare
 - Workers' Compensation Insurance
 - Sick leave and family leave
 - Reimbursement for mileage and vehicle maintenance
- Estimates vary but potentially 30% increase in expenses for employers
- Critics argue will threaten ability to design flexible schedules and earn supplemental income

What You Need To Know



The *Borello* Test still applies to employment status assessment for periods prior to July 1, 2020

- and to exempt occupations on or after July 1, 2020 (AB 5)
- and for additional conditionally exempt occupations (AB 2257), and applies retroactive to July 1, 2020.

Resources for More Information



**California Labor & Workforce Development Agency
Employment Status Portal**

<https://www.labor.ca.gov/employmentstatus/>

**California Department of Industrial Relations
Assembly Bill 5 FAQ's**

https://www.dir.ca.gov/dlse/faq_independentcontractor.htm

State Compensation Insurance Fund



- Founded in 1914
- Not-for-profit, public enterprise fund
- Covering 100,000 employers
- Committed to providing workers' compensation insurance to all California businesses

We **protect** the people who make
California work.

State Fund Services



- Claims Specialization
- Medical Provider Network
- Toll-Free Claims Reporting Center
- Loss Prevention Services
- Online Safety Resource Center
- Automated Billing
- Online Account Access
- Dedicated Operations Support Center
- Anti-Fraud Resources
- Online Policyholder Resources on www.StateFundCA.com

COVID-19 Resources for Employers



COVID-19 Resources to Keep Your Employees Safe

What you need to know about teleworking, home ergonomics, and preventing the spread of coronavirus in the workplace.

LEARN MORE

SafeAtWorkCA.com/coronavirus/

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