

A Roadmap to California's Worker Classification Law

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When Assembly Bill 5 (AB 5) went into effect January 1, 2020, it significantly altered the way California law distinguished between employees and independent contractors. Not only did AB 5 codify the California Supreme Court's decision in *Dynamex Operations West, Inc v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018) (*Dynamex*) — it also expanded it.

Stated simply, AB 5 made the independent contractor classification test established in *Dynamex*, referred to as the "ABC test," the general rule in most circumstances, though it created several exceptions, for which the common law classification test applies.

Early in the 2020 legislative session, shortly after AB 5 went into effect, the California Legislature introduced roughly 30 bills seeking to either amend or repeal AB 5 — and over the course of the session, that number dropped to one. Assembly Bill 2257 (AB 2257) was the only bill left standing, and Governor Gavin Newsom signed it into law on September 4, 2020. Because the bill was designated as urgent, it went into effect immediately upon signing.

AB 2257 didn't change the basic framework established by AB 5, but it revised and clarified existing provisions and created additional industry exceptions to the ABC test. The law was further revised by legislation effective January 1, 2022, but those changes were relatively small compared to previous years; they didn't change the test or add any additional exceptions.

Given the significant changes to California's independent contractor landscape in recent years, it's important for employers to understand both standards and when each applies. Here's your roadmap to worker classification compliance in California.

**California
uses a strict
"ABC" worker
classification test
to determine whether
someone is an employee
or independent
contractor, with some
exceptions.**

“ABC Test” vs. Common Law “Borello Test”

In *Dynamex*, the Court adopted a new test, commonly referred to as the “**ABC test**,” for determining whether a worker is an employee or independent contractor for purposes of applying California’s wage orders. Under the ABC test, a worker is classified as an employee unless the employer can establish all three of the following:

- A. That the worker is free from the hiring entity’s control and direction in connection with performance of the work, both under the contract for the performance of the work and in actually performing the work;
- 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.

The ABC test is more rigid and inclusive than the older common law classification test, commonly referred to as the **Borello test** (S. G. *Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989) (*Borello*)). Under the Borello test, the most important factor in determining proper worker classification is whether the business has the right to direct and control the manner and means of performing the work (sometimes referred to as the “right to control” test). In addition to the right to control, several factors must be considered, including:

- Ability to discharge at will, without cause;
- Whether the one performing services is engaged in a distinct occupation or business;
- The kind of work, and whether it’s usually done under close direction or supervision or by a specialist without supervision;
- Skill required in the particular occupation;
- Whether the principal or the worker supplies the instrumentalities, tools and the place of work for the person doing the work;
- Length of time for which the services are to be performed;
- Method of payment, whether by the time or by the job;
- Whether the work is a part of the principal’s regular business; and
- Whether the parties believe they’re creating the relationship of employer-employee.

These two tests overlap, but the significant difference is that the Borello test doesn’t require a business to satisfy all factors. Rather, courts consider and weigh the factors in each case, making it more flexible and less demanding than the rigid ABC test.

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AB 5 Expanded the ABC Test

After the *Dynamex* decision, the ABC test was applicable only to the Industrial Welfare Commission (IWC) Wage Orders. The law enacted by AB 5 (that has been further modified by AB 2257) codified and expanded the ABC test, applying it to both the Labor and Unemployment Insurance Codes, as well as the IWC Wage Orders. This means the ABC test is the general rule in determining whether a worker is an employee or independent contractor — though the law contains numerous exceptions. If an exception applies, then employers should use the Borello test in most cases.

AB 5 also clarified that the meaning of the terms “employee,” “employer,” “employ,” or “independent contractor” and “any extension of employer status liability” as they are used and defined in the Labor and Unemployment Codes and the IWC Wage Orders remain intact. For example, the definition of an “employee” in Wage Order 2 includes beauty salon workers/stylists who rent or lease chairs or space. Remember, businesses must continue to be aware of any nuances in these definitions as stated in the wage orders or statutes governing their specific industries.

There are more than 100 distinct exceptions to the ABC test that vary in specificity and complexity.

Notably, the law includes a public enforcement provision.

Under AB 5, the law allowed the Attorney General and a city attorney for a city with a population of 750,000 or more (San Francisco, San Jose, Los Angeles, San Diego) to bring an action for injunctive relief against businesses suspected of misclassifying workers as independent contractors. AB 2257 amended this section to also allow any district attorney to bring such an action. The California Attorney General and local governments brought several enforcement actions in 2020, but with AB 2257's enforcement expansion, we may see an increase in enforcement actions at the local level.

Exceptions to the ABC Test

The law contains numerous exceptions to the ABC test. With the additions made by AB 2257, there are now more than 100 distinct exceptions, which vary in their specificity and complexity. Some are vague while others are extremely specific and narrow, qualified by multiple criteria and statutory references.

Many of the specifics are included in the descriptions below to illustrate the law's complexity and emphasize that, regardless of whether an exception seems clearly applicable or not, businesses using contractors should consult with legal counsel regarding their circumstances under the law.

Additionally, the law also provides that if a court determines the ABC test “cannot be applied in a particular context,” the Borello test will govern whether a worker is an employee or independent contractor. Employers will have to wait and see how the courts utilize this provision.

Business-to-Business Contracting Relationships

Labor Code section 2776 states that the ABC test doesn't apply to a “bona fide business-to-business contracting relationship.” If an individual acting as a sole proprietor or a business entity formed as a partnership, limited liability company (LLC), limited liability partnership (LLP) or corporation (business service provider) contracts to provide services to another business

(contracting business), the Borello test determines employee or independent contractor status if the contracting business can satisfy all of the following criteria.

The business service provider must:

- Be free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in actually performing the work.
- Provide services directly to the contracting business rather than to customers of the contracting business. This requirement doesn't apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.
- Have a contract in writing.
- Have the required business license or business tax registration if the work is performed in a jurisdiction that requires such licensing and registration.
- Maintain a business location that's separate from the contracting business' work location.
- Customarily be engaged in an independently established business of the same nature as that involved in the work performed.
- Be able to contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.
- Advertise and hold itself out to the public as available to provide the same or similar services.
- Provide its own tools, vehicles and equipment to perform the services.
- Be able to negotiate its own rates.
- Be able to set its own hours and location of work consistent with the nature of the work.
- Not be performing the type of work for which a license from the Contractor's State License Board is required, pursuant to Chapter 9 (beginning with Section 7000) of Division 3 of the Business and Professions Code.

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Businesses must comply with all of the aforementioned factors to use this exception — which only means that the Borello test applies instead of the ABC test. Businesses must be mindful of the details in using this exception. For example, the lack of a contract in writing or a required business license may be the difference between applying the Borello or ABC test.

One of the most important factors above is the requirement that the service provider only provide services **directly to the contracting entity**, not to its customers. This presents a problem for a number of work/service arrangements. AB 2257 attempted to clarify this requirement by adding that the requirement doesn't apply if the business service provider's employees are "solely performing the

The law defines 'referral agency' as a business that connects clients with service providers to provide certain services under a contract — and certain services are specifically excluded from the exception.

service under the contract under the name of the business service provider and the provider regularly contracts with other businesses.” The revised language may help some business arrangements, but it remains to be seen how courts will interpret this provision. Businesses should consult with legal counsel regarding their business-to-business contracts under this law.

Another notable revision in AB 2257 was the requirement that the business be able to contract with other businesses instead of actually contracting with other businesses, as it was originally under AB 5.

Referral Agencies

Labor Code section 2777 excludes “referral agencies” from the ABC test on certain conditions.

If an individual acting as a sole proprietor or a business entity formed as a partnership, LLC, LLP or corporation

(service provider) provides services to clients through a referral

agency, the Borello standard applies if the referral agency can show the following:

- The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in actually performing the work.
- If work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration, the service provider must certify to the referral agency that they have the required business license or business tax registration. The referral agency must keep the certifications for three years.
- If work for the client requires the service provider to hold a state contractor's license pursuant to Chapter 9 (beginning with Section 7000) of Division 3 of the Business and Professions Code, the service provider has that license.
- If there is an applicable professional licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, the service provider must certify to the referral agency that they have the appropriate licensure, permit, certificate or registration.
- The service provider delivers services to the client under service provider's name without being required to deliver services under the name of the referral agency.
- The service provider provides its own tools and supplies to perform the services.
- The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client.
- The referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.
- The service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client.

- Without deduction by the referral agency, the service provider sets their own rates, negotiates their own rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client.
- The service provider is free to accept or reject clients and contracts without being penalized in any form by the referral agency. This subparagraph doesn't apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

The law defines "referral agency" as a business that connects clients with service providers to provide certain services under a contract. For the purpose of this exception, referrals for services **"include, but are not limited to, graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and interpreting services."**

The law specifically excludes certain services, including janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, construction services other than minor home repair, and high hazard industry services.

The law defines "referral service contract" as the agency's contract with clients and service providers governing the use of its intermediary services, which are limited to "client referrals and other administrative services ancillary to the service provider's business operation." A referral agency's contract may include a fee or fees to be paid by the client for utilizing the referral agency.

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Under AB 5, the list of services in this exception was limited, but AB 2257 expanded it to the list above and added the phrase "including, but not limited to," opening the door for additional services to potentially qualify for this exception. AB 2257 also clarified and added definitions of certain services such as tutoring, youth sports coaching, interpreting services, consulting and animal services.

Referral agencies should consult with legal counsel to determine the implications of changes made by AB 2257.

Professional Services Contracts

Labor Code section 2778 provides that if specific criteria are met, certain "professional services" contracts are exempt from the ABC test and will be controlled by the Borello test. To fall under this exception, the hiring entity must establish that the individual (contractor):

- Maintains a business location, which may include the individual's residence, that's separate from the hiring entity (but the individual may perform services at the hiring entity's location);
- Has a business license and any required professional licenses or permits to practice in the profession if work is performed more than six months after this section's effective date;
- May set or negotiate their own rates for the services performed;

- May set their own hours outside of project completion dates and reasonable business hours;
- Customarily performs the same type of work under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work;
- Customarily and regularly exercises discretion and independent judgment in performing the services.

An “individual” under this provision may provide services through sole proprietorship or other business entity. Even if all the above criteria are met, only certain “professional services” qualify for the exception, including:

- **Marketing**, provided that the contracted work is original and creative in character and the result of which depends primarily on the invention, imagination or talent of the employee or work that is an essential part of or necessarily incident to any of the contracted work.
- **Administrator of human resources**, provided that the contracted work is predominantly intellectual and varied in character, and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.
- **Travel agent services** provided by either of the following:
 - » A person regulated by the Attorney General under Article 2.6 (beginning with Section 17550) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code; or
 - » An individual who sells travel within the meaning of subdivision (a) of Section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (g) of Section 17550.20 of the Business and Professions Code.
- **Graphic design.**
- **Grant writer.**
- **Fine artist** who creates works of art to be appreciated primarily or solely for their imaginative, aesthetic, or intellectual content, including drawings, paintings, sculptures, mosaics, works of calligraphy, works of graphic art, crafts, or mixed media.
- **Enrolled agent licensed by the U.S. Treasury Department to practice before the Internal Revenue Service** pursuant to Part 10 of Subtitle A of Title 31 of the Code of Federal Regulations.
- **Payment processing agent** through an independent sales organization.
- **Photographer, photojournalist, videographer or photo editor** who works under a written contract that specifies the rate of pay and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume, and the individual does not primarily perform the work at the hiring entity's business location.
 - » This clause is not applicable to an individual who works on motion pictures (includes theatre, TV, streaming, other shows, etc.). Details on what constitutes a “submission” have been omitted.

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- **Digital Content Aggregator**, defined as a licensing intermediary that obtains a license or assignment of copyright from a still photographer, photojournalist, videographer or photo editor for the purposes of distributing that copyright by way of sublicense or assignment to the intermediary's third party end users.

- **Freelance writer, translator, editor, copy editor, illustrator or newspaper cartoonist** who works under a written contract that specifies the rate of pay, intellectual property rights and obligation to pay by a defined time, as long as the individual providing services is not directly replacing an employee who performed the same work at the same volume and the individual doesn't primarily perform the work at the hiring entity's location.

- Services provided by an individual as a **content contributor, advisor, producer, narrator or cartographer** for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work if the individual works under a contract that specifies the rate of pay, intellectual property rights and obligation to pay by a defined time, as long as the individual is not replacing an employee who performed the same work at the same volume, and the individual does not primarily work at the hiring entity's location.

- Licensed **estheticians, electrologists, barbers or cosmetologists** provided that the individuals:

- » Set their own rates, process their own payments and are paid directly by clients.
- » Set their own hours of work and have sole discretion to decide the number of clients and which clients for whom they will provide services.
- » Have their own book of business and schedule their own appointments.
- » Maintain their own business license for services offered.
- » If the individual is performing services at the hiring entity's location, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space.

- **Master class teacher**, who is someone hired by a performing arts company to teach a master class for no more than one week. "Master class" means a "specialized course for limited duration that is not regularly offered by the hiring entity and is taught by an expert in a recognized field of artistic endeavor who does not work for the hiring entity on a regular basis."

- **Appraiser** as defined in Part 3 (starting with Section 11300) of Division 4 of the Business and Professions Code.

- **Registered professional forester** licensed pursuant to the Public Resources Code.

- **Real Estate Licensee** licensed by the state of California pursuant to Division 4 (beginning with section 10000) of the Business and Professions Code." The real estate licensee's classification is determined by Business and Professions Code section 10032 or, if that's not applicable, under

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various statutes or the Borello test, depending on the context.

- **Home Inspector** as defined by Section 7195 of the Business and Professions Code.
- **Repossession agency** licensed pursuant to Business and Professions Code section 7500.2, which determines worker classification if the agency is free from the hiring person's or entity's control and direction in connection with the performance of the work, both under the contract for the performance of the work and in actually performing the work.

Many of the above “professional services” are clear, as they’re either specifically defined or qualified by statutory references. AB 2257 added definitions and clarifications from the original provisions of AB 5; however, a few of the services remain vague and potentially problematic. For example, “graphic design” and “grant writer” have no qualifying or guiding language. Although many people likely have an idea of what these services are, how a court will analyze and interpret them remains an open question.

It’s also unclear exactly what an “administrator of human resources” is. But the law borrows language from the professional exemption in California’s wage orders in requiring the work be “predominantly intellectual and varied in character,” which suggests this exception applies to HR professionals performing high-level HR work requiring judgment and discretion rather than non-discretionary tasks such as processing payroll, for example.

Some services not included in the single-engagement event exception are janitorial, transportation and retail, among others.

Similarly, for “marketing,” the law also borrows language directly from the professional exemption for artistic professions. This suggests the individual performing the “original and creative” marketing services has a high level of discretion and independent judgment, though it is unclear what qualifies as marketing services under this law.

Employers considering the use of contractors for any of these professional services should consult with legal counsel before doing so.

Single Engagement Events

Labor Code Section 2779 provides for an exception to the ABC test for single-engagement events. The ABC test does not apply to two individuals wherein each is acting as a sole proprietor or separate business entity formed as a partnership, LLC, LLP or corporation providing services under a contract at the location of a single-engagement event under the following conditions:

- Neither individual is subject to the control and direction of the other, in connection with the performance of the work, both under the contract for performance and in actually doing the work.
- Each individual has the ability to negotiate their rate of pay with the other.
- The written contract specifies the total payment for services provided by both individuals at the event and the specific rate paid to each.

- Each individual maintains their own business location, which may include the individual's personal residence.
- Each individual provides their own tools, vehicles and equipment to perform the contract services.
- Each individual has the required business license or business tax registration, if required by the jurisdiction in which the work is performed.
- 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 the other potential customers as available to perform the same type of work.
- Each individual can contract with other businesses.

A single-engagement event is 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. Services under this exception do not include janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, construction services other than minor home repair, and high hazard industry services.

Music, Entertainment Industries

Labor Code Section 2780 provides an exception to the ABC test for occupations connected with creating, marketing, promoting or distributing sound recordings and musical compositions. Under this exception, the Borello test applies to:

- Recording artists, subject to certain conditions.
- Songwriters, lyricists, composers and proofers.
- Managers of recording artists.
- Record producers and directors.
- Musical engineers and mixers engaged in the creation of sound recordings.
- Musicians engaged in the creation of sound recordings, subject to certain conditions.
- Vocalists, subject to conditions.
- Photographers working on recording photo shoots, album covers, and other press and publicity purposes.
- Independent radio promoters.
- Any other individual engaged to render any creative, production, marketing or independent music publicist services related primarily to the creation, marketing promotion or distribution of sound recordings or musical compositions.

This exception doesn't apply to film and television unit production crews or publicists who aren't independent music publicists.

**The
music and
entertainment
industry exception,
which contains
complicated provisions,
was effective
beginning in 2021.**

Section 2780 doesn't create a blanket exception for the occupations listed above. Most notably, it provides that musicians and vocalists who don't receive royalties from the sound recordings or musical compositions will be treated as employees solely for purposes of receiving minimum and overtime wages for the hours worked during the engagement.

Additionally, a musician or musical group performing for a single-engagement live performance event (e.g., a concert) is subject to Borello **unless** the musical group is performing as a symphony orchestra, performing at a theme park, performing in a musical theatre production, or the group is headlining an event with more than 1,500 attendees or performing at a festival that sells more than 18,000 tickets per day, in which case the ABC test applies.

An exception exists for the relationship between a contractor and subcontractor in the construction industry provided certain requirements are met.

Lastly, section 2780 provides an exception for "individual performance artists" including comedians, improvisors, magicians, illusionists, mimes, spoken word performers, storytellers and puppeteers performing original work they created so long as they're free from the control of the hiring entity, retain their intellectual property rights, set the terms of work and negotiate their rates.

The exception for the music industry was added by AB 2257 and contains some complicated provisions. Music and entertainment industry businesses should consult with legal counsel on the law's effects.

Contractor and Subcontractor Relationship

Labor Code Section 2781 creates an exception for the "relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry." Both the Borello test and Labor Code section 2781, which is specific to contractors and very similar to the Borello test, will determine whether an individual is a contractor's employee. To qualify for this exception, the contractor must show that:

- The subcontract is in writing.
- The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.
- If the subcontractor is based in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor has the required business license or business tax registration.
- The subcontractor maintains a business location that's separate from the contractor's business or work location.
- The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.
- The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, legally authorized indemnity obligations, performance bonds or

warranties relating to the labor or services being provided.

- The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.

Additionally, a subcontractor providing **construction trucking services** need not be licensed by the Contractor's State License Board, provided the following are met:

- The subcontractor is a business entity formed as a sole proprietorship, partnership, LLC, LLP or corporation.
- For work performed after January 1, 2020, the subcontractor is registered with the Department of Industrial Relations as a public works contractor pursuant to Section 1725.5, regardless of whether the subcontract involves public work.
- The subcontractor utilizes its own employees to perform the construction trucking services, unless the subcontractor is a sole proprietor who operates their own truck to perform the entire subcontract and holds a valid motor carrier permit issued by the Department of Motor Vehicles.
- The subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.

**The
ABC test
doesn't apply to
certain occupations —
including, but not
limited to, licensed
physicians, dentists
and practicing lawyers —
all of which
are subject to
the Borello test.**

Data Aggregator

Section 2782 provides that the ABC test doesn't apply to the relationship between a "data aggregator" and a "research subject" under the following conditions:

- The research subject is free from the control and direction of the data aggregator with respect to the substance and content of the feedback.
- The nature of the feedback requested requires the research subject providing feedback to exercise independent judgment and discretion.
- The research subject has the ability to reject feedback requests without being penalized by the data aggregator.

For purposes of this exception, a "data aggregator" is a business, research institution or organization that requests and gathers feedback on user interface, products, services, people, concepts, ideas, offerings or experiences from individuals willing to provide it.

A "research subject" is any person who willingly engages with a data aggregator in order to provide individualized feedback on user interface, products, services, people, concepts, ideas, offerings or experiences, and does not engage solely for the purposes of completing individual tasks.

Specific Occupations

Section 2783 provides that the ABC test doesn't apply to the following occupations, which are subject to the Borello test:

- A **person or organization licensed by the Department of Insurance** under Chapters 5 (beginning with Section 1621), Chapter 6 (beginning with Section 1760) and Chapter 8 (beginning with Section 1831) of Part 2 of Division 1 of the Insurance Code (e.g., certain insurance agents, brokers, analysts, etc.).
- A **physician, surgeon, dentist, podiatrist, psychologist or veterinarian** licensed by the state of California under Division 2 of the Business and Professions Code (beginning with Section 500), performing professional medical services to or by a health care entity, including an entity organized as a sole proprietorship, partnership or professional corporation. Nothing in the subdivision circumvents, undermines or restricts the rights under federal law to organize and collectively bargain.
- A practicing **lawyer, architect, engineer, private investigator or accountant** who holds an active license from the state of California.
- A **securities broker-dealer or investment adviser** registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed by the state of California under Chapter 2 (beginning with Section 25210) or Chapter 3 (beginning with Section 25230) of Division 1 of Part 3 of Title 4 of the Corporations Code.
- A **direct salesperson** as described in Section 650 of the Unemployment Insurance Code, so long as that section's conditions are met.
- A **manufactured housing salesperson** subject to all applicable obligations under the Health and Safety Code beginning with section 18000.
- A **commercial fisherman** working on an American vessel (details of commercial fisherman exception omitted). This exception expires January 1, 2026.
- A **newspaper distributor** working under contract with a newspaper publisher and a **newspaper carrier** working under contract with either a newspaper publisher or newspaper distributor.
- An individual engaged by an **international exchange visitor program** that has obtained full official designation under federal law.
- A **competition judge** with specialized skill or expertise. This includes amateur umpires and referees.

Because some specific occupation exceptions are narrow and/or qualified by reference to specific statutes, employers should consult with legal counsel to determine whether the exception applies.

For the most part, the above exceptions are clear. But, because some exceptions are narrow and/or qualified by reference to specific statutes, employers should consult with legal counsel to determine whether the exception applies to their specific circumstances and, if so, whether the circumstances meet the Borello standard.

Motor Clubs

Per section 2784, the ABC test will not apply to “the relationship between a motor club holding a certificate of authority issued pursuant to Chapter 2 (beginning with Section 12160) of Part 5 of Division 2 of the Insurance Code and an individual performing services pursuant to a contract between the motor club and a third party to provide motor club services utilizing the employees and vehicles of the third party.”

Instead, the Borello test will apply if the motor club shows that the third party is a “separate and independent business” from the motor club.

Even if an exception to the ABC test applies, employers should use caution in classifying workers as independent contractors — consult with legal counsel before doing so to assess any risk of misclassification.

Application of the Worker Classification Law

AB 5 went into effect on January 1, 2020, and subsequent modifications and additions to the law by AB 2257 took effect September 4, 2020. Additional relatively small revisions went into effect on January 1, 2022.

The law states that it does not change, “but is declaratory of” existing law with regard to both the IWC Wage Orders and “violations of the Labor Code relating to wage orders.” In other words, AB 5 didn’t change existing law related to the wage orders, most notably the **Dynamex** decision, which has been the law since 2018. It’s unclear which Labor Code sections are “related” to the wage orders. However, in a May 2019 Division of Labor Standards

Enforcement (DLSE) [opinion letter](#), the California Labor Commissioner’s special counsel explained that it would be appropriate to apply the ABC test to any claim, including Labor Code violations, that rest on an employer’s obligations under a wage order, including minimum wage, overtime, reporting time pay, recordkeeping violations, meal and rest periods, and others. While DLSE opinion letters aren’t binding on the courts, some courts, including the California Supreme Court, have chosen to adopt DLSE interpretations.

**On
January 14, 2021,
the California Supreme
Court determined that
the Dynamex decision
applies retroactively
to all cases
‘not yet final’
as of the date
Dynamex
was decided.**

Whether the 2018 **Dynamex** decision itself applied retroactively remained unsettled until January 14, 2021, when the California Supreme Court determined that the decision applies retroactively to all cases “not yet final” as of the date **Dynamex** was decided. The court reasoned that **Dynamex** didn’t change any “settled rule” about what test applied to the Wage Orders and, thus, it wouldn’t be “improper or unfair” to apply it to employers retroactively.

Employers should consult with legal counsel about the impact of the California Supreme Court's decision. Most claims for unpaid wages under the California Labor Code carry a three-year statute of limitations that can be extended to four years as long as the plaintiff also includes a claim under California's Unfair Competition Law, plus the penalties that can be added to those claims under both the Labor Code and the Private Attorneys General Act.

Regarding retroactivity and existing claims, it's unclear the extent to which employers may be able to use the exceptions to the ABC test described above and codified in Labor Code sections 2776 through 2784. The law specifically states that the exceptions apply "retroactively to existing claims and actions to the maximum extent permitted by law," though that language is far from clear and the courts have not yet decided any cases on that issue.

Employers should continue using caution in classifying workers as independent contractors — they should consult with legal counsel about the law and how it impacts their specific work/service arrangements and circumstances, including which classification standard applies to a given arrangement/contract, whether any of the numerous exceptions apply, and the level of risk of misclassification under the applicable standard.

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