

Date of Hearing: May 20, 2020

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kara, Chair

AB 1850 (Gonzalez) – As Amended May 12, 2020

SUBJECT: Worker classification: employees and independent contractors

SUMMARY: Exempts from the 3-part ABC test for employment status and instead applies the test set forth in the California Supreme Court's *Borello* decision (1989) to certain occupations such as musicians, insurance inspectors and competition judges, subject to specified conditions, adds appraisers and certain master class teachers to the professional services exemption, revises the freelancer exemption, and recasts the exemption for referral agencies, as specified.

Specifically, **this bill:**

- 1) Recasts the requirements for the referral agency exemption to the ABC test by clarifying a number of provisions, including but not limited to, how a referral agency confirms the licensing of a service provider, the freedom of a service provider to maintain its own clientele, and the ability of a service provider to set or negotiate its terms in consultation with clients as well as establishing its rates without deduction by a referral agency.
- 2) Clarifies the definition of a tutor for purposes of the referral agency exemption to include individuals who use privately developed curriculum or provide private instruction or supplemental academic enrichment services by using their own teaching methodologies and techniques.
- 3) Adds youth sports coaching, as defined, and exclusive of coaching based on curriculum developed by a public school or coaching services contracted by a public school, as specified, to the referral agency exemption.
- 4) Adds to the professional services exemption performers hired to teach a master class, as defined, and real estate appraisers, as defined.
- 5) Exempts the professional services of a still photographer, photojournalist, videographer, or photo editor, as defined, who works under a contract with specified terms, as long as the individual providing the services is not replacing an employee performing the same work at the same volume, the individual does not primarily perform the work at the hiring entity's business location, and the individual is not restricted from working for more than one hiring entity.
- 6) Exempts the professional services of a digital content aggregator, as defined, by a still photographer, photojournalist, videographer, or photo editor.
- 7) Revises the freelancer exemption to provide that the professional services of a freelance writer, certified translator, editor, copyeditor, illustrator, or newspaper cartoonist are exempt if the individual works under a contract with specified terms, is not replacing an employee performing the same work at the same volume, does not primarily perform the work at the hiring entity's business location, and is not restricted from working for more than one hiring entity.

- 8) Exempts individuals who provide underwriting inspections, premium audits, risk management or loss control work for the insurance industry.
- 9) Exempts individuals engaged by the International Exchange Visitor Program with official designation by the United States Department of State and that are in full compliance with its regulations, including the execution of a written agreement to act on behalf of a program sponsor.
- 10) Exempts certain competition judges who have a specialized skillset or expertise and provide services requiring the exercise of discretion and independent judgment to an organization in order to determine competition outcomes.
- 11) Exempts certain occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions, including, but not limited to, recording artists and musicians, as specified, songwriters, composers, record producers, and musical engineers.
- 12) Exempts a musician or musical group for the purpose of a single-engagement live performance event, *unless* one of the following conditions is met:
 - a) The musical group is performing as a symphony orchestra, performing at a theme or amusement park, or a musician is performing in a musical theater production.
 - b) The musical group is a headliner for a performance at a venue with more than 1,500 attendees.
 - c) The musical group is performing at a festival selling more than 18,000 tickets per day.
- 13) Provides that an action for injunctive relief to prevent the continued misclassification of employees as independent contractors may also be prosecuted by a district attorney.

EXISTING LAW:

- 1) Provides that for purposes of the Labor Code and the Unemployment Insurance Code, where another definition of “employee” is not otherwise specified, and for the wage orders of the Industrial Welfare Commission (IWC), a person providing labor or services for remuneration shall be considered an employee unless the hiring entity satisfies the 3-part ABC test:
 - 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.
 - 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.
- 2) Exempts from the application of the ABC test, and instead, applies the definition of an employee as set forth *Borello*, to specified occupations and business relationships, including the use of professional services under certain circumstances.

- 3) Includes in the ABC test exemption for specified professional services, those services provided by still photographers, photojournalists, freelance writers, editors, and newspaper cartoonists who do not license or provide, as applicable, content submissions more than 35 times annually to a hiring entity.
- 4) Exempts from the ABC test the relationship between a referral agency, as defined, and a service provider, as defined, under specified conditions.
- 5) Authorizes the state Labor Commissioner to enforce wage and hour, workplace retaliation, and employment classification laws.

FISCAL EFFECT: Unknown

COMMENTS: The California Supreme Court's *Dynamex* decision was issued two years ago but debate over worker misclassification and the Legislature's role in confronting it continues to garner attention on the state and national level. Worker misclassification is not a new concept. In fact, a 2000 study commissioned by the U.S. Department of Labor found that nationally between 10% and 30% of audited employers misclassified workers.¹ In addition, as our workplaces and the nature of the employee-employer relationship evolves, new opportunities for misclassification have emerged. In 2017, California's Employment Development Department Tax Audit Program conducted 7,937 audits and investigations, resulting in assessments totaling \$249,981,712, and identified nearly *half a million* unreported employees.²

With the passage of AB 5 last year, the California Legislature adopted the three-prong ABC test from *Dynamex* for determining employee status, with some exceptions, and applied it to wage orders, state labor law, and the Unemployment Insurance Code. The ABC test, compared to its predecessor, the *Borello* test, is seen as a simpler and more consistent approach to employment determinations. Where the *Borello* test focuses on the "economic realities" of the employment relationship and the degree of economic dependency borne by the worker, the ABC test is largely borrowed from common law and evaluates the employer's right to control the manner in which work is done. The National Labor Relations Act, which governs private sector employee-employer relations, also uses a right to control test for purposes of determining employee status.

AB 1850 recognizes that there may be business relationships where the hiring entity does not exercise a significant degree of control over the worker. As explained by the author below, the intent of this measure, as it evolves, is to clarify relationships where workers are free from employer direction while ensuring key labor rights and protections for those both inherently and at risk of being misclassified.

¹ See the National Employment Law Project's (NELP) Fact Sheet "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries," <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/>.

² Employment Development Department 2018 Annual Report on Fraud Deterrence and Detection Activities, https://edd.ca.gov/About_EDD/pdf/Fraud_Deterrence_and_Detection_Activities_2018.pdf.

Under this measure, the ABC test remains the overarching test for employment status. Consequently, the bill reinforces the protective purpose of our wage and hour laws. It acknowledges that employment relationships involve “a ‘democratic deficit’ since workers are subject to an employer’s direction rather than determining their own work tasks, and that employment builds on and reinforces economic inequality.”³

According to the author, “In 2019, I authored AB 5 to provide clarity for workers, businesses and taxpayers in the wake of the California Supreme Court’s unanimous 2018 *Dynamex* ruling that established a three-part ABC test for determining employment status. The stricter test makes it clear that workers who have been historically misclassified and kept off payroll as employees – including janitorial workers, construction workers, port truck drivers, home health aides, hotel and hospitality workers, delivery and rideshare drivers – are entitled to basic employment rights under all of the state’s labor laws, such as the right to minimum wage, overtime, unemployment insurance, workers’ compensation, paid sick days, paid family leave, workplace protections against discrimination and retaliation, and the right to form or join a union. In addition, AB 5 also outlines criteria for contracts between bona fide businesses in which the Borello test would apply for purposes of determining employment status, instead of the *Dynamex* ruling’s ABC test.

When AB 5 passed last year, I acknowledged that my work addressing these complex issues was not finished. I introduced Assembly Bill 1850 in January to continue working on clarifying issues affecting a variety of industries following the passage of AB 5. To date, I have spent two years since the *Dynamex* ruling engaging with individuals, worker and business representatives to understand how the ruling and AB 5 has impacted their work, as well as examine the legacy of misclassification in the respective industries.

It is my intent as AB 1850 moves through the legislative process to continue to address ambiguities in existing law and ensure there are clear workplace rules for those individuals operating as their own, independent businesses. Under both the ABC test and the Borello test, employment status has always been determined based on whether a hiring business can impose a significant level of control and direction on the manner and means by which a worker accomplishes their task. AB 1850 remains consistent with this principle and makes it clear that when the nature of an individual’s work is inherently subject to control and direction by the hiring business, those individuals will continue to be protected against misclassification under the ABC test.”

Legal Developments Regarding Enforcement of AB 5

Since the passage of AB 5, at least two notable complaints charging misclassification have been filed against prominent companies. In February, the City Attorney of San Diego, on behalf of the People of California, filed to enjoin Instacart from improperly classifying its shoppers as independent contractors. The superior court judge granted a preliminary injunction against Instacart on the grounds that the shoppers and the public would be irreparably harmed without the injunction, citing, in particular, the need for “restitution to the misclassified employees...for unpaid wages, overtime, and rest breaks, missed meals, and reimbursement for expenses

³ Guy Davidov, “The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection,” 52 U. Toronto L.J., 357, 377-386 (2002).

necessary to perform the work.”⁴ More recently, the State Attorney General and three City Attorneys filed a complaint for injunctive relief for continued misclassification against Uber and Lyft. The lawsuit alleges that the defendants “have devised an unlawful business model that denies these...drivers the protections and benefits they have rightfully earned as employees, and thereby gained an unlawful and unfair advantage in the marketplace. Defendants’ misclassification scheme hurts vulnerable drivers, undermines law-abiding competitors...and harms taxpayers who are often called upon to address the negative consequences to drivers and their families of Defendants’ exploitative employment practices.”⁵ The allegations rely heavily on the public policy behind California’s adoption of the ABC test.

Arguments in Support

The California Labor Federation, in support of the bill, states “AB 1850 furthers the original purpose of AB 5 by balancing the need to ensure the most vulnerable workers will continue to be protected under the ABC test, while clarifying instances when an individual who operates their own independent business is clearly subject to the *Borello* test. The provisions of AB 1850 were developed with the input of the individuals impacted by the changes and are carefully crafted to prevent the creation of loopholes or opportunities for employers to unnecessarily shift to an independent contractor model for profit.

One example of these provisions is for services provided by a still photographer, photojournalist, videographer, or photo editor. It requires that to be considered by the *Borello* test, there be a contract that specifies terms that ensure independence in advance and specifies that the contractor cannot replace an employee performing the same work at the same volume. The other exemptions in the bill are similarly crafted to balance the concerns of truly independent contractors and prevent employers from an unchecked shift to a contractor model that leaves workers unprotected.

AB 5 established a law that is fundamental to stopping the rapid decline into entrenched income inequality and the destruction of the social safety net in this state. Millions of workers are left without basic protections like minimum wage and unemployment insurance while working for global corporations worth billions – both gig companies, as well as well-established traditional businesses. Any exemptions to the AB 5 law must be carefully considered of the current and future implications. AB 1850 achieves that balance.”

Arguments in Support if Amended

A coalition of business organizations, including the California Chamber of Commerce, are in support if amended, and state, “We appreciate the recognition in this bill that the *Dynamex* decision and AB 5 were not one size fits all determinations, and that many other industries and professions are in need of relief and exemption from the unprecedented departure from the *Borello* test that had been utilized in California for nearly three decades. This has been made even more clear since AB 5 took effect.

⁴ *People v. Maplebear, Inc.*, Case No. 2019-48731, Tentative Ruling on Motion for Preliminary Injunction, Superior Court, County of San Diego, February 14, 2020, p. 4.

⁵ *People of the State of California v. Uber Technologies Inc., A Delaware Corporation; Lyft, Inc., A Delaware Corporation*, Complaint for Injunctive Relief, Restitution, and Penalties, filed in Superior Court, County of San Francisco, May 5, 2020, p. 18.

However, we believe the Legislature should not stop with selecting just a few industries and professions, while excluding others similarly situated. Accordingly, we seek additional amendments that provide a more comprehensive and holistic approach to the application of *Dynamex* and AB 5 that reflects today's modern workforce.

In particular, the business-to-business exemption enacted in AB 5 is too limiting and falls far short of recognizing the vast legitimate, lawful contracts between two sophisticated, independent businesses. Any business should be able to contract with another lawful business to provide services, despite whether the services provided are within the 'usual course of business' or the service benefits the company's customers/clients."

Arguments in Opposition Unless Amended

The California Music Educators Association is opposed and argues for their own exemption, stating, "AB 5 of 2019 created a major problem and a significant burden for small non-profit organizations like ours that will have a direct impact on California students. As a result of AB 5, music teachers and university music faculty (who are already fully employed and represented), can no longer serve in temporary work as adjudicators, guest conductors, clinicians, for music students as independent contractors."

Prior and Related Legislation in the Assembly

AB 5 (Gonzalez) Chapter 296, Statutes of 2019 codifies the decision of the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) that presumes a worker is an employee unless a hiring entity satisfies a three-factor test, and exempts from the test certain professions and business-to-business relationships.

AB 170 (Gonzalez) Chapter 415, Statutes of 2019 exempts newspaper distributors and carriers, as defined, from the three-part *Dynamex* test for determining employee status until January 1, 2021.

AB 1925 (Oberholte) of 2020 would expand the exemptions to the ABC test to include small businesses, as specified.

AB 1928 (Kiley) of 2020 would repeal existing provisions of the ABC test and instead require a determination of whether a person is an employee or an independent contractor to be based on the specific multifactor test set forth in *Borello*, as specified.

AB 2257 (Gonzalez) of 2020 would exempt from the 3-part ABC test for employment status and instead applies the test set forth in the California Supreme Court's *Borello* decision (1989) to certain occupations, subject to specified conditions, in connection with creating, marketing, promoting, distributing sound recordings or musical compositions and performing in single-engagement live events. In addition, it would recast the professional services exemption for various freelancer and creative professions to require that these individuals are not replacing employees, are not primarily performing their work at the hiring entity's business location, and are not restricted from working for more than one entity.

AB 2389 (C. Garcia) of 2020 would prohibit, among other things, adult entertainers or performers from working at an adult entertainment business or working in an adult entertainment

video unless they received a certificate of training completion regarding their employment rights, as specified.

AB 2457 (Melendez) of 2020 would prohibit an employer from being subject to a monetary fine or penalty for a violation of the above provisions with respect to an applicant who has applied for unemployment benefits and has previously acted as an independent contractor during the past 5 years, among other things.

AB 2458 (Melendez) of 2020 would exempt individuals working as physical therapists from the provisions of the ABC test.

AB 2465 (Gonzalez) of 2020 would recast and reorganize the exemptions for a person licensed as an esthetician, electrologist, manicurist, barber, or cosmetologist, as specified.

AB 2489 (Choi) of 2020 would, during the timeframe in which a state of emergency is in effect due to COVID-19 and 90 days thereafter, prohibit the application of the ABC test for respiratory therapists and other medical personnel not otherwise covered by an existing exemption from the ABC test, and would instead require that the multifactor test set forth in the case of *Borello* apply.

AB 2497 (Bigelow) of 2020 would exempt a person providing services as a livestock judge from the application of *Dynamex*.

AB 2572 (M. Dahle) of 2020 would exempt persons who perform work on forested landscapes as geologists and geophysicists, land surveyors, contractors, engineers, and persons in the pest control business who meet certain statutory licensing requirements from the ABC test.

AB 2793 (Mathis) of 2020 would expand exemptions under the ABC test to include an individual providing services as a licensed clinical social worker, a licensed education psychologist, a licensed professional clinical counselor, or a licensed marriage and family therapist.

AB 2794 (Mathis) of 2020 would expand the ABC test exemptions to also include health facilities, as defined, which contract with companies that employ health care providers who provide services to patients at those facilities.

AB 2796 (Fong) of 2020 would delete the sunset date of January 1, 2021, applicable to newspaper distributors or newspaper carriers, thereby making the above exemption apply indefinitely.

AB 2822 (Waldron) of 2020 would exempt transportation network companies from the application of *Dynamex*.

AB 2823 (Waldron) of 2020 would expand exemptions under the ABC test to include an individual who holds an active license from the State of California and is practicing as a land surveyor, landscape architect, geologist, or geophysicist, and individuals in construction management or planning.

AB 2864 (Bauer-Kahan) of 2020 would exempt from the ABC test nonprofit youth sports coaching, as prescribed, and define “nonprofit youth sports coach” for that purpose.

AB 2979 (Voepel) of 2020 would exempt from the ABC test specified individuals working as interpreters and translators.

AB 3136 (Voepel) of 2020 would exempt certified shorthand reporters from the ABC test.

AB 3185 (Lackey) of 2020 would expand exemptions of the ABC test to include individuals providing services as a sports official, as defined, for a youth or adult amateur sports event, unless the official is already exempted from the definition of employee under another statute or regulation, as specified.

AB 3281 (Brough) of 2020 would include as a “contracting business” for purposes of the business-to-business exemption to the ABC test, a business that is subject to specified tax provisions relating to sole proprietorships on limited partnerships.

REGISTERED SUPPORT / OPPOSITION:

Support

Asse International, INC.
Associated Builders and Contractors Northern California Chapter
California Labor Federation, AFL-CIO
California State Council of Service Employees International Union (SEIU California)
Field Services Alliance of California
International Student Exchange

Support If Amended

Acclamation Insurance Management Services
Agricultural Council of California
Allied Managed Care
Associated General Contractors
Auto Care Association
California Chamber of Commerce
California Farm Bureau Federation
California Manufacturers and Technology Association
Cawa - Representing the Automotive Parts Industry
Coalition of Community Artists
Coalition of Small & Disabled Veteran Business
Edelstein, Gilbert, Robson & Smith, LLC
Flasher Barricade Association
National Federation of Independent Business (NFIB)
Vintage Duplicate Bridge Club

Oppose Unless Amended

CMEA

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