

the performance of the work, both under the contract for the performance of such work and in fact, (b) they perform work that is outside the usual course of the hiring entity's business, and (c) they are customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

- 2) **Dynamex and AB 5.** The issue of “misclassification” – when an individual is wrongly classified as an independent contractor and therefore excluded from certain protections and benefits – has long been a nationwide problem. For instance, nearly 20 years ago, a study commissioned by the US Department of Labor found up to 30% of audited employers had misclassified workers. Despite misclassification's persistence as an enduring feature of the work landscape, it has recently gained significant new attention thanks to the California Supreme Court's *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (*Dynamex*) decision. With this decision, the court concluded that certain package delivery drivers were misclassified as independent contractors rather than employees, and the court adopted the ABC test and rejected the Borello test, in part, on the grounds the Borello test is not appropriate for wage and hour laws meant to protect workers.

In response to the court's ruling, the Legislature passed AB 5 to codify the *Dynamex* decision by adopting the ABC test with some exceptions. The author of AB 5 and this bill explains the goal of AB 5 as follows:

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.

- 3) **Recent events.** AB 5's provisions went into effect on January 1, 2020, and its full impact is not yet known. The Legislative Analyst's Office (LAO) estimates that up to 1 million independent contracts may be affected by the new ABC test, though there is significant uncertainty around how many will need to be reclassified as employees and how that process will unfold.

However, there are emerging signs that state and local governments are more assertively addressing misclassification following enactment of AB 5. In February 2020, the City Attorney of San Diego filed to enjoin Instacart for improperly classifying its shoppers as independent contractors. In May 2020, the State Attorney General and three city attorneys filed a complaint for injunctive relief against Uber and Lyft for continued misclassification.

Moreover, the Governor's 2020-21 budget proposes additional resources to enforce compliance with AB 4. The May revision to the Governor's budget proposal includes \$17.5 million for DIR, \$3.4 million for EDD, and \$780,000.

- 4) **COVID-19.** The COVID-19 pandemic and the unemployment crisis have put into sharp focus the importance of employee status and the safety net it provides. Many of those hardest hit by the economic crisis spurred by the COVID-19 pandemic are independent contractors, such as rideshare drivers, who experienced an immediate and deep decline in income. Unlike employees, these independent contractors are not eligible for traditional unemployment insurance. To help those contractors harmed by the economic downturn, the federal government created the temporary Pandemic Unemployment Assistance (PUA) program to provide unemployment benefits to independent contractors and other individuals typically excluded from regular unemployment benefits. As of May 23, 2020, approximately 11 million individuals nationwide either were utilizing PUA benefits or had applied for them.

The PUA program identifies some of the societal costs associated with business models that heavily rely on the use of independent contractors. Without emergency action, millions of workers would be without much-needed income support to weather the economic downturn.

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