

ASSEMBLY THIRD READING

AB 1850 (Gonzalez)

As Amended May 12, 2020

Majority vote

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

Major Provisions

- 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) Adds to the professional services exemption performers hired to teach a master class, as defined, and real estate appraisers, as defined.
- 3) 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.
- 4) 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.
- 5) Exempts individuals who provide underwriting inspections, premium audits, risk management or loss control work for the insurance industry.
- 6) 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.
- 7) 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.

- 8) 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.
- 9) Exempts a musician or musical group for the purpose of a single-engagement live performance event, *unless* certain conditions are met.
- 10) 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.

COMMENTS:

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.

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.

According to the Author:

"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. "

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."

Arguments in Opposition:

The California Music Educators Association is opposed unless and amended and argues for their own exemption, stating, "AB 5 [(Gonzalez), Chapter 296, Statutes 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."

FISCAL COMMENTS:

According the Assembly Appropriations Committee:

- 1) Minor and absorbable costs to the Department of Industrial Relations (DIR) to implement the provisions of this bill. This bill is not expected to create additional workload beyond what is expected from ongoing implementation of AB 5 (Gonzalez) of 2019.
- 2) Minor and absorbable costs to the Employment Development Department (EDD) to update employer guidance and train staff on the provisions of this bill. EDD does not anticipate this bill generating additional workload related to classification issues compared to current law.
- 3) Unknown impact on state income tax revenues because of a possible shift in the number of individuals classified as independent contractors instead of employees. The Franchise Tax Board (FTB) notes that this type of reclassification shifts business-related expenses from the business to the worker, which will decrease a business's tax liability. At the same time, the decrease in business expenses will increase business tax liability. The net revenue effect is unknown.

VOTES:

ASM LABOR AND EMPLOYMENT: 7-0-0

YES: Kalra, Flora, Carrillo, Diep, Gonzalez, Jones-Sawyer, Luz Rivas

ASM APPROPRIATIONS: 18-0-0

YES: Gonzalez, Bigelow, Bauer-Kahan, Bloom, Bonta, Calderon, Carrillo, Chau, Megan Dahle, Diep, Eggman, Fong, Gabriel, Eduardo Garcia, Petrie-Norris, McCarty, Robert Rivas, Voepel

UPDATED:

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CONSULTANT: Megan Lane / L. & E. / (916) 319-2091

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