

## CONCURRENCE IN SENATE AMENDMENTS

AB 323 (Blanca Rubio)

As Amended August 27, 2020

Majority vote

**SUMMARY:**

Exempts, until January 1, 2022, newspaper carriers and newspaper distributors, as defined, from the 3-part ABC test for employment status. Requires that the Department of General Services (DGS) report annually information on the state's contracting practices with media platforms for placement of marketing or outreach advertising material.

**The Senate Amendments:**

Delete the prior version of this bill and instead:

- 1) Provide that newspaper carriers, as defined, and newspaper distributors working under contract with a publisher are exempt from the three-part ABC test for employment status until January 1, 2022.
- 2) Declare it is the policy of the Legislature that the state should assess and evaluate the effectiveness of its contracts to determine how it can best use its media and marketing efforts to reach ethnic residents, as specified.
- 3) Require that beginning July 1, 2021, DGS shall publicly issue a report on its website by July 1 of each year identifying the following:
  - a) Each state agency that paid for placement of advertising material, as specified, pursuant to a contract.
  - b) The amounts paid by each state agency to each media platform pursuant to a contract including subcontractor amounts when available to place advertising material.
  - c) The recipients of the amounts paid by each state agency to media platforms including subcontractor amounts when available, with which the agency contracted or subcontracted to place advertising materials.
- 4) Require the information in 3), above, to be further disaggregated to report information on contracts and subcontracts, if the information is available, for advertising material targeting ethnic communities, as specified, and the LGBTQIA community.
- 5) Provide that the reporting provisions become inoperative on July 1, 2023, and as of January 1, 2024, are repealed.
- 6) Add language to address chaptering out with AB 2257 (Gonzalez) of the current legislative session.

**COMMENTS:***Background on AB 5*

AB 5 (Gonzalez) of 2019 codified and clarified the application of the California Supreme Court's ruling in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018). The *Dynamex* ruling presumes a worker is an employee unless a hiring entity satisfies a three-factor test. AB 5 provides that certain occupations and business to business relationships that meet specified criteria are exempt from the three-part test and are, instead, governed by the definition of an employee as set forth in the decision of the California Supreme Court in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations (Borello)* (1989). This measure further delays the application of the ABC test to the newspaper delivery industry until January 1, 2023.

*Background on the Newspaper Carrier Industry*

The newspaper carrier or delivery industry is arguably one of the first gig sectors in the United States dating back to the 19th century, the industry has utilized "news boys" and so-called "little merchants" to deliver the news, and has done so primarily by calling them independent contractors. While the industry has since evolved to utilize adults who largely use their own vehicle to deliver the papers, their classification as independent contractors remains an ongoing issue.

Many argue that the long-standing practice of classifying carriers as independent contractors has put carriers in a position of economic precarity. Misclassification of newspaper carriers has led to "serious injustice, with thousands of carriers being denied millions of dollars in tax contributions, benefits, and workers' compensation in the instances where carriers have been injured on the job."<sup>1</sup> Without irony, the industry has tried to have it both ways, by controlling the pay and terms and conditions of the carriers' employment, while evading other traditional employer duties such as the provision of minimum wage, overtime, and meal and rest breaks.

*Newspaper Carrier Misclassification Cases*

Courts have addressed the issue of misclassification of newspaper carriers since the 1920's.<sup>2</sup> In 1922, in *Press Publishing Co. v. Industrial Accident Commission*, the California Supreme Court concluded that a paperboy was an employee of the publishing company for purposes of workers' compensation.<sup>3</sup> The court reasoned that "the most significant fact in this regard and one which points towards the relation of employee rather than to the status of an independent contractor is the fact that [the plaintiff] was hired on the same terms as the other carriers and the [defendant newspaper] had the right to exercise the same direction and control over [the plaintiff] as it did over the other carrier boys ..."<sup>4</sup> In 1944, the California Supreme Court concluded that newspaper carriers are employees for purposes of the Unemployment Insurance Act.<sup>5</sup> In 2017, a California appellate court—applying the *Borello* test for causes of action under the Labor Code—affirmed a

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<sup>1</sup> Jean Tom, "Note: Is a Newscarrrier an Employee or an Independent Contractor? Deterring Abuse of the 'Independent Contractor' Label via State Tort Claims," *Yale Law and Policy Review*, Volume 19, page 493, 2001.

<sup>2</sup> See *Press Publishing Co. v. Industrial Accident Com.* (1922) 190 Cal. 114; *Call Publishing Co. v. Industrial Accident Com.* (1928) 89 Cal. App. 194.

<sup>3</sup> *Press Publishing Co.*, *supra* 190 Cal. 114.

<sup>4</sup> *Id.* at pp. 120-121.

<sup>5</sup> *Cal. Employment Com. v. Los Angeles Down Town Shopping News Corp.* (1944) 24 Cal. 2d 421.

trial court decision that newspaper carriers were employees.<sup>6</sup> Furthermore, in June of this year, a district court found that even a newspaper carrier who subcontracts some of their route to another carrier is an employee, provided the manner and means of their work is controlled by the employer.<sup>7</sup>

**According to the Author:**

None.

**Arguments in Support:**

According to the Los Angeles County Business Federation, "Newspapers are the primary source of information that keeps our customers and the community informed about issues that impact local business operations. In the Los Angeles region, the L.A. Daily News, San Fernando Valley Business Journal, San Fernando Valley Sun/El Sol del Valle de San Fernando, The Los Angeles Times, Glendale News-Press, Los Angeles Herald Examiner, and others serve as the primary means of learning about services and discounts from a variety of businesses such as electric and utility providers, communication providers, hospitals, banks, real estate agents and local retailers.

Even before the pandemic, newspapers were operating under extreme financial pressure, and the recent loss of advertising has created an industry crisis that the Legislature cannot ignore. The recent closure of the Glendale News-Press is just one example of this crisis. AB 323 will help to sustain the news industry, thus helping our businesses to reach customers and recovery swiftly. California's newspapers are our critical partners in rebuilding the local and state economy and must be granted these provisions."

**Arguments in Opposition:**

None.

**FISCAL COMMENTS:**

According to the Senate Appropriations Committee,

- 1) The enacted 2020-21 state budget provides resources to implement AB 5 (see below), including \$17.5 million for the Department of Industrial Relations (DIR), and \$3.4 million for the Employment Development Department (EDD). Both agencies indicate that they can implement this bill's requirements with the above provided resources.
- 2) The Department of General Services (DGS) indicates that it would incur annual General Fund costs of \$152,000 to implement its provisions of the bill.
- 3) The Franchise Tax Board (FTB) indicates that the bill would have an unknown impact on revenues. FTB's implementation costs would be minor and absorbable.

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<sup>6</sup> *Espejo v. The Copley Press, Inc.* (2017) 207 Cal.App.5th 329, 342-352.

<sup>7</sup> *Martel v. Hearst Communications, Inc.*, (2020) (N.D. Cal.) Case: 3:19-cv-02715-WHA.

**VOTES:****ASM BUDGET: 28-0-3**

**YES:** Ting, Obernolte, Bloom, Brough, Chiu, Cooper, Fong, Frazier, Gallagher, Cristina Garcia, Jones-Sawyer, Lackey, Limón, Mathis, McCarty, Medina, Melendez, Mullin, Muratsuchi, Nazarian, O'Donnell, Patterson, Ramos, Luz Rivas, Mark Stone, Weber, Wicks, Wood

**ABS, ABST OR NV:** Arambula, Reyes, Blanca Rubio

**ASSEMBLY FLOOR: 77-0-3**

**YES:** Aguiar-Curry, Arambula, Bauer-Kahan, Berman, Bigelow, Bloom, Boerner Horvath, Bonta, Brough, Burke, Calderon, Carrillo, Chau, Chen, Chiu, Choi, Chu, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Diep, Eggman, Flora, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kiley, Lackey, Levine, Limón, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Melendez, Mullin, Muratsuchi, Nazarian, O'Donnell, Obernolte, Patterson, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Smith, Mark Stone, Ting, Voepel, Waldron, Weber, Wicks, Wood, Rendon

**ABS, ABST OR NV:** Cervantes, Gloria, Kamlager

**SENATE FLOOR: 39-0-1**

**YES:** Allen, Archuleta, Atkins, Bates, Beall, Borgeas, Bradford, Caballero, Chang, Dahle, Dodd, Durazo, Galgiani, Glazer, Lena Gonzalez, Grove, Hertzberg, Hill, Hueso, Hurtado, Jackson, Leyva, McGuire, Melendez, Mitchell, Monning, Moorlach, Morrell, Nielsen, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener, Wilk

**ABS, ABST OR NV:** Jones

**UPDATED:**

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