
SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT

Senator Dave Cortese, Chair

2021 - 2022 Regular

Bill No:	AB 1506	Hearing Date:	July 12, 2021
Author:	Kalra		
Version:	July 6, 2021		
Urgency:	No	Fiscal:	Yes
Consultant:	Alma Perez-Schwab		

SUBJECT: Worker status: employees and independent contractors: newspaper distributors and carriers

KEY ISSUE

Should the Legislature extend for three years an existing exemption for newspaper distributors and carriers from the ‘ABC Test’ under *Dynamex* (AB 5) and require them to submit specified information on the number of carriers utilized as independent contractors and as employees, as well as their wage rates and information to demonstrate compliance of their carriers with the *Borello* test?

ANALYSIS

Existing law:

- 1) Establishes a comprehensive set of protections for employees, including a time-sure minimum wage, meal and rest periods, workers’ compensation coverage in the event of an industrial injury, sick leave, disability insurance (DI) in the event of a non-industrial disability, paid family leave, and unemployment insurance (UI).
(Labor Code §§201, 226.7, 246, 512, 1182.12, & 3600 and UI Code §§1251 & 2601)
- 2) 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 (per *Dynamex*):
 - 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.
The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.
(Labor Code §2775)
- 3) Exempts from the application of the ABC test, and instead, applies the definition of an employee as set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) (*Borello*), to specified occupations and business relationships, including newspaper distributors working under contract with a newspaper publisher, as defined, or

newspaper carriers. This newspaper distributor exemption expires on January 1, 2022. (Labor Code §2783)

- 4) Provides the following definitions:
 - a) “Newspaper” means a newspaper of general circulation, as defined in Section 6000 of the Government Code, and any other publication circulated to the community in general as an extension of or substitute for that newspaper’s own publication, whether that publication be designated a “shoppers’ guide,” as a zoned edition, or otherwise.
 - b) “Publisher” means the natural or corporate person that manages the newspaper’s business operations, including circulation.
 - c) “Newspaper distributor” means a person or entity that contracts with a publisher to distribute newspapers to the community.
 - d) “Carrier” means a person who effects physical delivery of the newspaper to the customer or reader.
(Labor Code §2783)

This bill:

- 1) Extends the exemption for newspaper distributors working under contract with a newspaper publisher and newspaper carriers from January 1, 2022, to January 1, 2025.
- 2) Requires every newspaper publisher and distributor to submit to the Labor and Workforce Development Agency, on or before March 1, 2022, March 1, 2023, and March 1, 2024, the following information related to their workforce for the current year:
 - a. The number of carriers utilized as independent contractors and as employees.
 - b. The average wage rate paid to carriers classified as independent contractors and as employees.
 - c. The number of carriers who are under a contract containing a minimum performance standards clause.
 - d. The number of carrier wage claims filed, if any, with the Labor Commissioner or in a court of law.
 - e. Any information the agency deems relevant to demonstrate compliance with *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 as it pertains to the employment status of carriers.
- 3) Specifies that for the March 1, 2022 reporting date only, every newspaper publisher and distributor shall also report the number of carrier wage claims filed with the Labor Commissioner or in a court of law for the preceding three years.
- 4) Specifies that the Labor and Workforce Development agency may request that a publisher or distributor provide additional documentation to verify the information they have reported.

COMMENTS

1. Background: *Dynamex* and AB 5

The employer-employee relationship is at the core of the rights and obligations found within Labor Code. Being classified as an employee is essential to trigger most of the employer mandates and worker protections found within existing law. California's wage and hour laws (e.g., minimum wage, overtime, meal periods and rest breaks, etc.), workplace safety laws, and retaliation laws protect employees, but not independent contractors. Additionally, employees can go to state agencies such as the Labor Commissioner's office to seek enforcement of these laws, whereas independent contractors must resolve their disputes or enforce their rights under their contracts through other means.

For several decades, the employer-employee relationship was put under pressure due to the increased use of independent contractors and the misclassification of employees. For employers lawfully using the independent contractor model, they trade control over the working conditions for being released from many of the primary obligations of being an employer, including paying overtime, remitting payroll taxes, securing workers' compensation coverage, and ensuring a healthy and safe work environment. Unfortunately, this model created incentives for employers to misclassify employees as independent contractors. 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.¹

The issue culminated with a 2018 Supreme Court decision, *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. Under *Dynamex*, the test for whether a worker is an independent contractor or an employee was simplified to a three-prong test:

- (A) *The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;*
- (B) *The worker performs work that is outside the usual course of the hiring entity's business;*
and
- (C) *The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.*

In 2019, AB 5 (Gonzalez, Chapter 296, Statutes of 2019) codified the *Dynamex* decision requiring that employers prove that their workers can meet the ABC test in order to be lawfully classified as independent contractors, and exempted from the test certain professions and business-to-business relationships. AB 5 also provided specified industrial categories where the long-standing *Borello* test would remain the standard for determining who is an employee. Under *Borello*, in *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341, the California Supreme Court created an 11 point "economic realities" test on whether someone could lawfully be considered an independent contractor.

¹ 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.

Also in 2019, AB 170 (Gonzalez, Chapter 415, Statutes of 2019) provided newspaper distributors an exemption from the ABC test under *Dynamex* and specified that instead, the determination of employee or independent contractor status would be governed by *Borello*. The exemption was set to sunset January 1, 2021. In 2020, AB 323 (Rubio, Chapter 341, Statutes of 2020), among other things, extended the sunset date on this exemption from January 1, 2021, to January 1, 2022. Also in 2020, AB 2257 (Gonzalez, Chapter 38, Statutes of 2020) recast and clarified the business-to-business referral agency, and professional services exemption to the 3-part ABC test for employment status and exempted additional occupations and business relationships.

2. Need for the bill?

As noted above, the newspaper exemption from the ‘ABC’ test was first enacted in 2019 with a sunset date of January 1, 2020. The sunset on the exemption was extended for one year to January 1, 2022. This bill would be the third extension on the exemption sunset.

According to the author, “Since the passage of AB 5 (Gonzalez) in 2019, newspaper carriers have been temporarily exempted from coverage under the ABC test established in the *Dynamex* decision of the California Supreme Court. The last exemption was provided in the form of a one-year extension in AB 323 (Rubio) of 2020. That extension will sunset on January 1, 2022. This measure will extend the sunset for three additional years while providing critical reporting requirements in order to assess the use of the independent contractor model in the industry, understand any trends in carrier misclassification, and ensure that publishers and distributors are complying with the *Borello* test for employment status. This bill both recognizes the importance of the newspaper industry in providing essential news and information to our communities while seeking confirmation that newspaper carriers are appropriately classified and are receiving the labor law protections they are entitled to.”

3. Proponent Arguments:

According to the California News Publisher’s Association, “In 2020, the Legislature passed, and the Governor signed into law AB 323 (Rubio), which provided a one-year extension of independent carrier status for newspaper carriers. In doing so, the legislature recognized the importance of factual reporting and that publications were struggling to stay open due to a 50 percent decline in advertising revenue.

This year, our Association has been working with Assemblymember Kalra, stakeholders in the labor community, and other legislators to find a long-range solution. During these discussions, CNPA has provided information about the current economic state of industry and the evolution of distribution models that have changed drastically due to digitalization.

CNPA and hundreds of community newspapers across the state – are hoping this time will allow carriers to continue their businesses as independent contractors and give the economy time to recover, as well as newspapers time to continue transition to digital platforms. Additionally, the reporting requirements, the mechanics of which we are continuing to work with the author on, will better inform future discussions relating to news carriers.

Newspaper are frontline community resources, reporting essential news and providing information that informs and entertains readers in diverse communities across the state. The

provides information about local COVID-19 cases, the location of vaccine centers, county protocols and restrictions, school districts reopening plans, local crime, city and county government news, transportation projects, and sports and entertainment. Newspapers connect neighbors and neighborhoods -- and when they are gone, numerous studies show that crime increases, the local economy suffers, and corruption goes unnoticed.

Without AB 1506 and the extension of the sunset clause, publications already struggling to survive will see costs increase anywhere from 40 to 100 percent. A recent survey of California publications shows that 40 percent of publications would have to consider closing their doors forever, 64 percent would eliminate delivery areas, 57 percent would raise prices, and 71 percent would reduce staff (in addition to those laid off or furloughed from the pandemic).”

4. Opponent Arguments:

None received.

5. Prior Legislation:

AB 2257 (Gonzalez, Chapter 38, Statutes of 2020) recast and clarified the business-to-business referral agency, and professional services exemption to the 3-part ABC test for employment status and exempted additional occupations and business relationships.

AB 323 (Rubio, Chapter 341, Statutes of 2020) extended an existing exemption for newspaper distributors from the “ABC” test from January 1, 2021, to January 1, 2022, and required an assessment of the effectiveness of contracts to conduct outreach and marketing to specified communities.

AB 170 (Gonzalez, Chapter 415, Statutes of 2019) provided that until January 1, 2021, newspaper distributors working under a contract with newspaper publisher, and for a newspaper carrier working for a newspaper distributor, the applicable test for determining if an individual is an employee or an independent contractor is the test developed by the California Supreme Court in *Borello*.

AB 5 (Gonzalez, Chapter 296, Statutes of 2019) codified the decision of the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018)* requiring that employers prove that their workers can meet a 3 part ‘ABC’ test in order to be lawfully classified as independent contractors, and exempted from the test certain professions and business-to-business relationships.

SUPPORT

California News Publisher’s Association

OPPOSITION

None received