

INDEPENDENT CONTRACTOR

AB 5 COMPLIANCE

On September 18, 2019, Governor Newsom signed California Assembly Bill 5 (AB 5) into law – codifying and expanding the California Supreme Court's decision in the *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County (Dynamex) case*. Effective January 1, 2020, AB 5 installs the “ABC” test as the default standard to determine whether independent contractors should be treated as employees of a hiring entity. The ABC test applies for purposes of the Unemployment Insurance Code and all other provisions of the Labor Code not “relating to the wage orders.”

The exemptions listed out in AB 5 have caused some controversy and confusion among employers, leading many to ask for further clarification. In response, the Legislature introduced 34 stand-alone bills exempting certain industries, which, for the most part, have been distilled into a new bill called Assembly Bill 2257. AB 2257 has been effective since September 4, 2020, applies retroactively where applicable.

Although we are providing a summary of AB 5 and its recent changes here, the determination of who is an employee and who is an independent contractor is a complex analysis. Companies must satisfy the ABC test (or the Borello multi-factor test if for an exempt worker, below) or face an increased risk of defending against additional claims from individual workers claiming to be employees, class action attorneys representing workers on a class or collective basis, and government authorities.

PLEASE ENGAGE LEGAL COUNSEL TO ASSIST WITH THIS ANALYSIS.

THE ABC TEST

Under the ABC test, a worker is presumed to be an employee unless the employer proves that the worker is:

- Free from the control and direction of the employer in the performance of services;
- Performing work outside the usual course of the employer's business; and
- Customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed

AB 5 OCCUPATIONAL EXEMPTIONS*

Workers are exempt from AB 5 if they are any of the following:

- Licensed by the Department of Insurance
- State-licensed physicians, surgeons, dentists, podiatrists, psychologists, or veterinarians
- State-licensed lawyers, architects, engineers, private investigators, hair stylists, or accountants
- Securities broker-dealers, investment advisers, and their agents and representatives registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed by the state
- Direct salespeople
- Commercial fishermen working on American vessels
- Real Estate licensees
- Licensed repossession agencies
- Individuals providing driving services for motor clubs

AB 5 “BUSINESS-TO-BUSINESS” EXEMPTIONS*

If the business does not fit within any of the occupational exceptions, they might fit within the limited business-to-business exception. To qualify, the work must be performed by a business entity formed as a sole proprietor, partnership, LLC, or corporation and meet all the following requirements:

- Is free from the control and direction of the contracting business entity in the performance of work
- Is providing services directly to the contracting business, rather than to customers
- Has a written contract with the contracting business
- Has all required business licenses or business tax registration
- Maintains a business location that is separate from the location of contracting business
- Is customarily engaged in an independently established business of the same nature as the work performed
- Contracts with other businesses to provide similar services and maintains a clientele without restrictions from the contracting business
- Advertises and holds itself out to the public as available to provide similar services
- Provides own tools, vehicles, and equipment to perform the services
- Negotiates its own rates
- Sets its own hours and location of work
- Is not performing the type of work for which a license from the Contractor’s State License Board is required

AB 2257 UPDATES

“BUSINESS-TO-BUSINESS” EXEMPTION*

- Broadens application to include “public agency or quasi-public corporation” who has retained a contractor
- Clarifies that when two bona fide businesses are contracting with one another, the determination of whether an individual working for a business service provider is an employee or independent contractor of the business service provider remains governed by the ABC test.

“SINGLE-ENGAGEMENT” BUSINESS-TO-BUSINESS EXEMPTION

- Adds exemption for individuals contracting with another to perform services at “a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week”

AB 5 provides an exemption for businesses referring customers to providers for the following services**:

- 1 Graphic design
- 2 Photography
- 3 Tutoring
- 4 Event planning
- 5 Moving
- 6 Minor home repairs
- 7 Home cleaning
- 8 Errands
- 9 Furniture assembly
- 10 Animal services
- 11 Dog walking
- 12 Dog grooming
- 13 Web design
- 14 Picture hanging
- 15 Pool cleaning
- 16 Yard cleanup

If the service in question is not on this list, then it does not qualify for this carve-out.

“REFERRAL AGENCY” EXEMPTIONS*

The service provider must meet all of the following requirements:

- Is free from the control and direction of the referral agency while working for the client
- Has all required business licenses or business tax registration
- Has required contractor's license, if the work requires state contractor's license
- Delivers services under service provider's name, rather than name of the referral agency
- Provides its own tools and supplies to perform the services
- Is customarily engaged in an independently established business of the same nature as work performed
- Maintains a clientele without any restrictions from the referral agency and is free to seek work elsewhere, including through a competing agency
- Sets its own hours and terms of work and is free to accept or reject clients and contracts
- Sets its own rates for services performed, without deduction by the referral agency
- Is not penalized for rejecting clients or contracts

AB 2257 UPDATES

1. EXEMPTS WORKERS IN THE FOLLOWING INDUSTRIES

- Consulting
- Youth sports coaching
- Caddying
- Wedding or event planning
- Services provided by wedding and event vendors
- Interpreting services

2. DOES NOT APPLY TO THE FOLLOWING INDUSTRIES

- Industries designated by two state agencies as a “high hazard industry”
- Janitorial
- Delivery
- Courier
- Transportation
- Trucking*
- Agricultural labor
- Retail
- Logging
- In-home care
- Construction services, other than minor home repair

*On June 30, 2022, a federal injunction to exempt trucking companies from AB5 was lifted when the Supreme Court denied the California Trucking Association's Petition for Certiorari. It is currently in remand with the federal District Court.

AB 5 provides carve-outs for the following “professional services”:

- 1 Marketing professional
- 2 Human resources professional
- 3 Travel agent
- 4 Graphic designer
- 5 Graphic artist
- 6 Fine artist
- 7 Freelance writer
- 8 Barber or cosmetologist
- 9 Esthetician
- 10 Electrologist
- 11 Manicurist
- 12 Payment processing agent
- 13 IRS licensed tax professional

AB 5 “PROFESSIONAL SERVICES” EXEMPTION*

- The worker must meet all of the following requirements:
- Maintain a business location separate from the hiring firm
- Have a business license, in addition to any required professional licenses or permits
- Be able to set or negotiate their own rates for the services performed
- Be able to set their own hours
- Be customarily engaged in the same type of work under contract with another hiring firm, OR Hold themselves out to other potential customers as available to perform the same type of work
- Customarily and regularly exercise discretion and independent judgment performing their services

AB 2257 UPDATES

1. REMOVES THE “35 PIECES OF CONTENT” SUBMISSION CAP FOR:

- Still photographers and photojournalists
- Videographers
- Photo editors
- Freelance writers
- Translators
- Editors/copy editors
- Illustrators/newspaper cartoonists

2. REVISES AB 5 REQUIREMENTS FOR THE EXEMPTION:

- Workers are providing services pursuant to a contract specifying the time of delivery of payment, rate or pay, and the worker's intellectual property rights
- Workers are not primarily providing services at the hiring entity's business location
- The hiring entity does not hire the individual to directly replace an existing employee doing the same work at the same volume or preventing the individual from providing services to more than one hiring entity

3. EXPANDS LIST OF OCCUPATIONS THAT MAY QUALIFY FOR AN EXEMPTION UNDER THE NEW REQUIREMENTS:

- Content contributors, advisors, producers, narrators, or cartographers for certain publications
- Specialized performers hired to teach a class for no more than a week
- Real estate appraisers and home inspectors
- Registered professional foresters

AB 2257 MUSIC INDUSTRY & PERFORMER EXEMPTIONS

1. Adds exemptions related to the creation, marketing, promotion, or distribution of sound recordings or musical compositions, including the following professionals:

- Musicians, vocalists, and other recording artists
- Composers
- Songwriters, lyricists, and proofers
- Musical engineers
- Sound mixers
- Record producers and directors
- Other professionals involved in the creation, marketing, promotion, or distribution of a sound recording or musical composition

2. Adds certain independent contractor exemptions for musicians/musical groups with the exception of:

- A musician or group performing as an event headliner in a venue with more than 1,500 attendees
- A musician or group performing at a festival that sells more than 18,000 tickets per day
- A musician or group regularly performing in a symphony orchestra, or in a musical theater production, or at a theme park or amusement park

3. Adds exemption for individual performance artists (comedians, improvisers, magicians and illusionists, mimes, spoken word performers, storytellers, and puppeteers) who perform original work so long as they:

- Are free from the hirer's control
- Retain the intellectual property rights related to their performance
- Set their terms of work
- Negotiate their rates

AB 2257 MISCELLANEOUS EXEMPTIONS

Adds exemptions for the following occupations:

- Inspection underwriters and other specified insurance industry services
- Manufactured housing salespersons
- Certain international exchange visitor program workers
- Competition judges with specialized skills (including amateur umpires and referees)
- Certain consulting services workers
- Certain animal services workers
- Licensed landscape architects
- Feedback aggregators

NEW 2022 LAW UPDATES THAT IMPACT AB 5

AB 1506 and 1561

AB 1506 and 1561 make small adjustments to the law by revising the “data aggregator” exception for the ABC Test and extending the exceptions for newspaper carriers, licensed manicurists, and construction trucking contractors until December 31, 2024. It also expands the exemptions to include individuals providing claims adjusting, or third-party administration for, the insurance and financial services industries.

PROP 22

Proposition 22 reclassified many app-based drivers as independent contractors instead of employees, providing them with fewer labor protections under state law. However, many workers have not acquired the benefits promised by this initiative. The ruling has been appealed and Prop 22 remains in effect until the litigation is concluded.

*If the business fits within this limited exception, the determination of employee or independent contractor status of the business services provider shall be governed by the Borello test.

**To qualify for this exemption, the worker must work in the listed industries or specific services.

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