

The New ABC Test (AB 5 & AB 2257)





Agenda



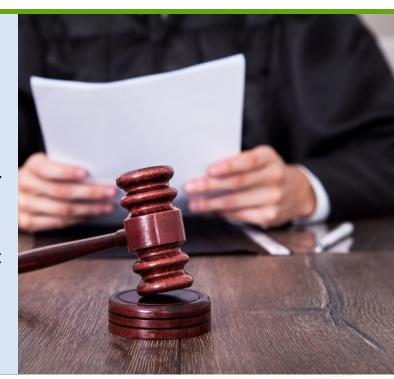
- The *Dynamex* Decision
- New "ABC" Test
- Prior Test Borello
- Assembly Bill 5 & 2257
- 39 Conditional Exemptions AB 5
- Additional Conditional Exemptions AB 2257
- "Professional Services" and "Business to Business Exemption" (AB 5)
- "Single Engagement" Exemption (AB 2257)
- Potential Impacts of AB 5 & AB 2257
- What You Need to Know



The *Dynamex* Decision

California Supreme Court Case – April 30, 2018: (Dynamex Operations West, Inc. v. Los Angeles County Superior Court (2018) 4 Cal.5th 903

- Changed the (almost 30 year old) test on whether a worker is an employee or independent contractor as applied to wage orders
 - Wage orders address minimum wages, overtime, mileage, basic working conditions (e.g. meal and rest breaks, etc.)
 - Wage orders do NOT govern/relate to worker's compensation requirements





The Prior Test- Borello



S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 351

- Multi-factor test to determine whether an individual was an independent contractor
- Principal factor was whether the "person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."



New "ABC Test"

Prong A "Free from Control"

 The person (worker) 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.

Prong B "Outside the usual course of business"

 The person (worker) performs work that is outside the usual course of the hiring entity's business.

Prong C "Customarily engaged in business of the same nature"

 The person (worker) is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.



Assembly Bill 5 & 2257

- AB 5 created Labor Code §2750.3
 - Applied to work performed after January 1, 2020
 - Effective for Workers' Compensation purposes on July 1, 2020
- AB 2257 repealed Labor Code §2750.3 and created Labor Codes §2775 to §2787
 - Emergency order effective immediately.
 - Signed by Governor Newsom September 4, 2020





Original 39 Conditional Exemptions AB 5

Accountants	Construction Trucking Services	Fine Artists	Newspaper Carriers	Psychologists
Administrator of HR	Cosmetologists	Freelance Writers/ Editors/ Cartoonists	Manicurists	Real Estate Licensees
Architects	Dentists	Grant Writers	Marketing	Repossession Agencies
Attorneys	Direct Salespersons	Graphic Designers	Motor Club Contracting Services	Securities Brokers & Dealers
Barbers	Engineers	Insurance Brokers & Agents	Payment Processing Agents	Still Photographers/ Photojournalists
Business-to-Business Contracting Relationships	Enrolled Agents	Investment Advisors & their agents/reps	Physicians & Surgeons	Travel Agent Services
Commercial Fishermen	Estheticians	Job Referral Agencies	Podiatrists	Veterinarians
Construction Subcontractors	Electrologists	Newspaper Distributors	Private Investigators	

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Additional Conditional Exemptions AB 2257

Appraisers	Home inspectors	Master Class Instructors	Two Contracting Businesses/Single Engagement Services
Competition Judges	Individual Performance Artists	Music Industry	Videographers
Content Contributors, Advisors, Producers, Narrators, or Cartographers for a journal	Insurance Industry: Underwriting, Audit, Risk Management or Loss Control	Photo Editors	
Data Aggregators	International Exchange Program	Registered Professional Foresters	
Digital Content Aggregators	Manufactured Housing Sales	Specialized performers hired by a performing arts company	



Example of How Qualifying Exemptions Work under Labor Code § 2778 (b)(2)

Additional criteria required by Labor Code. For example, *Borello* still applies to contracts for "**professional services**" as long as <u>all</u> conditions are met.

- The individual maintains a business location (may be a personal residence) that is separate from the hiring entity;
- 2. If the work is performed more than six months after the law goes into effect, the individual is required to have a business license as well as any other required professional license;
- 3. The individual can set or negotiate their own rates;
- Outside of project completion dates and reasonable business hours, the individual can set their own hours;
- 5. The individual must perform the same type of work under the contract for other hiring entities or hold themselves out to potential customers for the same work;
- 6. The individual regularly exercises discretion and independent judgment.



Business to Business Exemption

Exemption Criteria Labor Code §2776

Business relationships must be formed between sole proprietorships, partnerships, limited liability companies, limited liability partnerships, corporations, public agencies and quasi-public organizations.

- 1. Is free from control/direction of contracting business
- 2. Is providing services directly to contracting business, not customers of contracting business (with caveat)
- 3. Has entered into written contract with contracting business (specifies the due date and payment amount)
- 4. Has business license/tax registration if required in jurisdiction where work is performed
- 5. Maintains business location separate from business or work location of the contracting business (can be residence)
- 6. Is customarily engaged in an independently established business of the same nature as that involved in the work performed
- The business provider can contract with other businesses to provide same/similar services. Maintains clientele without restrictions from hiring entity
- 8. Advertises and holds itself out to the public as available to provide the same or similar services
- 9. Provides its own tools, vehicles, and equipment
- 10. Can negotiate its own rates
- 11. Can set its own hours and location of work if consistent with the nature of the work
- 12. Is not performing work for which a CSLB license is required



"Single Engagement Event" Between Contracting Businesses Exemption

Exemption Criteria Labor Code §2779

Business relationship between two individuals that are acting as a sole proprietor or separate business entity formed as a partnership, limited liability company, limited liability partnership, or corporation performing work pursuant to a contract at the location of a single-engagement event

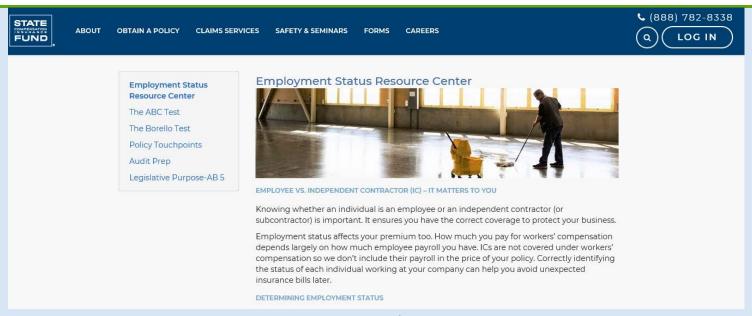
- 1. Neither individual is subject to control and direction by the other, in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- 2. Each individual has the ability to negotiate their rate of pay with the other individual.
- 3. The written contract specifies the total payment and the specific rate paid to each individual.
- 4. Each individual maintains their own business location. (may include the individual's personal residence)
- 5. Each individual provides their own tools, vehicles, and equipment.
- 6. Each individual has the required business license or business tax registration if needed for the work
- 7. Each individual is customarily engaged in the same or similar type of work performed under the contract or each individual separately holds themselves out to other potential customers as available to perform the same type of work.
- 8. Each individual can contract with other businesses to provide the same or similar services and maintain their own clientele without restrictions.

"Single Engagement Event" is defined as "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."

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Employment Status Resource Center



For an in depth look at how AB5/AB2257 impacts your business, visit our **Employment Status Resource Center** on **StateFundCA.com**.

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Employment Status Resource Center Conditional Exemptions

Employment Status Resource Center

The ABC Test

» Conditional Exemptions

The Borello Test

Policy Touchpoints

Audit Prep

AB5, Who Is An Employee? Webinar

Legislative Purpose-AB 5

Conditional Exemptions

Most California employers must apply the ABC test (for workers' compensation), effective July 1, 2020. There are some conditional exemptions, however.

The following is a list of conditional exemptions for which the Borello test may still apply, even after July 1, 2020.

Administrator of human resources.

Business-to-business contracting relationship

Condition of Exemption from ABC Test	Additional Conditions (if any)	Current Expiration of Exemption	Labor Code Reference
Business service provider must be formed as sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation (if individual worker, exemption does not apply)	Business provider: 1. is free from control/direction of contracting business 2. is providing services directly to contracting business, not customers of contracting business 3. has entered into written contract with contracting business 4. has business license/tax registration if required in jurisdiction where work	None	§2750.3(e)



Potential Impacts of AB 5 & 2257

- Impacts over 2 million workers in gig economy
- Bill supported by 2 million members of California Labor Federation and other unions
- Worker protections, such as:
 - Guaranteed minimum wage
 - Overtime pay
 - Contribute to Social Security and Medicare
 - Workers' Compensation Insurance
 - Sick leave and family leave
 - Reimbursement for mileage and vehicle maintenance
- Estimates vary but potentially 30% increase in expenses for employers
- Critics argue will threaten ability to design flexible schedules and earn supplemental income



What You Need To Know



The *Borello* Test still applies to employment status assessment for periods prior to July 1, 2020

- and to exempt occupations on or after July 1, 2020 (AB 5)
- and for additional conditionally exempt occupations (AB 2257), and applies retroactive to July 1, 2020.



Resources for More Information



California Labor & Workforce Development Agency Employment Status Portal

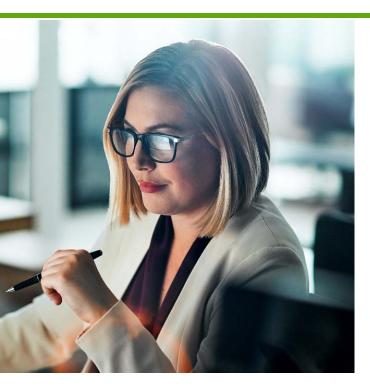
https://www.labor.ca.gov/employmentstatus/

California Department of Industrial Relations Assembly Bill 5 FAQ's

https://www.dir.ca.gov/dlse/faq_independentcontractor.htm



State Compensation Insurance Fund

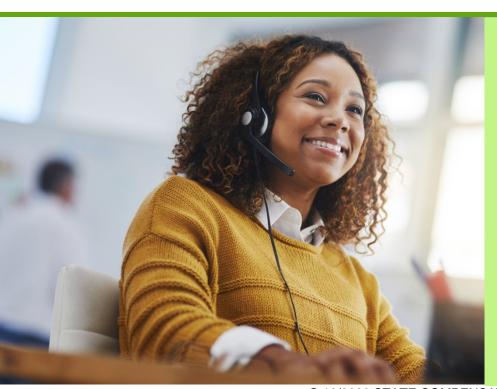


- Founded in 1914
- Not-for-profit, public enterprise fund
- Covering 100,000 employers
- Committed to providing workers' compensation insurance to all California businesses

We **protect** the people who make California work.



State Fund Services



- Claims Specialization
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- Online Safety Resource Center
- Automated Billing
- Online Account Access
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- Anti-Fraud Resources
- Online Policyholder Resources on www.StateFundCA.com



COVID-19 Resources for Employers



SafeAtWorkCA.com/coronavirus/

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Operations Support Center: (888) 782-8338

