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California's Independent Contractor/Employee Determination: New Legislative Changes to the ABC Test

The "ABC test" now used in California to make determinations regarding the validity of independent contractor classifications initially was adopted by the California Supreme Court in *Dynamex Operations W. v. Superior Court*, 4 Cal.5th 903 (2018), described [here](#). Effective January 1, 2020, [AB 5](#) codified the ABC test set forth in *Dynamex*.

To establish an independent contractor relationship under California's ABC test, a hiring entity must demonstrate that all of the following conditions have been met:

1. 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.
2. The person performs work that is outside the usual course of the hiring entity's business.
3. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Notably, AB 5 had a bevy of exemptions where the previous test, known as the "Borello test," should be used for the independent contractor/employee determination. The Borello test considers a number of secondary factors, but its primary focus is whether the hiring entity controls the manner and means of the individual's performance.

On September 4, 2020, the California Legislature adopted and Governor Gavin Newsom signed into law [AB 2257](#), which replaces and expands the initial exemptions from the ABC test. Assembly Bill 2257 also introduces new exemptions covering the music industry and services provided at single-engagement events.

AB 2257's New Exemptions

As with AB 5, under AB 2257, unless an exemption applies, the ABC test is used to distinguish between employees and independent contractors. However, AB 2257 expanded or created additional exemptions where the older Borello test will apply. These expanded exemptions from the ABC test include:

- Music industry professionals, including recording artists, managers of recording artists, record producers and directors, songwriters, and musical engineers who receive royalties for a recording and/or perform at single-engagement live events. There is additional detail in AB 2257 that will need to be addressed by companies that seek to take advantage of this exemption. *See* Labor Code §2780.
- Services provided at "single-engagement events," defined as stand-alone non-recurring events in a single location, or a series of events in the same location no more than once a week, are also now exempt from the ABC test. Importantly, this exemption does not apply to janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair. *See* Labor Code §2779.
- The expansion of the business-to-business exemption to include contracts with governmental and quasi-governmental agencies.
- The "referral agency" exemption from AB 5 has been expanded to include youth sports coaches, interpreters, consultants, caddies, wedding planners, and services provided by wedding and event vendors.
- Expansion of the "professional services" exemption from AB 5 to include: (1) digital content aggregators; (2) content contributor, advisor, producer, narrator, or cartographer for a journal, book, periodical,

evaluation, other publication or educational, academic, or instructional work; (3) a specialized performer hired by a performing arts company or organization to teach a master class for no more than one week; (4) registered professional foresters; and (5) home inspectors.

- An increase to the submission limit (35 under AB 5) for freelance writers, translators, editors, copy editors, illustrators, or newspaper cartoonists, still photographers, photojournalists, videographers, or photo editors provided that these individuals: (1) work under a written contract that specifies the rate of pay and obligation to pay by a defined time; (2) are not directly replacing an employee who performed the same work at the same volume for the hiring entity; (3) do not primarily perform the work at the hiring entity's business location; and (4) are not restricted from working for more than one hiring entity. Like prior law, this exemption does **not** apply to individuals working in the movie or television industries.
- New exemptions for: (1) manufactured housing salespersons; (2) certain individuals engaged by international exchange visitor programs; and (3) competition judges (including amateur umpires and referees).

Expanded Enforcement Powers

AB 2257 also expands enforcement authority to allow district attorneys to seek injunctive relief for alleged misclassification—AB 5 limited enforcement authority to the California attorney general and certain city attorneys.

Contractor Classification Remains in Flux for Companies Operating in California

AB 2257 is not the end of this story. [Proposition 22](#), on the California ballot in November, addresses criteria for determining whether app-based transportation and delivery drivers are employees or independent contractors. Companies with California operations should consult with local legal counsel regarding the independent contractor/employee determination to make sure they are current on the latest developments in this ever-evolving area of the law.

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