

AMENDED IN ASSEMBLY MAY 24, 2019

AMENDED IN ASSEMBLY MAY 1, 2019

AMENDED IN ASSEMBLY MARCH 26, 2019

CALIFORNIA LEGISLATURE—2019–20 REGULAR SESSION

ASSEMBLY BILL

No. 5

Introduced by Assembly Member Gonzalez

December 3, 2018

An act to add Section 2750.3 to the Labor Code, relating to employment, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 5, as amended, Gonzalez. Worker status: employees and independent contractors.

Existing law, as established in the case of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (*Dynamex*), creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission. Existing law requires a 3-part test, commonly known as the “ABC” test, to establish that a worker is an independent contractor for those purposes.

Existing law, for purposes of unemployment insurance provisions, requires employers to make contributions with respect to unemployment insurance and disability insurance from the wages paid to their employees. Existing law defines “employee” for those purposes to include, among other individuals, any officer of a corporation, and any individual who, under the usual common law rules applicable in

determining the employer-employee relationship, has the status of an employee.

This bill would state the intent of the Legislature to codify the decision in the Dynamex case and clarify its application. The bill would provide that the factors of the “ABC” test be applied in order to determine the status of a worker as an employee or independent contractor for all provisions of the Labor Code and the Unemployment Insurance Code, unless another definition or specification of “employee” is provided. ~~The bill would codify existing exemptions for specified professions that are not subject to wage orders of the Industrial Welfare Commission or the ruling in the Dynamex case. Because exempt specified professions from these provisions and instead provide that the employment relationship test for those professions shall be governed by the test adopted in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 if certain requirements are met. These exempt professions would include licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, a direct sales salesperson, real estate licensees, workers providing hairstyling or barbering services, and those performing work under a contract for professional services. The bill would require the State Board of Barbering and Cosmetology to promulgate regulations for the development of a booth rental permit and a reasonable biennial fee upon workers providing specified hairstyling or barbering services, by no later than July 1, 2021.~~

Because this bill would expand the categories of individuals eligible to receive benefits from, and thus would result in additional moneys being deposited into, the Unemployment Fund, a continuously appropriated fund, the bill would make an appropriation. The bill would state that ~~these changes do~~ *addition of the provision to the Labor Code does not constitute a change in, but* ~~are~~ *is* declaratory of, existing law with regard to violations of the Labor Code relating to wage orders of the Industrial Welfare Commission.

Existing provisions of the Labor Code make it a crime for an employer to violate specified provisions of law with regard to an employee. The Unemployment Insurance Code also makes it a crime to violate specified provisions of law with regard to benefits and payments.

By expanding the definition of an employee for purposes of these provisions, the bill would expand the definition of a crime.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: yes. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 (a) On April 30, 2018, the California Supreme Court issued a
4 unanimous decision in *Dynamex Operations West, Inc. v. Superior*
5 *Court of Los Angeles* (2018) 4 Cal.5th 903.

6 (b) In its decision, the Court cited the harm to misclassified
7 workers who lose significant workplace protections, the unfairness
8 to employers who must compete with companies that misclassify,
9 and the loss to the state of needed revenue from companies that
10 use misclassification to avoid obligations such as payment of
11 payroll taxes, payment of premiums for ~~workers~~ workers'
12 compensation, Social Security, unemployment, and disability
13 insurance.

14 (c) The misclassification of workers as independent contractors
15 has been a significant factor in the erosion of the middle class and
16 the rise in income inequality.

17 (d) It is the intent of the Legislature in enacting this act to
18 include provisions that would codify the decision of the California
19 Supreme Court in *Dynamex Operations West, Inc. v. Superior*
20 *Court of Los Angeles* (2018) 4 Cal.5th 903, and would clarify the
21 decision's application in state law.

22 SEC. 2. Section 2750.3 is added to the Labor Code, to read:

23 2750.3. (a) For purposes of the provisions of this code and the
24 Unemployment Insurance Code, where another definition or
25 specification for the term "employee" is not provided, and for the
26 wage orders of the Industrial Welfare Commission, a person
27 providing labor or services for remuneration shall be considered
28 an employee unless the hiring entity demonstrates that all of the
29 following conditions are satisfied:

1 (1) The person is free from the control and direction of the hiring
2 entity in connection with the performance of the work, both under
3 the contract for the performance of the work and in fact.

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

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

9 (b) This section and the holding in *Dynamex Operations West,*
10 *Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903, do
11 not apply to the following occupations as defined below, and
12 instead, for these occupations only, the employment relationship
13 shall be governed by the test adopted by the California Supreme
14 Court in the case of *S. G. Borello & Sons, Inc. v. Department of*
15 *Industrial Relations* (1989) 48 Cal.3d ~~341~~ 341 *or Business and*
16 *Professions Code Section 10032(b) as set forth in paragraph (5)*
17 *below.*

18 (1) A person or organization who is licensed by the Department
19 of Insurance pursuant to Chapter 5 (commencing with Section
20 1621), Chapter 6 (commencing with Section 1760), ~~and~~ *or* Chapter
21 8 (commencing with Section 1831) of Part 2 of Division 1 of the
22 Insurance Code.

23 (2) A physician and surgeon licensed by the State of California
24 pursuant to Division 2 (commencing with Section 500) of the
25 Business and Professions Code, performing professional or medical
26 services provided to or by a health care entity, including an entity
27 organized as a sole proprietorship, partnership, or professional
28 corporation as defined in Section 13401 of the Corporations Code.

29 (3) A securities broker-dealer or investment adviser or their
30 agents and representatives that are registered with the Securities
31 and Exchange Commission or the Financial Industry Regulatory
32 Authority or licensed by the State of California under Chapter 2
33 (commencing with Section 25210) or Chapter 3 (commencing with
34 Section 25230) of Division 1 of Part 3 of Title 4 of the
35 Corporations Code.

36 (4) A direct sales salesperson as described in Section 650 of the
37 Unemployment Insurance Code, so long as the conditions for
38 exclusion from employment under that section are met.

39 (5) *A real estate licensee licensed by the State of California*
40 *pursuant to Division 4 (commencing with Section 10000) of the*

1 *Business and Professions Code shall have their relationship*
2 *governed by Business and Professions Code Section 10032(b). If*
3 *that section is not applicable then classification shall be governed*
4 *as follows: (1) for purposes of unemployment insurance by*
5 *Unemployment Insurance Code Section 650; (2) for purposes of*
6 *workers compensation by Section 3200 and following (3) for all*
7 *other purposes in the Labor Code by the test adopted by the*
8 *California Supreme Court in the case of S.G. Borello and Sons,*
9 *Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341.*
10 *The statutorily imposed duties of a responsible broker under*
11 *Business and Professions Code Section 10015.1 are not factors*
12 *under the Borello test.*

13 (6) (A) *A worker providing hairstyling or barbering services*
14 *who has a booth rental permit and is free from direction or control*
15 *both under the contract for the performance of the work and in*
16 *fact. For purposes of this subparagraph, “free from direction or*
17 *control” includes, but is not limited to, the worker meets all of the*
18 *following criteria:*

19 (i) *Sets their own rates for services performed.*

20 (ii) *Sets their own hours of work.*

21 (iii) *Has their own book of business or clients.*

22 (B) *The State Board of Barbering and Cosmetology shall*
23 *promulgate regulations no later than July 1, 2021, for the*
24 *development of a booth renter permit and a reasonable biennial*
25 *fee not to exceed fifty dollars (\$50), which may be included as an*
26 *addendum to the initial and biennial license renewal application.*
27 *Booth renters shall post a notice of their booth renter permit for*
28 *consumers to view. The board shall share the list and contact*
29 *information of all booth renters with any state agency that requests*
30 *the list, for purposes of assuring compliance with this section.*

31 (C) *The permit requirement set forth in subparagraph (B) shall*
32 *not become operative until six months after the State Board of*
33 *Barbering and Cosmetology finalizes regulations as required under*
34 *this section in accordance with the Administrative Procedure Act*
35 *(Chapter 3.5 (commencing with Section 11340) of Part 1 of*
36 *Division 3 of Title 2 of the Government Code). Until that date, the*
37 *employment relationship between a hiring entity and a worker*
38 *who meets all the criteria in paragraph (1) of subdivision (a),*
39 *except for the permit requirement of subparagraph (B) of this*
40 *paragraph, shall be governed by the test adopted by the California*

1 *Supreme Court in the case of S. G. Borello & Sons, Inc. v.*
2 *Department of Industrial Relations (1989) 48 Cal.3d 341.*

3 (D) *For the purposes of this paragraph:*

4 (i) *“Hairstyling” is any combination of the following practices:*

5 (I) *Arranging, dressing, curling, waving, machineless permanent*
6 *waving, permanent waving, cleansing, cutting, shampooing,*
7 *relaxing, singeing, bleaching, tinting, coloring, straightening,*
8 *dyeing, applying hair tonics to, beautifying, or otherwise treating*
9 *by any means, the hair of any person.*

10 (II) *The provision of natural hair braiding services together*
11 *with any of the services and procedures described in subclause*
12 *(I).*

13 (ii) *“Barbering shall have the same meaning as defined in*
14 *subdivision (a) of Section 7316 of the Business and Profession*
15 *Code.*

16 (c) (1) *This section and the holding in Dynamex Operations*
17 *West, Inc. v. Superior Court (2018) 4 Cal.5th 903, do not apply*
18 *to a contract for professional service and instead the employment*
19 *relationship shall be governed by the test adopted by the California*
20 *Supreme Court in the case of S. G. Borello & Sons, Inc. v.*
21 *Department of Industrial Relations (1989) 48 Cal.3d 341, if the*
22 *hiring entity demonstrates that all of the following factors are*
23 *satisfied:*

24 (A) *The individual maintains a business location, which may*
25 *include the individual’s residence, that is separate from the hiring*
26 *entity.*

27 (B) *If work is performed more than six months after the effective*
28 *date of this section, the individual has a business license, in*
29 *addition to any required professional licenses or permits for the*
30 *individual to practice in their profession.*

31 (C) *The individual has the ability to use their own employees*
32 *in the completion of the work, where reasonable, and has the*
33 *authority to hire and fire other persons who assist in providing*
34 *the services. Nothing in this section requires an individual to hire*
35 *an employee.*

36 (D) *The individual has the ability to engage in other contracts*
37 *for services than with the hiring entity.*

38 (E) *Both the individual and the hiring entity have the ability to*
39 *negotiate compensation for the services performed.*

1 (F) Outside of project completion dates and reasonable business
2 hours, the individual has the ability to set their own hours.

3 (G) For services that do not reasonably have to be performed
4 at a specific location, the individual can determine where to
5 perform the services under the contract.

6 (H) The individual is customarily engaged in the same type of
7 work performed under the contract with another hiring entity or
8 holds themselves out to other potential customers as available to
9 perform the same type of work.

10 (I) The individual customarily and regularly exercises discretion
11 and independent judgment in the performance of the services.

12 (2) For purposes of this subdivision:

13 (A) An “individual” includes an individual providing services
14 through a sole proprietorship or other business entity.

15 (B) (i) “Professional services” means services that either:

16 (I) Require an active license from the State of California and
17 involve the practice of one of the following recognized professions:
18 law, dentistry, architecture, engineering, or accounting.

19 (II) Require possession of an advanced degree that customarily
20 involves a prolonged course of specialized intellectual instruction
21 and study in the field of marketing or the administration of human
22 resources from an accredited university, college, or professional
23 school, as distinguished from a general academic education.

24 (ii) “Professional services” does not include professionals
25 engaged in the fields of health care and medicine.

26 (e)

27 (d) The addition of this section to the Labor Code by this act
28 does not constitute a change in, but is declaratory of, existing law
29 with regard to violations of the Labor Code relating to wage orders
30 of the Industrial Welfare Commission.

31 SEC. 3. No reimbursement is required by this act pursuant to
32 Section 6 of Article XIII B of the California Constitution because
33 the only costs that may be incurred by a local agency or school
34 district will be incurred because this act creates a new crime or
35 infraction, eliminates a crime or infraction, or changes the penalty
36 for a crime or infraction, within the meaning of Section 17556 of
37 the Government Code, or changes the definition of a crime within

- 1 the meaning of Section 6 of Article XIII B of the California
- 2 Constitution.

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