

ASSEMBLY THIRD READING
AB 5 (Gonzalez)
As Amended May 24, 2019
Majority vote

SUMMARY:

Codifies the decision of the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) that presumes a worker is an employee unless a hiring entity satisfies a three-factor test, and exempts from the test certain insurance and real estate occupations, physicians, securities broker-dealers, direct salespersons, hair stylists and barbers, and those performing work under a contract for professional services, as specified.

Major Provisions

- 1) Provides that for purposes of the Labor Code and the Unemployment Insurance Code, where another definition of "employee" is not otherwise provided, 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 all of the following conditions:
 - 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.
 - c) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.
- 2) Exempts from the application of *Dynamex* and instead, applies the definition of an employee as set forth in the decision of the California Supreme Court in *S. G. Borello & Sons, Inc. v Department of Industrial Relations (Borello)* (1989) 48 Cal.3d 341, to the following occupations:
 - a) A person or organization who is licensed by the Department of Insurance pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), and Chapter 8 (commencing with Section 1831) of Part 2 of Division 1 of the Insurance Code.
 - b) A physician and surgeon licensed by the State of California pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation as defined in Corporations Code Section 13401.
 - c) A securities broker-dealer or investment adviser or their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed by the State of California under Chapter 2 (commencing with Section 25210) or Chapter 3 (commencing with Section 25230) of Division 1 of Part 3 of Title 4 of the Corporations Code.

- d) A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met.
- e) A real estate licensee licensed by the State of California pursuant to Division 4 of the Business and Professions Code, except where their employment is otherwise defined by Business and Professions Code Section 10032(b) and for purposes of unemployment and workers' compensation insurance.
- f) Individuals providing hairstyling and barbering services who have a booth rental permit and are free from the direction and control of the hiring entity, as defined.
- g) Individuals engaged in professional services, as defined, and exclusive of professionals in the health care and medical fields, provided that nine separate elements are established, including among other things, that the individual has the ability to use their own employees, engage in contracts for services with other entities, negotiate their own compensation, set their own hours, and customarily exercise discretion and independent judgment in the performance of services.

COMMENTS:

None.

According to the Author:

"The misclassification of workers is a clear detriment to working families, local businesses, and the state. This harmful practice undermines the hard-fought laws passed by the Legislature that have historically positioned California as a national leader in creating the strongest worker protections in the country. AB 5 codifies the ABC test prescribed in the Court's *Dynamex* ruling to help ensure that working Californians can retain all the rights and job protections afforded to employees under the California Labor Code."

Arguments in Support:

The California Labor Federation, sponsor of this bill, states that the ABC test "prevents the common practice in many industries of a company forcing an individual to act as an independent business while the company maintains the right to set rates, direct work, and impose discipline. It distinguishes carefully between a trucking company that has no employee drivers (misclassification) and a trucking company that contracts with a mechanic (legitimate contractor). Bringing misclassified workers into employee status will mean more workers have a safety net when they are sick, laid off, or hurt at work."

Arguments in Opposition:

The Southwest California Legislative Council, is opposed and states, "the rise of independent contractors has served to ignite large portions of the California economy, encourage entrepreneurship, and provide income for an estimated 4 million workers. Many of our members are local entrepreneurs who contract their services out to a variety of businesses, enabling them to benefit from multiple income streams."

FISCAL COMMENTS:

According to the Assembly Appropriations Committee, there is considerable uncertainty around the fiscal impact of this bill. Widespread adoption of the ABC test will, relative to current law, likely lead to more workers classified as employees rather than independent contractors. This will generate additional workload and costs for the Department of Industrial Relations (DIR) and the Employment Development Department (EDD), though costs would be partially offset by a simpler process to determine a worker's classification.

Moreover, as drafted, it is unclear how broadly the ABC test will be applied under this bill. Appropriations Committee assumes the bill's fiscal impact is primarily related to DIR and enforcement of the Labor Code. Costs to DIR's Division of Labor Standards Enforcement (DLSE) will be \$840,000 in the first year and \$800,000 each year thereafter, and there will be an unknown fiscal impact on DIR's Department of Workers' Compensation (DWC). These costs reflect the costs of additional legal staff and the costs of preparing and updating guidance for the public and staff.

VOTES:

ASM LABOR AND EMPLOYMENT: 5-0-2

YES: Kalra, Carrillo, Gonzalez, Jones-Sawyer, Luz Rivas

ABS, ABST OR NV: Flora, Diep

ASM APPROPRIATIONS: 13-3-2

YES: Gonzalez, Bloom, Bonta, Calderon, Carrillo, Chau, Eggman, Gabriel, Eduardo Garcia, Maienschein, Petrie-Norris, Quirk, Robert Rivas

NO: Brough, Fong, Obernolte

ABS, ABST OR NV: Bigelow, Diep

UPDATED:

VERSION: May 24, 2019

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