

File No. 190771

Committee Item No. \_\_\_\_\_

Board Item No. 62

### COMMITTEE/BOARD OF SUPERVISORS

#### AGENDA PACKET CONTENTS LIST

Committee: \_\_\_\_\_

Date: \_\_\_\_\_

Board of Supervisors Meeting

Date: July 16, 2019

#### Cmte Board

- Motion
- Resolution
- Ordinance
- Legislative Digest
- Budget and Legislative Analyst Report
- Youth Commission Report
- Introduction Form
- Department/Agency Cover Letter and/or Report
- MOU
- Grant Information Form
- Grant Budget
- Subcontract Budget
- Contract/Agreement
- Form 126 – Ethics Commission
- Award Letter
- Application
- Public Correspondence

#### OTHER

- California State Assembly Bill No. 5 - 05/24/19
- \_\_\_\_\_
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Prepared by: Lisa Lew

Date: July 12, 2019

Prepared by: \_\_\_\_\_

Date: \_\_\_\_\_

1 [Supporting California State Assembly Bill No. 5 (Gonzalez) - Worker Status: Employees and  
2 Independent Contractors]

3 **Resolution supporting California State Assembly Bill No. 5, authored by Assembly**  
4 **Member Lorena Gonzalez, to codify and expand the California Supreme Court's**  
5 **decision in Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018),**  
6 **establishing a presumption that a worker is an employee for purposes of wages and**  
7 **benefits.**

8  
9 WHEREAS, On April 30, 2018, the California Supreme Court issued a landmark,  
10 unanimous decision in the matter of Dynamex Operations West, Inc. v. Superior Court of Los  
11 Angeles (2018), which embraced a standard for worker classification that presumes that all  
12 workers are employees instead of independent contractors; and

13 WHEREAS, The ruling was one of the most significant legal victories in decades for  
14 misclassified workers, who lack a basic safety net when they are sick, laid off, or get injured  
15 on the job; and

16 WHEREAS, The Dynamex Case interprets existing law as placing the burden on any  
17 entity classifying an individual as an independent contractor of establishing that such  
18 classification is proper under the newly adopted "ABC Test"; and

19 WHEREAS, Under the ABC Test, a worker is presumed to be an employee unless their  
20 employer establishes each of the following: 1) that the worker is free from the control and  
21 direction of the hiring entity in connection with the performance of their work; 2) that the  
22 worker performs work that is outside the usual course of the hiring entity's business; and 3)  
23 that the worker is customarily engaged in an independently established trade, occupation, or  
24 business of the same nature as the work performed; and  
25

1           WHEREAS, The question of whether a worker is an employee has considerable  
2 impacts on the livelihood of the worker, including whether the employer bears the  
3 responsibility of paying Social Security and payroll taxes, unemployment insurance taxes and  
4 state employment taxes, providing worker's compensation insurance, and complying with  
5 State and Federal laws governing wages, hours, and working conditions; and

6           WHEREAS, The relatively recent rise of the so-called "gig economy," wherein  
7 employers contract with purportedly independent workers for ostensibly short-term  
8 engagements, has predicated itself on the exploitation of many workers who have been  
9 denied the opportunity to be classified as employees and therefore denied the basic benefits  
10 that all employees are entitled to, such as unemployment insurance, health care subsidies,  
11 paid parental leave, overtime pay, workers' compensation, a guaranteed minimum hourly  
12 wage, and the right to organize to better their working conditions; and

13           WHEREAS, California's low-wage and immigrant workers, such as domestic workers,  
14 day laborers, restaurant workers, and janitors, among others, are some of the most vulnerable  
15 workers also subjected to misclassification and wage theft; and

16           WHEREAS, For years, worker organizations, advocates and city officials in San  
17 Francisco worked together and passed laws to establish strong labor protections, fair  
18 minimum wages, healthcare security, paid sick leave and other benefits for employees in San  
19 Francisco; and

20           WHEREAS, Assembly Bill No. 5 would codify existing case law as established by the  
21 California Supreme Court in the Dynamex Case, and apply the Dynamex "ABC Test" to  
22 determine the status of a worker as an employee or independent contractor for all provisions  
23 of the Labor Code and the Unemployment Insurance Code, unless another definition or  
24 specification of "employee" is provided; and

1           WHEREAS, By codifying the law established by the Dynamex Case, Assembly Bill No.  
2 5 would give the State of California stronger enforcement tools and make it harder for  
3 companies to label workers as independent contractors instead of employees, a common  
4 practice that has allowed businesses to skirt local, state and federal labor laws; and

5           WHEREAS, Assembly Bill No. 5 would likely impact a number of companies that have  
6 risen to prominence in the past decade in large part by exploiting tens of thousands of  
7 workers, depriving those workers of a basic social safety net and passing along costs to  
8 taxpayers, costing the State of California in excess of \$7 billion annually; and

9           WHEREAS, Assembly Bill No. 5 would help to address widening income inequality that  
10 has allowed a small number of executives to profit immensely while subjecting workers to  
11 poverty wages and unsustainable working conditions; now, therefore, be it

12           RESOLVED, That the City and County of San Francisco stands with workers,  
13 community groups and labor unions in strong support of Assembly Bill No. 5; and, be it

14           FURTHER RESOLVED, That the Board of Supervisors hereby directs the Clerk of the  
15 Board to transmit copies of this Resolution to San Francisco's State Legislative Delegation  
16 and the Office of the Governor of California accordingly.

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**

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**Introduced by Assembly Member Gonzalez**

December 3, 2018

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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.

O

# Introduction Form

By a Member of the Board of Supervisors or Mayor

RECEIVED  
BOARD OF SUPERVISORS  
SAN FRANCISCO

2019 Jul 9 PM 2:16  
Time stamp  
of meeting date

BY AK

I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- 2. Request for next printed agenda Without Reference to Committee.
- 3. Request for hearing on a subject matter at Committee.
- 4. Request for letter beginning : "Supervisor [ ] inquiries"
- 5. City Attorney Request.
- 6. Call File No. [ ] from Committee.
- 7. Budget Analyst request (attached written motion).
- 8. Substitute Legislation File No. [ ]
- 9. Reactivate File No. [ ]
- 10. Topic submitted for Mayoral Appearance before the BOS on [ ]

ase check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission
- Youth Commission
- Ethics Commission
- Planning Commission
- Building Inspection Commission

**Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.**

Sponsor(s):

Rafael Mandelman, Aaron Peskin, Gordon Mar, Shamann Walton, Matt Haney, Vallie Brown, Safai

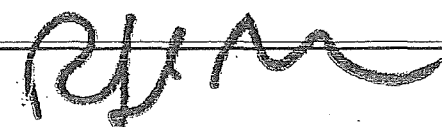
Subject:

Supporting California State Assembly Bill No. 5 (Gonzalez) – Worker Status: employees and independent contractors

The text is listed:

Resolution supporting California State Assembly Bill 5 (Gonzalez) to codify and expand the California Supreme Court’s decision in Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018), establishing a presumption that a worker is an employee for purposes of wages and benefits.

Signature of Sponsoring Supervisor:



For Clerk's Use Only

