

## AB 5 AND THE “GIG ECONOMY”: Contractors or Employees?

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The California Legislature passed AB 5 on Wednesday, which will likely have a huge impact on businesses utilizing an independent contractor model in classifying its employees. This bill had already gained national attention from presidential candidates, including Senators Elizabeth Warren, Bernie Sanders, and Kamala Harris.

We at Laughlin, Falbo, Levy & Moresi LLP are tackling and getting to know this bill and its potential impact more thoroughly. Here is what we know so far.

In April 2018, the California Supreme Court issued its decision in *Dynamex Operations West Inc. v. Superior Court of Los Angeles County*. In this case the courier service, Dynamex, had converted all of its delivery drivers to independent contractors. Some of the “independent contractors” sued arguing that they should still be classified as employees in part because they worked solely for Dynamex. The California Supreme Court seemed to scrap a more flexible classification that has been used for decades in California (the *Borello* test) and adopted instead the “ABC” test. This test requires an employer to meet **each** of three criteria to prove their workers are independent contractors, instead of employees. More specifically, this test required proof that: (A) the contractor provides the service free from company control; (B) the service provided is outside of the company’s core business; and (C) the contractor is an independent professional that customarily engages in an independently established trade occupation or business. Ultimately, the Court held that with respect to part “B” of the ABC test, the drivers’ work was not outside of the usual course of Dynamex’s business as their business is that of a delivery service.

It was unclear at that point, however, if the *Dynamex* decision would affect California’s workers’ compensation system at all, as *Dynamex* dealt with a specific wage violation issue and the *Borello* test specifically dealt with a situation arising out of the workers’ compensation setting.

AB 5 sets forth the intent of the California Legislature to codify the California Supreme Court decision in *Dynamex* and clarify the decision’s application into state law. This bill will add section 2750.3 to the California Labor Code and essentially adopt the “ABC” test into law by declaring that a person providing labor or services for remuneration **shall** be considered an employee rather than an independent contractor **unless** the hiring entity can demonstrate that (A) the person is free from control and direction of the hiring entity in connection with the performance of the work; (B) the person performs work that is outside of the usual course of the hiring entity’s business; and (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.

The newly enacted Labor Code 2750.3 (b) and (c) does set forth specific exceptions to the holding in *Dynamex* and instead leaves the determination of employee or independent contractor to remain governed by the *Borello* factors. Some of the common exceptions include specific industries including licensed insurance and real estate agents, cosmetologists and commercial fisherman.

Given the likely potential to seriously challenge the landscape of the “gig economy” in California, we understand that companies such as Lyft, Uber and DoorDash have already said they would work together on an initiative to overturn the law, which law will go into effect on January 1, 2020.

We will be watching as that progresses and will keep you informed.

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