

San Diego Media Pros

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January 27, 2020

AB5:

THE PAST, PRESENT, AND FUTURE

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https://www.dir.ca.gov/dlse/faq_IndependentContractor.htm

<https://www.allenmatkins.com/images/content/2/0/v5/2058/22-05-2018-WLJ-LeeRittmuller.pdf>

<https://www.natlawreview.com/article/ab-2257-enacts-significant-changes-to-ab-5-classification-workers-independent>

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Prior to April of 2018, California law in the manner of classifying independent contractors vs. employees followed the California Supreme Court's decision creating a multi-factor classification analysis known as the Borello Test. This 13-part multi-factor test strove to determine "right to control" in assigning classification. All 13 parts did not need to be met for classification.

On April 30, 2018, in a case called *Dynamex Operations West v. Superior Court*, the California Supreme Court reinterpreted and ultimately rejected the Borello test as the ONLY method for determining whether workers should be classified as either employees or independent contractors. Instead, they reintroduced a wage order court decision from *Martinez v. Combs* that defined the term "to employ."

On January 1, 2020, Assembly Bill 5 (AB5), codified the Dynamex decision, doing away with the common law Borello Test as the MAIN METHOD of determining employment classification. Instead, it determined INDEPENDENT CONTRACTOR status as follows:

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You are an INDEPENDENT CONTRACTOR not an EMPLOYEE if:

(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.

If you cannot meet ALL THREE of these conditions, you are an EMPLOYEE.

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AB5, as originally written, included a number of job category exemptions and professional services exemptions. No methodology was presented as to how these “exemptions” were chosen. This created a “healthy conversation” among many groups of left-out professions as to why they were excluded and why parts of their jobs were limited.

On September 4, 2020, Assembly Bill 2257 was passed, which amended AB5 to include more exempted professions and to correct some ambiguities in the original Bill. Again, no methodology was presented as to how professions were chosen.

In granting these exemptions, AB5 allows the classification question to revert back to the Borello Test in determining independent contractor status. The Borello Test features 13 factors that are used as “considerations” in determining status. No single factor controls the determination. However, exempted professional services must clear an additional set of SIX factors before the Borello Test can be used. Those factors are as follows:

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A) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. Nothing prohibits an individual from choosing to perform services at the location of the hiring entity.

(B) The individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession.

(C) The individual has the ability to set or negotiate their own rates for the services performed.

(D) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.

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

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

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Within AB5 is a Business-to-Business exemption that allows for the Borello Test in contracting relationships if they satisfy ALL of these 12 conditions:

- (A) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- (B) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.
- (C) The contract with the business service provider is in writing.
- (D) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.
- (E) The business service provider maintains a business location that is separate from the business or work location of the contracting business.
- (F) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

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Within AB5 is a Business-to-Business exemption that allows for the Borello Test in contracting relationships if they satisfy ALL of these 12 conditions:

(G) The business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.

(H) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

(I) The business service provider provides its own tools, vehicles, and equipment to perform the services.

(J) The business service provider can negotiate its own rates.

(K) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

(L) The business service provider is not performing the type of work for which a license from the Contractor's State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

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ALL THAT SAID, KNOW THIS...

Please read the reports and texts of the Bills. LOTS of “if/then” situations to know about.

AB5 has yet to be tested in court in any case where an independent contractor has challenged a classification.

The Business-to-Business exemption has yet to be ruled on by the EDD, so whether it holds up or not is unknown.

Prop 22 – the Uber and Lyft exemption proposition – will not overturn AB5.

Attempts to repeal AB5 have been, and remain, unsuccessful.

The PRO Act (Protecting the Right to Organize Act) passed the US House of Representatives in February of 2020 seeks, among other things, to make the ABC test a national standard.

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