

**Companies Doing Business in California Must Examine the Status of
Persons Working as Independent Contractors Due to New Legislation
Codifying and Expanding *Dynamex*'s "ABC Test"**

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By [Michael S. Kun](#)

There may soon be a fair number of big-rig trucks for sale in California, as well as computers, desks, and other material investments of persons who determine that they may no longer offer their services as independent contractors and must shut down their small businesses, a potential repercussion of new legislation intended to restrict the use of independent contractor status in the state.

Whether those and other practical consequences of the hurried passage of the new law were considered by the California Legislature is unclear.

But the eleventh-hour exemptions that were extended to some industries—and denied to others—suggest that the impact of the new statute may not have been given as much thought as it could have been. And perhaps—just perhaps—the statute will be tweaked further and more exemptions could be recognized.

Until then, companies doing business in California need to be aware of the new law and take steps to comply with it if they wish to avoid (or defend against) the class action lawsuits that are so prevalent in the state.

[AB 5](#), which goes into effect on January 1, 2020, codifies and expands the "ABC test" set forth in [Dynamex Operations West, Inc. v. Superior Court](#) for determining whether workers in California should be classified as employees or as independent contractors. Where *Dynamex* applied only to claims under the wage orders issued by the Industrial Welfare Commission, AB 5 extends to virtually all aspects of the work relationship—and to claims related to that.

In the days and hours before AB 5 was passed, a number of groups lobbied for exemptions from AB 5. More than a few professions were exempted from the final version of the statute, most notably lawyers, human resources administrators, doctors, psychologists, dentists, podiatrists, insurance agents, stock brokers, accountants, engineers, veterinarians, direct sellers, real estate agents, hairstylists, barbers, aestheticians, commercial fishermen, marketing professionals, travel agents, graphic designers, grant writers, fine artists, and payment processing agents. Those positions are not subject to the "ABC test," but instead will be subject to what has long been known as the "Borello test," established in [S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations](#).

But other groups or industries were not successful in lobbying for last-minute exemptions and are still covered by AB 5, including independent truckers, physical therapists, manicurists, exotic dancers, and musicians—and gig economy workers. The “ABC test” will apply to such persons.

Generally speaking, it is more difficult to establish that an individual is an independent contractor under the “ABC test” than under the “Borello test.” To satisfy the “ABC test,” the hiring entity must establish each of the following three factors:

- (A) that the worker 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; and
- (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Practically speaking, factor (B) will likely be the most difficult for a company to establish. Without it, an individual will be considered the company’s employee, not an independent contractor.

At the very least, AB 5 is going to create headaches for many small businesses and persons who wish to have the flexibility of working as independent contractors—and for companies that use their services. It is likely that many small businesses will shut their doors after concluding they cannot provide services as independent contractors, or after their clients decide they can no longer use them.

What California Employers Should Do Now

In light of AB 5 and *Dynamex*, companies in industries that have not already successfully lobbied for exemptions should take a close look at persons they treat as independent contractors to determine whether such a classification would be supported by the “ABC test.” Such examinations should be done carefully and with the guidance of experienced counsel, and could result in reclassification of some workers as employees or other significant changes to a company’s business model.

Additionally, companies in some industries may want to consider lobbying together for additional exemptions, like those granted in the days and hours before AB 5 was passed.

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