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Wage and Hour Defense Blog

Insight and Commentary on Wage and Hour Law Developments Affecting Employers

California Adds More Exemptions to Controversial Independent Contractor Statute

By Michael S. Kun on September 8, 2020

We have written frequently here about AB5, California's controversial law that creates an "ABC" test that must be satisfied in order for a worker to be treated as an independent contractor. As we **explained here**, AB5 codified and expanded the "ABC" test adopted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* for determining whether workers in California should be classified as employees or as independent contractors.

While the statute was unambiguously aimed at ride share and food delivery companies that treat drivers as independent contractors, it was broadly written and was passed with little discussion. Confusingly, it contained a mishmash of last-minute exemptions from the "ABC" test that, from a distance, seemed to be based on little more than which industry groups were able to get legislators' ears in the hours before the statute was passed.

The original exemptions to AB5 extended to doctors, dentists, insurance agents, lawyers, accounts, real estate agents, and hairstylists, among others.

Now, eight months after AB5 went into effect, more industries and occupations have been exempted from AB5.

On September 4, 2020, Governor Gavin Newsom signed **AB 2257**, which immediately exempts the following professions from the ambit of AB5:

- Fine artists
- Freelance writers
- Still photographers
- Photojournalists
- Freelance editors
- Newspaper cartoonists
- Translators
- Copy Editors
- Producers
- Cartographers
- Musicians with single-engagement live performances
- Musicians involved in sound recordings or musical compositions
- Insurance inspectors
- Real estate appraisers
- Manufactured housing salespersons

- Youth sports coaches
- Landscape architects
- Professional foresters

These new exemptions may be just the start of amendments to AB5 that will carve out other industries and occupations.

And while it seems highly unlikely that AB5 will be amended to exempt ride share and food delivery companies from the "ABC" test, California voters will decide that themselves in November when they vote on **Proposition 22**, which would exempt those companies.

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AB 5, Dynamex and Borello: What Standard Governs Independent Contractor Status In California?

By Michael S. Kun & Kevin Sullivan on March 30, 2020

It is no secret that independent contractor misclassification claims are being filed against employers with a great deal of frequency, often as class actions and often in California. Many of those lawsuits have been filed against gig economy companies. But, of course, they are not the only companies facing such claims.

As a result, many companies that classify workers as independent contractors are asking a basic question, "Are those workers properly classified?"

It sounds like such a simple question, one that should have a simple answer.

But there is no simple answer, at least not in California, where the California Supreme Court created a new "ABC" test in ***Dynamex***, only to have the legislature follow up with a statute known as **AB 5**, codifying and expanding *Dynamex* while simultaneously excluding some occupations from its scope.

Let's see if we can help navigate the current state of the law in California.

What is the test for independent contractor status in California?

For claims post-January 1, 2020, it's **AB 5**, which we previously discussed **here**.

For claims pre-January 1, 2020, it could be AB 5.

Or maybe AB 5 and ***Dynamex***.

Or maybe AB 5 and *Dynamex* and ***Borello***.

Or maybe just *Dynamex*.

Or maybe just *Borello*.

It depends on what time period, claims and occupations are at issue, and whether AB 5 and *Dynamex* are determined to be retroactive.

Does AB 5 apply retroactively?

Maybe, maybe not. AB 5 specifically states that some sections apply retroactively.

And to the extent AB 5 is intended to be a "clarification" of existing law, it may apply retroactively because clarifications generally apply retroactively.

But that does not mean that there are not arguments that AB 5 does not apply retroactively. **"[U]nless there is an 'express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature must have intended a retroactive application.'"** And the subdivision of AB 5 that codifies *Dynamex*'s "ABC" test has no express retroactivity language, while a subsequent subdivision concerning the exceptions to the "ABC" test does have such language. That distinction is meaningful because if the **"legislature carefully employs a term in one statute and deletes it from another, it must be presumed to have acted deliberately."**

What is the difference between AB 5 and *Dynamex*?

AB 5 has a number of exceptions that were not in *Dynamex*, and *Dynamex*'s ABC test was limited to claims arising under a California wage order.

And AB 5 extends beyond just claims relating to wage orders. For example, AB 5 extends to claims for wrongful termination or expense reimbursement, where *Dynamex* did not.

What occupations are excepted from AB 5?

A number of occupations are excepted from AB 5, subject to certain conditions (including licensure or certification), including physicians and surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, securities broker-dealers, investment advisers, and commercial fisherman.

And more exceptions may be on the way.

Does *Dynamex* still apply to occupations that are excepted from AB 5?

Maybe, maybe not.

For claims arising on or after January 1, 2020, *Dynamex* should not apply.

For the specific occupations that are excepted from the ABC test, AB 5 makes clear what the test is, and that is generally the one set forth in *Borello,* not *Dynamex*.

Assuming AB 5 is not retroactive, for claims relating to wage orders arising before January 1, 2020 but after *Dynamex* was issued on April 30, 2018, then *Dynamex* would apply for those claims – and *Borello* would be the test for all non-wage order claims arising before January 1, 2020.

Is *Dynamex* retroactive?

Maybe, maybe not. That issue is before the **California Supreme Court**.

There is a good argument that *Dynamex* should not be retroactive because, before *Dynamex*, the "ABC" test had never been adopted in California courts. For 70 years, the worker classification test focused on the right of control, which came to be known as the *Borello* test. Before *Dynamex*, there was not a single California authority that had adopted the "ABC "test, which was taken from New Jersey and Massachusetts law. Because the *Borello* test had been the law of California since 1946, California businesses reasonably relied on that standard, and decisions (like *Dynamex*) should apply only prospectively where the California

Court of Appeal has previously consistently applied **"a settled rule"** different from the new one.

Is the *Borello* test dead?

Not at all. It is the test generally used for the exceptions identified in AB 5.

And if AB 5 is not retroactive, then *Borello* would still apply to claims unrelated to wage orders, such as expense reimbursement.

Additionally, it arguably applies to the "joint employer" inquiry even if AB 5 is not retroactive.

Do AB 5 and *Dynamex* apply to the "joint employer" inquiry?

So far, there are two courts that have concluded AB 5 and *Dynamex* do not apply where one of the entities is an undisputed employer, and that they only apply to the relationship between a worker and the "hiring entity."

But what if there is no undisputed employer and an individual performs services for two unrelated companies?

The "ABC" test in *Dynamex* and AB 5 arguably should not apply to any entity that does not "hire" the individual.

By way of example, assume an individual enters into a contract with Company X and performs services for Company X's clients Companies Y and Z. And assume that none of these companies are affiliates (i.e., they do not have common ownership). While the plaintiffs' bar may argue that the "ABC "test should apply to all three companies, *Dynamex* explained that workers are presumptively employees of "the hiring business" unless that business meets the ABC test. And AB 5 expressly refers to "the hiring entity" in codifying the ABC test. Because Companies Y and Z did not "hire" the individual, the ABC test should not apply to them.

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Federal Judge Denies Ride Share and Delivery Companies' Request for Preliminary Injunction to Enjoin Enforcement of California's Controversial New Independent Contractor Test

By Vanessa Manolatou on February 12, 2020

As we recently wrote **here**, Uber and Postmates (and two of their drivers) to file an eleventh-hour lawsuit seeking to enjoin the enforcement of California's controversial new independent contractor law – known as AB 5 – against them.

In a significant blow to the challenge to the companies' challenge to the new law, the court has **denied Uber and Postmates' request for a preliminary injunction** to block the enforcement of AB 5 against them.

In denying the request for a preliminary injunction, the court concluded that Uber and Postmates were not likely to succeed on the merits of their various constitutional challenges to the statute, and that they had failed to demonstrate that they would suffer irreparable harm.

The court found that the companies had offered no evidence showing that the Legislature could not have reasonably conceived that AB 5 would further the state's interest in reducing the misclassification of workers as independent contractors such that they were likely to succeed on their equal protection clause challenge. And the court rejected the argument that there is no rational basis for AB 5's exemptions, under which an individual who directly sells products is exempted from the scope of AB 5, while an individual who earns income by offering driving services is not. In considering the rationale for AB 5's exemptions, the court found that exempted workers, such as direct salespersons, exert independence and control in performing their jobs.

The court also rejected the companies' argument that AB 5 deprives gig economy workers of the right to pursue their chosen occupation.

The ruling does not signal the end of the case, or of Uber, Postmates and other companies' challenges to AB 5. Should they not succeed in the trial court, an appeal is likely. But perhaps more importantly, ride-share and delivery companies have reportedly earmarked more than $110 million to a campaign to have **California voters exclude them from application of AB 5 in a referendum to take place later this year**.

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Federal Judge Grants Preliminary Injunction to Prevent Enforcement of California's Controversial New Independent Contractor Statute to Independent Truckers

By Michael S. Kun on January 31, 2020

As we have written **here**, the day before California's controversial AB 5 was set to go into effect, U.S. District Court Judge Roger Benitez issued a temporary restraining order to block enforcement of the law as to approximately 70,000 independent truckers.

Subsequently, **Judge Benitez granted a preliminary injunction** to prevent enforcement of the statute to those truckers.

In reaching his decision, Judge Benitez concluded that, as to independent truckers, the Federal Aviation Administration Authorization Act preempts AB 5.

The preliminary injunction is a significant victory for the California Trucking Association – and another blow to the hastily passed statute that is being attacked left and right.

The matter is far from resolved. California's attorney general and the Teamsters, who intervened in the lawsuit, have already announced that they intend to appeal the ruling to the Ninth Circuit. Whatever the Ninth Circuit decides, that could just be the next step before the matter ultimately reaches the United States Supreme Court.

We will continue to monitor developments in the case.

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Who's Up Next? Now It's Ride-Share and Delivery Companies' Turn to File Suit Challenging California's Controversial New Independent Contractor Test

By Michael S. Kun on December 31, 2019

AB 5, California's hastily passed and controversial independent contractor statute, which codifies the use of an "ABC test," is set to go into effect on **January 1, 2020**.

Already, the **California Trucking Association has filed suit** challenging the statute.

As have freelance **writers and photographers**.

Now, it's ride-share and delivery companies' turn to file suit.

Those companies have already commenced the process to create a ballot initiative that would allow voters to decide whether to **exempt ride-share and delivery drivers** from the "ABC test."

Now, on December 30, 2019 – just two days before AB 5 goes into effect – two of those companies (and two drivers) have **filed suit in Los Angeles in the United States District Court for the Central District of California**, seeking to enjoin AB 5 as it pertains to them.

In the complaint, they argue that AB 5 is an "irrational and unconstitutional statute designed to target and stifle workers and companies in the on-demand economy." They contend that the statute violates various provisions of the California Constitution, including the equal protection clause, the inalienable rights clause, and the due process clause.

The equal protection argument is particularly fascinating as the companies contend that "[t]here is no rhyme or reason to the[] nonsensical exemptions" that were granted at the eleventh hour to some industries and professions.

We will continue to monitor this action – and the other actions challenging AB 5. Unless and until an injunction is issued, that statute will go into effect as planned, and companies that do business with independent contractors would be wise to review those relationships swiftly.

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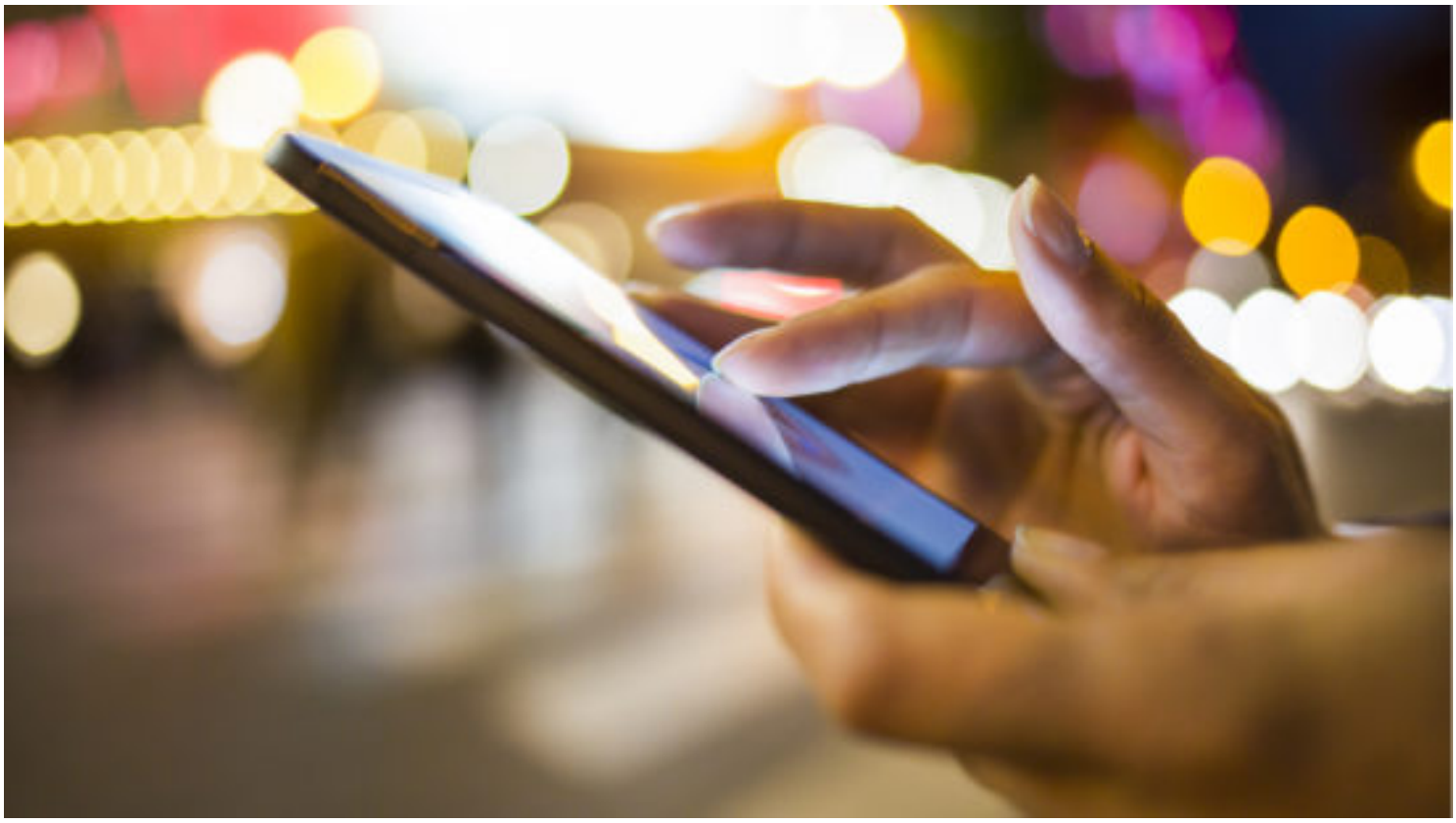
DOL Endorses Independent Contractor Status in the Gig Economy

By Kevin R. Vozzo & Steven M. Swirsky on May 3, 2019



On April 29, 2019, the U.S. Department of Labor ("DOL") **issued an opinion letter** concluding that workers providing services to customers referred to them through an unidentified virtual marketplace are properly classified as independent contractors under the Fair Labor Standards Act ("FLSA").

Although the opinion letter is not "binding" authority, the DOL's guidance should provide support to gig economy businesses defending against claims of independent contractor misclassification under the FLSA. The opinion letter may also be of value to businesses facing other kinds of claims from gig economy workers that are predicated on employee status, such as organizing for collective bargaining purposes.

Overview

An unidentified "virtual marketplace company" – defined by the DOL to include an "online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting, and household services" – requested an opinion on whether service providers who utilize the company's platform to connect with customers are employees or independent contractors under the FLSA.

To answer this question, the DOL analyzed whether, and to what extent, the service providers are "economically dependent" upon the company. Applying what is commonly referred to as the "economic realities test," the DOL considered the following six factors:

1. the nature and degree of the putative employer's control;
2. the permanency of the relationship;
3. the level of the worker's investment in facilities, equipment, or helpers;
4. the amount of skill, initiative, judgment, or foresight needed;
5. the worker's opportunity for profit and loss; and
6. the extent to which the worker's services are integrated into the putative employer's business.

The DOL noted that because status determinations depend upon the "circumstances of the whole activity," it could not "simply count[] factors" when evaluating the service providers' independent contractor status. Instead, it needed to weigh the relevant factors to determine whether the service providers are in business for themselves, or economically dependent on the company.

The DOL's Analysis

The DOL began its analysis by explaining that because the service providers work *for customers* – and not the virtual marketplace, or the company that maintains it – it was "inherently difficult to conceptualize the service providers' 'working relationship'" with the company. The DOL then applied the factors listed above, finding that each weighed in favor of independent contractor status.

- **Control.** The DOL determined that the "control" factor weighed heavily in favor of independent contractor status. In reaching this conclusion, the DOL noted that the service providers – who have the right to accept, reject, or ignore any opportunity offered to them through the platform – control "if, when, where, how, and for whom they will work," and are not required to complete a minimum number of jobs in order to maintain access to the platform. The DOL also pointed to the service providers' freedom to work for competitors, and to simultaneously use competing platforms when looking for work. Finally, the DOL found that the service providers are subject to minimal, if any, supervision. Although customers have the ability to rate the service providers' performance, the company does not inspect the service providers' work or rate their performance, or otherwise monitor, supervise, or control the details of their work.
- **Permanence.** The DOL found that the lack of permanence in the parties' relationship weighed strongly in favor of independent contractor status because: (i) the service providers have a "high degree of freedom to exit" the relationship; (ii) the service providers are not restricted from "interacting with competitors" during the course of the parties' relationship (or after the relationship ends); and (iii) even if the service providers maintain a "lengthy working relationship" with the company, they do so only on a "project-by-project" basis.
- **Investment.** The DOL next concluded that the level of investment favored independent contractor status, reasoning that although the company invests in its platform, it does not invest in facilities, equipment, or helpers on behalf of the service providers, who are responsible for all costs associated with the "necessary resources for their work."
- **Skill and Initiative.** Although the company did not disclose the specific types of services available to customers through the platform, the DOL concluded that the level of skill and initiative needed to perform the work supported independent contractor status. Regardless of the specific types of work they perform, the service providers

"choose between different service opportunities and competing virtual platforms," "exercise managerial discretion in order to maximize their profits," and do not receive training from the company.

- **Opportunity for Profit and Loss.** The DOL found that although the company sets default prices, the service providers control the major determinants of profit and loss because they are able to select among different jobs with different prices, accept as many jobs as they see fit, and negotiate with customers over pricing. The DOL also found that the service providers can "further control their profit or loss" by "toggling back and forth between" competing platforms, and determining whether to cancel an accepted job (and incur a cancellation fee) if they find a more lucrative opportunity.
- **Integration.** The DOL concluded that the service providers are not integrated into the company's business operations because: (i) the service providers do not develop, maintain, or operate the company's platform; (ii) the company's business operations effectively terminate at the point of connecting service providers to consumers; and (iii) the company's "primary purpose" is to provide a referral system to connect service providers with consumers in need of services – not to provide any of those services itself.

The DOL found that these facts "demonstrate economic independence, rather than economic dependence," and concluded that the service providers are independent contractors under the FLSA.

Takeaways

As noted by the DOL, determining "[w]hether a worker is economically dependent on a potential employer is a fact-specific inquiry that is individualized to each worker." In addition, the tests for determining independent contractor status vary by statute, and by jurisdiction. Accordingly, agencies in some jurisdictions, including in states that apply the "ABC test" to determine independent contractor status in certain contexts, such as **California** and New Jersey, may disregard the opinion letter. Indeed, the New Jersey Labor Commissioner recently issued a statement indicating that the opinion letter "has zero effect on how the New Jersey Department of Labor enforces state laws … [because] the statutory three-part test for independent contractor status [in New Jersey] … is distinct from and much more rigorous than the standard referenced in the opinion letter." Nevertheless, the opinion letter should provide support to gig economy businesses defending against claims

of independent contractor misclassification under the FLSA, and in jurisdictions that apply tests that overlap with the FLSA's economic realities test.

The opinion letter may also be of value to businesses facing other kinds of claims from gig economy workers that are predicated on employee status, such as organizing for collective bargaining purposes. Earlier this year, the National Labor Relations Board ("NLRB" or "Board") adopted a new test to be used in distinguishing between "employees," who have rights under the National Labor Relations Act ("NLRA" or "Act") and independent contractors who do not. In its January 25, 2019 decision in *SuperShuttle DFW, Inc.*, 367 NLRB No.75 (2019) the Board rejected the test adopted in 2014 in *FedEx Home Delivery*, 361 NLRB 610 (2014) and returned to the common-law test, finding that the test adopted in *FedEx* minimized the significance of a worker's entrepreneurial opportunity.

SuperShuttle involved a union petition for an election among a group of franchisees operating SuperShuttle airport vans at Dallas-Fort Worth Airport. In response to the petition, SuperShuttle, the franchisor, argued that the franchisees who were seeking representation were not employees but rather independent contractors and as such were not entitled to vote in an NLRB election or to exercise the rights granted to employees, but not independent contractors, under the Act. The Board found that the franchisees' leasing or ownership of their work vans, their method of compensation, and their nearly unfettered control over their daily work schedules and working conditions provided the franchisees with significant entrepreneurial opportunity for economic gain. These factors, along with the absence of supervision and the parties' understanding that the franchisees are independent contractors, resulted in the Board's finding that the franchisees are not employees under the Act. While the tests for determining independent contractor status under the NLRA and FLSA differ, both the Board's decision in *SuperShuttle* and the DOL's opinion letter emphasize similar themes, including the significance of a worker's economic opportunity and discretion.
