On April 30, 2018, the California Supreme Court issued its opinion in *Dynamex Operations West Inc. v. Superior Court*, which retroactively changed the test for determining whether an individual is an employee or independent contractor within the state of California. The Court adopted the “ABC Test,” under which workers are presumed to be employees unless all three of the following conditions are met:

(A) The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(B) The service is performed outside the usual course of the business of the employer; and,

(C) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

AB 5 was signed to codify the *Dynamex* decision.\(^1\) AB 5 lists several exemptions to the ABC Test; if a worker falls into one of these exemptions, the ABC Test does not apply and instead, the old *Borello* rule would apply.

**Professional Services Exception**\(^2\) to the ABC Test

The ABC Test does not apply to a contract for “professional services” as defined below. “Professional services” means services that meet any of the following:

- Marketing, provided that the contracted work is **original and creative** in character and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the contracted work.

- Administrator of human resources, provided that the contracted work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

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\(^1\) Several lawsuits have been filed challenging AB5. On December 30, 2019 Uber and Postmates filed suit in federal court asserting the law violates the equal protection and due process clauses of the Constitution. Freelance journalists and photographers filed suit in December 2019 alleging AB5 unconstitutionally restricts free speech, free press and equal protection. The California Trucking Association also filed a lawsuit in November 2019.

\(^2\) Labor Code 2750.3 (c)
☐ Travel agent services (as defined)\(^3\)
☐ Graphic design.
☐ Grant writer.
☐ Fine artist.
☐ Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service.
☐ Payment processing agent through an independent sales organization.
☐ Services provided by a still photographer or photojournalist who do not license content submissions to the putative employer more than 35 times per year.
  o This clause is not applicable to an individual who works on motion pictures, which includes, but is not limited to, projects produced for theatrical, television, internet streaming for any device, commercial productions, broadcast news, music videos, and live shows, whether distributed live or recorded for later broadcast, regardless of the distribution platform.
  o For purposes of this clause a “submission” is one or more items or forms of content produced by a still photographer or photojournalist that:
    ▪ pertains to a specific event or specific subject;
    ▪ is provided for in a contract that defines the scope of the work; and
    ▪ is accepted by and licensed to the publication or stock photography company and published or posted.
☐ Services provided by a freelance writer, editor, or newspaper cartoonist who does not provide content submissions to the putative employer more than 35 times per year. Items of content produced on a recurring basis related to a general topic shall be considered separate submissions for purposes of calculating the 35 times per year.
  o For purposes of this clause, a “submission” is one or more items or forms of content by a freelance journalist that:
    ▪ pertains to a specific event or topic;
    ▪ is provided for in a contract that defines the scope of the work;
    ▪ is accepted by the publication or company and published or posted for sale.
☐ Services provided by a licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist provided that the individual:

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\(^3\) A person regulated by the Attorney General under Article 2.6 (commencing with Section 17550) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, or (II) an individual who is a seller of travel within the meaning of subdivision (a) of Section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (g) of Section 17550.20 of the Business and Professions Code.
Sets their own rates, processes their own payments, and is paid directly by clients.
Sets their own hours of work and has sole discretion to decide the number of clients and which clients for whom they will provide services.
Has their own book of business and schedules their own appointments.
Maintains their own business license for the services offered to clients.
If the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space.
This exception shall become inoperative with respect to licensed manicurists on January 1, 2022.

If there is a contract for “professional services” as defined above, the Borello test will apply to determine if the worker is an employee of independent contractor only if the hiring entity demonstrates that all of the following criteria are satisfied:

☐ The individual maintains a business location, which may include the individual’s residence, that is separate from the hiring entity, or may be at the location of the hiring entity.

☐ If work is performed after June 1, 2010, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession.

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

☐ Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual’s own hours.

☐ 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.

☐ The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

☐ An “individual” includes an individual providing services through a sole proprietorship or other business entity.

☐ This subdivision shall become inoperative, with respect to licensed manicurists, on January 1, 2022.

If the worker and the work meet the definition of “professional services” and all of the above criteria are met, then the ABC Test does not apply, and instead the Borello Test below must be followed to determine if the worker is an independent contractor or employee.
**Borello Test**

The California Supreme Court established the Borello test in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* in 1989. This test relies upon multiple factors to make the determination of whether a worker is properly classified, including whether the potential employer has control over the manner and means of accomplishing the result desired, although such control need not be direct, actually exercised, or detailed. This factor, which is not dispositive, must be considered along with other factors, which include:

1. Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
2. Whether the work is a regular or integral part of the employer’s business;
3. Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
4. Whether the worker has invested in the business, such as in the equipment or materials required by their task;
5. Whether the service provided requires a special skill;
6. The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
7. The worker’s opportunity for profit or loss depending on their managerial skill;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job;
11. Whether the worker hires their own employees;
12. Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
13. Whether or not the worker and the potential employer believe they are creating an employer-employee relationship (this may be relevant, but the legal determination of employment status is not based on whether the parties believe they have an employer-employee relationship).