AB 5 – BUSINESS TO BUSINESS INDEPENDENT CONTRACTOR ANALYSIS
January 2, 2020

Dynamex/AB 5

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 decision1. 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.

Business to Business Exemption2 to the ABC Test

The ABC Test does not apply to a “bona fide business-to-business contracting relationship.” If a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation (“business service provider”) contracts to provide services to another such business (“contracting business”), the Borello test will apply if the contracting business demonstrates that all of the following criteria are satisfied:

☐ There is a written contract between the business service provider and the contracting business.

☐ 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.

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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(e)
☐ The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.

☐ 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.

☐ The business service provider maintains a business location that is separate from the business or work location of the contracting business.

☐ The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

☐ 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.

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

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

☐ The business service provider can negotiate its own rates.

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

☐ The business service provider is not performing the type of work for which a license from the Contractor’s State License Board is required.

The business to business “exception” does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.

If all of the above criteria are met, then the ABC Test does not apply, and instead the Borello Test below must be followed.

The determination of whether an individual working for a business service provider is an employee or independent contractor of the business service provider is governed by the ABC test.

This subdivision does not alter or supersede any existing rights under Section 2810.3 (dealing with contracts or agreements for labor or services with a construction, farm labor, garment, janitorial, security guard, or warehouse contractor.)
**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).