

AB 2257 – PROFESSIONAL SERVICES INDEPENDENT CONTRACTOR CHECKLIST October 2020

HISTORY

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 September 18, 2019 to codify the *Dynamex* decision.¹

AB 2257 was signed September 4, 2020 to revise and recast AB 5, to add additional exemptions, and to clarify some of the AB 5 exemptions. If a worker satisfies one of the AB 2257 exemptions, the ABC Test does not apply and instead, the old *Borello* rule would apply.

PROFESSIONAL SERVICES EXEMPTION² TO THE ABC TEST- LABOR CODE 2778

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.

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)

- 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.
- Travel agent services (as defined)³
- Graphic design.
- Grant writer.
- Fine artist, defined as an individual who creates works of art to be appreciated primarily or solely for their imaginative, aesthetic, or intellectual content, including drawings, paintings, sculptures, mosaics, works of calligraphy, works of graphic art, crafts, or mixed media.
- Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service pursuant to Part 10 of Subtitle A of Title 31 of the Code of Federal Regulations .
- Payment processing agent through an independent sales organization.
- Services provided by a still photographer, photojournalist, videographer, or photo editor who works under a written contract that specifies:
 - the rate of pay and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity;
 - the individual does not primarily perform the work at the hiring entity's business location; and
 - the individual is not restricted from working for more than one hiring entity.
 - The still photographer, photojournalist, videographer, or photo editor does not work on motion pictures, including but not limited to, theatrical or commercial productions, broadcast news, television, and music videos.
- Services provided to a digital content aggregator by a still photographer, photojournalist, videographer, or photo editor.

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.

- “Digital content aggregator” means a licensing intermediary that obtains a license or assignment of copyright from a still photographer, photojournalist, videographer, or photo editor for the purposes of distributing that copyright by way of sublicense or assignment, to the intermediary’s third-party end users.
- “Photo editor” means an individual who performs services ancillary to the creation of digital content, such as retouching, editing, and keywording.
- Services provided by a freelance writer, translator, editor, copy editor, illustrator, or newspaper cartoonist who works under a written contract that specifies:
 - the rate of pay, intellectual property rights, and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity;
 - the individual does not primarily perform the work at the hiring entity’s business location; and
 - the individual is not restricted from working for more than one hiring entity.
- Services provided by an individual as a content contributor, advisor, producer, narrator, or cartographer for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work in any format or media, who works under a written contract that specifies:
 - the rate of pay, intellectual property rights and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity;
 - the individual does not primarily perform the work at the hiring entity’s business location; and
 - the individual is not restricted from working for more than one hiring entity.
- Services provided by a licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist provided that the individual:
 - 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.
- A specialized performer hired by a performing arts company or organization to teach a master class for no more than one week.
 - “Master class” means a specialized course for limited duration that is not regularly offered by the hiring entity and is taught by an expert in a recognized field of artistic endeavor who does not work for the hiring entity to teach on a regular basis.
- Services provided by an appraiser, as defined in Part 3 (commencing with Section 11300) of Division 4 of the Business and Professions Code.
- Registered professional foresters licensed pursuant to Article 3 (commencing with Section 750) of Chapter 2.5 of Division 1 of the Public Resources Code.

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 March 4, 2021⁴, and the work is performed in a jurisdiction that requires the individual to have a business license or business tax registration the individual has the required license or tax registration, 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.

⁴ 6 months from September 4, 2020, which is the effective date of AB 2257

- 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 as a sole proprietorship or other business entity.

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.

Section 2775 and the holding in *Dynamex* do not apply to the following, which are subject to the Business and Professions Code:

- A real estate licensee licensed by the State of California pursuant to Division 4 (commencing with Section 10000) of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by subdivision (b) of Section 10032 of the Business and Professions Code. If that section is not applicable, then this determination shall be governed as follows:
 - o For purposes of unemployment insurance by Section 650 of the Unemployment Insurance Code.
 - o For purposes of workers’ compensation by Section 3200 et seq.
 - o For all other purposes in the Labor Code by the *Borello* test. The statutorily imposed duties of a responsible broker under Section 10015.1 of the Business and Professions Code are not factors to be considered under the *Borello* test.
- A home inspector, as defined in Section 7195 of the Business and Professions Code, and subject to the provisions of Chapter 9.3 (commencing with Section 7195) of Division 3 of that code.
- A repossession agency licensed pursuant to Section 7500.2 of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by Section 7500.2 of the Business and Professions Code, if the repossession agency is free from the control and direction of the hiring person or entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

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).