Single Engagement Business to Business Exemption Checklist- AB 2257
October 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 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.

Labor Code 2779 – Single Engagement Business to Business Exemption

The ABC test does not apply to:

☐ the relationship between two individuals when each individual is acting as a sole proprietor or separate business entity formed as a partnership, limited liability company, limited liability partnership, or corporation;

☐ the parties have a written contract for purposes of providing services at the location of a single-engagement event.

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.
☐ The event meets the definition of a single engagement event: a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week.

☐ Neither individual is subject to control and direction by the other, in connection with the performance of the work, both under the contract for the performance of the work and in fact.

☐ Each individual has the ability to negotiate their rate of pay with the other individual.

☐ The written contract between both individuals specifies the total payment for services provided by both individuals at the single-engagement event, and the specific rate paid to each individual.

☐ Each individual maintains their own business location, which may include the individual’s personal residence.

☐ Each individual provides their own tools, vehicles, and equipment to perform the services under the contract.

☐ Each individual has a business license or business tax registration if required by the jurisdiction where the services are performed.

☐ Each individual is customarily engaged in the same or similar type of work performed under the contract or each individual separately holds themselves out to other potential customers as available to perform the same type of work.

☐ Each individual can contract with other businesses to provide the same or similar services and maintain their own clientele without restrictions.

This exemption is not available to individuals providing services in high hazard industries as defined by OSHA, or janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.

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

**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).