

CLIENT NEWS BRIEF

AB 5: New Law Further Limits Employers' Ability To Classify Workers As Independent Contractors

Governor Newsom signed Assembly Bill 5 (AB 5) on September 18, 2019, which takes effect on January 1, 2020. AB 5 codifies the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles (Dynamex)* ([see 2018 Client News Brief No. 20](#)), which made it more difficult to classify a worker as an independent contractor. This new legislation also creates additional protections for workers.

In *Dynamex*, the Court held that, for purposes of Industrial Welfare Commission (IWC) wage orders, a worker is presumed to be an employee unless the hiring entity is able to demonstrate that:

- (A) The person is free from their control and direction in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) The person performs work that is outside the usual course of the hiring entity's business; and
- (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

AB 5 expands the applicability of this three-part test, commonly referred to as the "ABC test," to specific sections of the California Labor Code and Unemployment Insurance Code. The bill exempts specific occupations such as licensed architects, lawyers, and private investigators from the ABC test. Instead, those professionals will be governed by the *Borello* test, which does not contain a rebuttable presumption that a worker is an employee. The *Borello* test has nine factors and focuses on the amount of "control" the hiring entity has over a worker. Hiring entities are not required to meet all nine factors to show that a worker is an independent contractor. Therefore, it is easier to classify a worker as an independent contractor under *Borello*. AB 5 provides that, in addition to the specific exemptions, *Borello* can also be applied when a court determines that the ABC test cannot be applied in a particular circumstance.

AB 5 authorizes the California Attorney General and certain local government officials to seek injunctions against hiring entities on behalf of misclassified workers. Additionally, some of the changes to the Labor Code apply retroactively to existing claims to the extent permitted by law.

Takeaways

AB 5 extends the applicability of *Dynamex* and the ABC test from IWC wage orders to provisions of the Labor and Unemployment Insurance Codes. The legislation has the potential to increase employer liability because it is partially retroactive to existing claims and creates a new right to seek injunctive relief.

Precisely what impact AB 5 will have on public entities is yet to be determined. First, while most IWC wage orders do not apply in full to public entities, sections of the Labor Code and the Unemployment Insurance Code do apply.

October 2019
Number 53



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As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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Number 53

Second, AB 5 does not contain an exemption for public entities. Third, adopting the ABC test could lead to greater use of the test by other agencies that have historically relied on the *Borello* test such as the California Public Employees' Retirement System (CalPERS). If this occurs, the change may have a significant impact on CalPERS membership rules, including post-retirement work implications for CalPERS retirees attempting to return to work as independent contractors. Therefore, public entity employers with independent contractors should review their classification decisions to ensure workers are correctly classified under the appropriate test.

For more information about AB 5, worker classification, or CalPERS post-employment work restrictions, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#), and [LinkedIn](#) or download our [mobile app](#).

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