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California to Codify Dynamex

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The California Legislature has passed Assembly Bill 5 ("AB 5"), which if signed by Governor Gavin Newsom, will codify the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018). *Dynamex* adopted a legal standard presuming that workers are employees and placed the burden on the hiring entity to show otherwise pursuant to the three-factor "ABC" test. The legislature identified the misclassification of workers as independent contractors as "a significant factor in the erosion of the middle class and the rise of income inequality" and announced its intention to protect workers who are currently being exploited by being misclassified. Though the *Dynamex* decision's application of the "ABC" test was limited to the definition of "employee" contained in the Industrial Welfare Commission Wage Orders, the new Labor Code section 2750.3 will expand the application of that test to the Labor Code and the Unemployment Insurance Code.

Labor Code section 2750.3 will read, in part, as follows:

> (a) (1) For purposes of the provisions of this code and the Unemployment Insurance Code and for the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> > (A) The person is free from the control and direction of the hiring entity 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.
> >
> > (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.

To the extent that a court finds that the ABC test cannot be applied in a particular situation, the determination of a worker's independent contractor status will be governed by the California Supreme Court's decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). *Borello* applied a nine-factor test to the classification inquiry that included evaluations of factors such as skill required for the position, provision of tools or equipment, and length of time for which the services would be performed. The new bill also identifies several professions as exceptions to subdivision (a) of section 2750.3, including, among others, physicians, lawyers, architects, engineers, investment advisors, and work performed under certain contracts for professional services, which will also be governed by *Borello*.

It is well understood that the passage of AB 5 is targeted at the gig economy, and the bill even contains a prophylactic response to an attack levied upon it by companies at the forefront of the gig economy in California, noting that "[n]othing in this act is intended to diminish the flexibility of employees to work part-time or intermittent schedules or to work for multiple employers." Despite the many exceptions to subdivision (a) of section 2750.3, the impact of AB 5 will extend well beyond the gig economy, affecting traditional businesses in California and their ability to classify workers as independent contractors. AB 5 is now headed to the desk of Governor Newsom, who has previously indicated support for the measure.

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