

# Are More Exemptions Warranted to New California Legislation Codifying and Expanding Dynamex’s “ABC Test” for Independent Contractor Status?

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There may soon be a fair number of big rig trucks for sale in California, as well as computers, desks and other material investments of persons who determine that they may no longer offer their services as independent contractors and must shut down their small businesses, a potential repercussion of new legislation intended to restrict the use of independent contractor status in the state.

Whether those and other practical consequences of the hurried passage of the new law were considered by the California legislature is unclear.

But the eleventh-hour exemptions that were extended to some industries – and denied to others – suggests that the impact of the new statute may not have been given as much thought as it could have been. And perhaps – just perhaps – the statute will be tweaked further and more exemptions will be recognized.

We are writing, of course, about AB 5, which codifies and expands the “ABC test” set forth in [\*Dynamex Operations West, Inc. v. Superior Court\*](#) for determining whether workers in California should be classified as employees or as independent contractors. On September 18, 2019, California Governor Gavin Newsom signed the [bill](#), which now will go into effect on January 1, 2020.

In the days and hours before it was passed, a number of groups lobbied for exemptions from AB 5. More than a few professions were exempted from the final version of the statute, most notably for lawyers, human resources administrators, doctors, psychologists, dentists, podiatrists, insurance agents, stock brokers, accountants, engineers, veterinarians, direct sellers, real estate agents, hairstylists, barbers, aestheticians, commercial fishermen, marketing professionals, travel agents, graphic designers, grant writers, fine artists and payment processing agents. Those positions are not subject to the “ABC test,” but instead will be subject to what has long been known as the “*Borello* test,” established in [\*S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations\*](#).

But other groups or industries were not successful in lobbying for last-minute exemptions and are still covered by AB 5, including independent truckers, physical therapists, manicurists, exotic dancers and musicians – and gig economy workers.

Generally speaking, it is more difficult to establish that an individual is an independent contractor under the “ABC test” than under the “*Borello* test.” To satisfy the “ABC test,” the hiring entity must establish *each* of the following three factors:

(A) that the worker 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; *and*

(B) that the worker performs work that is outside the usual course of the hiring entity’s business; *and*

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Practically speaking, factor (B) will likely be the most difficult for a company to establish. Without it, an individual will be considered the company’s employee, not an independent contractor.

At the very least, AB 5 is going to create headaches for many small businesses and persons who wish to have the flexibility of working as independent contractors, some of whom can be expected to lobby for exemptions to AB 5 – and for companies that use their services.

Noting that more lobbying for exemptions was likely, a columnist for [\*The Los Angeles Times\*](#) proposed something more drastic: “[T]he entire law should be rewritten with more realistic definitions of ‘independent contractor’ and ‘employee.’ Democrats and labor overreached.”

Only time will tell which groups or industries successfully lobby for additional exemptions from AB 5 or whether the legislature indeed will revise it.

In the meantime, in light of AB 5 and *Dynamex*, companies in industries that have not already successfully lobbied for exemptions should take a close look at persons they may treat as independent contractors to determine whether such a classification would be supported by the “ABC test.”

And persons who have their own small businesses and operate as independent contractors should do the same. Some who have operated independently for years may conclude that they can no longer do so. Some, such as owner-operators of trucks, may conclude that they now must shut down their businesses and sell off their assets, including trucks that they invested hundreds of thousands of dollars on.

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