

California AB 5's Impact on Board Directors and Advisory Members

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AB 5's elimination of independent contracting as we know it in California will have significant legal consequences for businesses doing business in California. While we believe board directors will escape its reach, businesses with advisory boards should proceed with caution.

Effective January 1, 2020, AB 5 will presume that every California worker is an employee unless the hiring entity establishes that the worker meets the three criteria of the so-called "ABC" test, or the worker satisfies one of the law's exemptions, as discussed in more detail on our [previous blog post](#).

Board directors are not "employees" and instead have a unique legal status with respect to corporations. Board directors are typically compensated for their service through stipend, equity, or both. Board directors also clearly perform a "service" for the corporate entities that appoint them. AB 5 does not expressly list board directors as among those categories of individuals who are exempted.

So does a valid concern exist with respect to AB 5's impact on the [legal classification of a board director or a member of an advisory board](#)?

In fact, a little-discussed provision of AB 5, which adds Section 2750.3 to the California Labor Code, provides the unique legal status for board directors by specifying that notwithstanding the adoption of the ABC test for determining employee status, the existing carve-out in the Unemployment Insurance Code will remain preserved. Because Section 622 of the Unemployment Code expressly provides that a corporate director is not an "employee" of the corporation, by interpretation, AB 5 preserves this legal status.

Unlike directors, advisory board members should not be so quick to exhale a sigh of relief. Board advisors, like corporate board directors, are typically industry experts who provide businesses with unique talent and skills to enhance the mission of the business – whether it is related to developing product, expanding lines of business, or other critically needed business advice. Section 622 of the Unemployment Insurance Code, however, does not address the employment classification of *advisory* board members. As a result, despite similarities to board directors, *advisory* board members must qualify separately as independent contractors under AB 5's ABC test, if the business

compensates them.

As explained in our prior blog post, to rebut the ABC presumptive “employee” test, the business must prove that (1) the individual service provider is free from the company’s control, (2) the individual performs work outside the company’s primary business, and (3) the individual is regularly engaged in the trade the individual is hired for, independent of work for the company.

An advisory board member presumably would satisfy the first prong of the test because the purpose of an advisory board member is to direct the company’s affairs rather than be the subject of corporate direction. The second prong may or may not be satisfied depending on the nature of the advisor’s primary business. Advisory board members are typically experts in their field and are sought after precisely because they perform work that is squarely within the company’s primary business. Similarly, the third prong of the test – whether the advisor is regularly engaged in the business for which the individual is hired, is also a fact-intensive inquiry.

As a result, while board directors almost certainly escape AB 5’s consequences (based solely on the board role), businesses entering into advisory board agreements (which include compensation for the advisor’s time and efforts) should consult counsel regarding compliance.

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