

Expanding Independent Contractors in California: New Law Awaits Governor's Signature

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As we have previously [reported](#), California law utilizes the “ABC” test to determine if workers are employees or independent contractors for purposes of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission.

Existing law, under [AB 5](#), exempts specified occupations and business relationships from the application of the “ABC” test and instead provides that these exempt relationships are governed by the traditional multifactor test detailed in [S. G. Borello & Sons, Inc. v. Department of Industrial Relations](#) (1989) 48 Cal.3d 341.

Under [AB 2257](#), passed by the California legislature Monday night, these exemptions would be modified and expanded to cover several additional occupations and industry areas. The bill now sits on Governor Newsom's desk for signature.

We have detailed the major changes proposed by AB 2257 below. That said, the proposed changes to AB 5 are very detailed and complex. If your business or occupation appears to fall into one of these exemptions, we strongly recommend consulting with your counsel given the nuances involved in understanding this complex subject matter, and the multi-faceted penalties that may be imposed for non-compliance. Moreover, even though the CARES Act provides unemployment benefits to independent contractors, many unemployment claims by independent contractors have led directly to investigations by the EDD as to whether the individual has been properly classified. The EDD has been proactive in finding independent contractors to have been misclassified.

Current Exemptions Under AB-5

Existing exemptions under AB-5 include persons who meet certain criteria and provide services under specific circumstances, including the following:

- Doctors, including physicians, surgeons, dentists, podiatrists, veterinarians, and

psychologists;

- Licensed professionals, including lawyers, architects, engineers, hairstylists, barbers, estheticians, electrologists, and manicurists;
- Financial services professionals, including insurance brokers, accountants, securities broker-dealers, and investment advisors;
- Real estate agents;
- Direct salespersons, provided compensation is based on actual sales rather than wholesale purchases or referrals;
- Commercial fishermen, until 2023;
- Builders and contractors;
- Professional services, including marketing, human resources administrators, travel agents, graphic designers, grant writers, and fine artists;
- Freelance writers, photographers, editors, photojournalists, and newspaper cartoonists, provided the worker contributes no more than 35 submissions to an outlet in a year;
- Tutors; and
- AAA-affiliated tow truck drivers.

New Exemptions Under AB-5 If Governor Signs AB 2257

AB 2257 adds a number of new exemptions to AB 5, allowing use of the *Borello* test instead of the more restrictive “ABC” test for the following occupations if certain requirements are met:

- Recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineers, musicians engaged in creating sound recordings, vocalists, photographers working on album covers, and other press and publicity photos relating to recordings, and independent radio promoters;
- Musicians or musical groups for the purpose of a single-engagement live performance event;
- Individual performance artists;
- Licensed landscape architects;
- Freelance translators, content contributors, advisors, narrators, cartographers, producers, copy editors, and illustrators;
- Registered professional foresters;
- Real estate appraisers;

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- Home inspectors;
 - Persons who provide underwriting inspections, premium audits, risk management or loss-control work for the insurance industry;
 - Manufactured housing salespersons;
 - Persons engaged in conducting international and cultural exchange visitor programs;
 - Competition judges with specialized skill sets;
 - Digital content aggregators who serve as licensing intermediaries for digital content;
 - Specialized performers hired to teach a master class for no more than one week; and
 - Feedback aggregators.

Modified Exemption – Business-to-Business Exemption

AB 5 provides for a so-called “business-to-business” exemption to provide relief to freelancers and sole proprietors operating in California. This exception has been criticized due to intertwined and overlapping requirements. AB 2257 attempts to address these criticisms by revising the language to clarify the exemption’s requirements and allow more flexibility in its application.

We believe that this modification is a positive development because it should provide businesses more certainty if they are contracting with a *bona fide* business with its own Employer Identification Number as opposed to paying a sole proprietor to their individual Social Security Number.

Modified Exemption – Freelance Writers, Photographers, Etc.

Under AB 5, freelance writers, photographers, photojournalists, editors, and newspaper cartoonists would automatically become employees of a publisher if he or she were contracted for more than 35 submissions in a single year.

AB 2257 eliminates the 35 submission-per-year limit and expands the list of positions to include fine artists, freelance writers, translators, editors, content contributors, advisors, narrators, cartographers, producers, copy editors, illustrators, and newspaper cartoonists, subject to certain preconditions. In particular, AB 2257 adds requirements that the writer or photographer provide services under a contract that specifies in advance the rate of pay and intellectual property rights, and that the contractor not replace an employee performing the same work at the same volume. In addition, the writer or photographer must not perform the work primarily at the hiring entity’s business location, and may not be restricted from working for other hiring entities.

AB 2257 would also establish a similar exemption for services provided to a digital content aggregators by a still photographer, photojournalist, videographer, or photo editor.

That being said, it is important to also note that the question of classification of employees and independent contractors is complicated by the fact that some workers who would normally qualify as independent contractors under the common law test are classified under California law as employees

for specific taxes only. For example, someone hired as an author of a commissioned work pursuant to a written contract designating the work as a “work for hire” is subject to the provisions of California Unemployment Insurance Code sections 621(d) and 686, dealing with withholding for unemployment insurance and state disability insurance, but not to personal income tax withholding. The payments to the author would be reported on Form 1099-MISC.

Modified Exemption – Referral Agencies

AB 5 created an exception for “referral agencies,” subject to an extensive and rather complicated multi-factor test. AB 2257 revises the criteria governing which referral agencies and service providers are exempt, and clarifies applicable definitions. The bill also expands the types of services that can utilize the referral agency exception to include consulting, youth sports coaching, caddying, wedding planning, services provided by wedding and event vendors, and interpreting and interpreting services by a service provider that has been certified by one of several specified agencies. The bill uses the phrase “including but not limited to” to determine coverage, which broadens the scope of this exception to also include those that are not expressly itemized. On the other hand, AB 2257 lists a handful of services that expressly do not qualify for the “referral agencies” exception, including high-hazard industry services, janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, and in-home care services, as well as construction services other than minor home repair.

Takeaways

Moving forward, we recommend that all California companies develop an internal process or checklist to ensure that workers are properly classified as employees or independent contractors. Given the complexity of this topic, we recommend having your legal counsel review these processes and checklists to ensure compliance with all applicable laws and relevant best practices. We also recommend that you update any existing independent contractor agreements in light of the evolving landscape. Lastly, you should stay up to date on new laws and cases regarding independent contractors, as this topic is currently in a state of flux.

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