

HR COMPLIANCE OVERVIEW

California's Worker Classification Standard (AB 5)

In 2019, California adopted [AB 5](#), a new law that changes the process for determining whether a worker should be classified as an employee or independent contractor.

The new law adopts the California Supreme Court's decision in [Dynamex Operations West, Inc. v. Superior Court of Los Angeles](#) (Dynamex) and dictates that a worker is an employee if he or she provides labor or services for remuneration. The new law also shifts responsibility to employers to prove that independent contractors are classified correctly and prohibits employers from reclassifying individuals who were employees on Jan. 1, 2019 as independent contractors.

However, on Jan. 31, 2019, a district court in San Diego issued a temporary injunction to prevent enforcement of this law for the trucking industry. The injunction does not affect other industries and all other employers are still expected to comply with the state's "ABC test" for employee classification.

LINKS AND RESOURCES

- Employment Development Department [AB 5 webpage](#)
- Answers to [frequently asked questions](#)
- Employment status [portal](#)

Highlights

- ✓ The new law affects employers that hire contractors, particularly in the gig economy.
- ✓ The new law expands the ABC test to California's Unemployment, Labor and Insurance Codes.
- ✓ The new law does not diminish the flexibility of intermittent or part-time work schedules, or the ability to work for multiple employers.

Important

Sept. 18, 2019

AB 5 becomes law and sets the "ABC test" as the new standard to determine employment status.

Dec. 31, 2019

Federal district court issues temporary injunction against the enforcement of AB 5 in the trucking industry.

Jan. 1, 2020

Effective date for AB 5 across the state of California.

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BACKGROUND

Whether a worker is covered by a particular law or is entitled to receive a particular benefit often depends on whether he or she is an employee or an independent contractor.

In general, employment benefits, labor laws and related taxes do not apply to independent contractors. The matter of worker classification as either an employee or independent contractor generally comes up when issues dealing with wages, unemployment and workers' compensation benefits arise.

For nearly 30 years, California used the multi-factor test set by the California Supreme Court in [S.G. Borello & Sons, Inc. v. Department of Industrial Relations](#) (*Borello*) to determine whether an individual is an employee. The 11 factors set out by *Borello* focused primarily on the degree of control an employer has not only over the work but also over how a worker completes his or her responsibilities. This standard was challenged in court, and in *Dynamex* the state Supreme Court replaced the multi-factor test with a simpler standard called the ABC test.

On Sept. 18, 2019, the California legislature adopted the *Dynamex* ABC test as the state standard for employee classification and expanded its scope to include matters related to the state's:

- Labor code;
- Wage orders (including overtime, meal periods, rest breaks and other wage and hour issues);
- Unemployment benefits; and
- Workers' compensation laws.

The new law became effective on Jan. 1, 2020 and will apply retroactively in some situations.

THE NEW STANDARD—THE ABC TEST

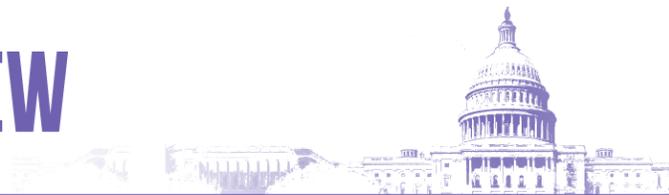
The ABC *Dynamex* test presumes that a worker is an employee, unless the **employer** can prove that the worker:

| | |
|-----------|---|
| A. | Is free from the control and direction of the employer when performing work, both practically and in the contractual agreement between the parties; |
| B. | Performs work that is outside the usual course of the employer's business; and |
| C. | Is culturally engaged in an independently established trade, occupation or business of the same nature as the work performed for the employer. |

This new standard introduces two new factors that were never before part of California's independent contractor analysis: part B and part C. Traditionally, when this test has been applied, part B tends to be the most difficult obstacle for employers and part C tends to eliminate most workers who perform side jobs and is expected to have a substantial impact on the gig economy.

It is important to note that this new law does not change or establish additional wage and hour requirements. The new law simply changes who is protected by existing wage, hour and other employment laws.

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EXCEPTIONS

In spite of having a broad reach, the new law also offers a substantial number of exemptions. However, when an exemption applies, the new law also dictates which standard must be used for worker classification under that exemption. For the vast majority of exemptions, the *Borello* multi-factor test will continue to apply.

General exemptions to the new law include (but are not limited to):

- AAA-affiliated tow truck drivers;
- Builders and contractors;
- Commercial fishermen (until 2023);
- Direct sales (if compensation is based on actual sales and not wholesale purchases or referrals);
- Doctors, physicians, surgeons, dentists, podiatrists, veterinarians and psychologists;
- Financial services (accountants, securities broker-dealers, investment advisors);
- Freelance writers and photographers (if they contribute no more than 35 submissions to an outlet in a year);
- Hair stylists and barbers (if licensed and can set own rates and schedule);
- Insurance brokers;
- Licensed estheticians, electrologists;
- Licensed manicurists (until 2021);
- Professional services (marketing, human resources administrators, travel agents, graphic designers, grant writers, fine artists);
- Professionals (lawyers, architects, engineers);
- Real estate agents; and
- Tutors (who teach their own curriculum, and who are not public school tutors).

ENFORCEMENT

The law empowers California's Attorney General, certain city attorneys, public officials and agencies pursue civil actions and seek injunctions to prevent or correct worker misclassification.

Retroactivity

The new law becomes effective **on Jan. 1, 2020**, but also states that "specified Labor Code provisions of the bill apply retroactively to existing claims and actions to the maximum extent permitted by law while other provisions apply to work performed on or after January 1, 2020."

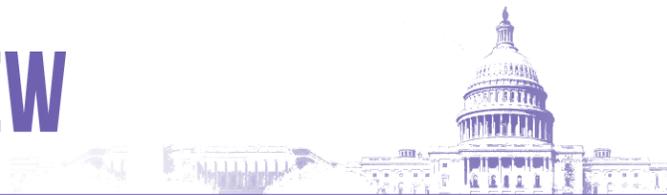
At this point, it is still unclear what this retroactivity provision means, but it certainly signals the legislature's intent to honor the standing 2018 *Dynamex* decision. Some have taken this to mean that the ABC test will apply retroactively with respect to wage orders and labor code violations, but that Jan. 1, 2020 will remain the enforcement and effective date for unemployment and workers' compensation benefits.

Nevertheless, the law does prohibit employers from reclassifying individuals who were employees on January 1, 2019 to independent contractors due to the law's enactment.

Temporary Injunction - *California Trucking Assoc. v. Becerra*

In a lawsuit brought against the state of California, the California Truckers Association (CTA) asserted that the recently enacted bill AB 5 would reclassify most drivers as employees. The CTA argued that most truck drivers it represents would prefer to retain their independent contractor classification, which allows them to set their own schedules and profit from owning their own vehicles. The CTA also argued that AB 5 is preempted by a federal law that prohibits states from regulating the price, route or service of freight-hauling motor carriers.

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The district court judge found that the CTA was likely to succeed in its case and likely to suffer irreparable damage if relief was not granted, and that the request for a temporary injunction was in the public interest. A hearing on this matter is scheduled for Jan. 13, 2020.

While the CTA case is not the only case that has been filed against California's AB 5, this case is the only one that has succeeded against enforcement of the new law.

IMPACT ON EMPLOYERS

Some estimate that this change in employer classification standards will impact roughly 10 percent of California's workforce.

The new ABC test is a fundamental departure from the traditional or common-law approach to worker classification. Given the possible retroactivity of this law, employers should take ample care to review their current independent contractor relationships and determine whether applying the new ABC test would change them. Should reclassification be necessary, it is highly recommended that employers engage licensed, knowledgeable counsel in the process.

Moreover, employers should monitor future guidance from state agencies and courts, to determine how this test is interpreted and applied in various situations.