

Engage PEO Client Alert:

California - Independent Contractor Law Update

California has a new test for determining whether a worker is an employee or an independent contractor. Before April 2018, California applied the *Borello* degree-of-control test to determine if a worker was an employee or independent contractor. The *Borello* test requires employers to balance various factors summarized below.

- The most significant factor is to determine if the worker to whom service is rendered has control or the right to control the worker both as to the work done and the manner and means in which it is performed.
- Additional factors considered include the following:
 - the hiring entity's right to discharge the worker;
 - whether the one performing the services is engaged in a distinct occupation or business;
 - the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
 - the skill required in the particular occupation;
 - whether the hiring entity or the worker supplies the instrumentalities, tools, and the place of work for the worker doing the work;
 - the length of time for which the services are to be performed;
 - the method of payment, whether by the time or by the job;
 - whether or not the work is part of the regular business of the hiring entity; and
 - whether or not the parties believe they are creating a relationship of employer-employee.

Businesses do not have to satisfy all *Borello* factors in order to establish that a worker is an independent contractor versus an employee.

Surprisingly, on April 30, 2018, a California state court issued the *Dynamex* decision, which imposed a new three-part **ABC test** to determine if a worker is an employee or independent contractor for purposes of California Wage Orders (as to minimum wage, overtime and meal and rest break liability). Pursuant to the ABC test, a worker is presumed an employee unless the hiring entity can demonstrate each of the following factors:

- a) 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;
- b) The worker performs work that is outside the usual course of the hiring entity's business; **and**
- c) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The ABC test undoubtedly makes it more difficult for businesses to classify workers as independent contractors. In September 2019, California legislature further shifted the legal landscape by enacting Assembly Bills 5 and 170. Assembly Bill 5 codified the ABC test, but it provides the following seven categories of exemptions to the ABC test analysis:

1. Occupational Exemptions:
 - a. Insurance agents, surplus line brokers, and analysts;
 - b. Physicians, surgeons, dentists, podiatrists, psychologists, and veterinarians; *however, the exemption does not apply to “the employment settings currently or potentially governed by collective bargaining agreements”*;
 - c. Lawyers, architects, engineers, private investigators, and accountants;
 - d. Securities broker-dealers and investment advisors;
 - e. Direct sales salespersons;
 - f. Commercial fishermen;¹ and
 - g. Newspaper distributor working under contract with a newspaper publisher and a newspaper carrier working under contract, either with a newspaper publisher or newspaper distributor.²
2. Contracts for “professional services” between a hiring entity and an individual providing professional services, subject to certain conditions;³
3. Real estate licensees and licensed repossession agencies, subject to certain conditions;
4. Business-to-business contracting relationships between a contracting business and a “business service provider,” subject to certain conditions;
5. Relationships between a contractor and an individual performing work pursuant to a subcontract in the construction industry, subject to certain conditions;
6. Relationships between a referral agency and a service provider that uses the referral agency to connect with clients, subject to certain conditions; and
7. Motor club services.

Effective January 1, 2020, and unless one of the statutory exemptions apply,⁴ hiring entities must satisfy the ABC test in order for a worker to be classified as an independent contractor versus an employee. Misclassification of workers can expose employers to significant legal liability. For workers that will be considered employees under the ABC test, such workers will be entitled to legal protection under state anti-discrimination, anti-harassment, and retaliation laws. Without question, before January 1, 2020, California employers must examine their workforce and make tough decisions in light of the dramatic shift in independent contractor law.

If you have questions, please contact your Engage HR Consultant.

¹ This exception will expire on January 1, 2023.

² This exception will expire on January 1, 2021.

³ This exception will expire on January 1, 2023, but this exception as applied to licensed manicurists will expire on January 1, 2022.

⁴ On December 2, 2019, the plaintiffs in the federal case *California Trucking Association, et al. v. Becerra, et al.*, Case No. 3:18-cv-02458-BEN-BLM, filed a Motion for Preliminary Injunction, seeking to enjoin the application of AB 5 to the trucking industry (specifically motor carriers and independent owner-operators). The case is pending before the United States District Court for the Southern District of California in San Diego. On December 30, 2019, the court will hold the hearing on the plaintiffs’ motion.