

California Adopts the "ABC Test" for Independent Contractors, with Several Specific Exceptions

In May 2018, we published an article about the California Supreme Court's decision in the case of *Dynamex Operations West, Inc. v. Superior Court*, which abandoned the 9-factor balancing test (the *Borello* factors) for determining whether a worker was properly classified as an independent contractor in favor of a much more rigid "ABC test." On September 19, 2019, Governor Newsom signed into law AB 5, which adopts the "ABC test," clarifies how and when the test applies, and provides several exceptions for job functions that will continue to be subject to the 9-factor *Borello* balancing test. Under the ABC test, an individual is an independent contractor only if each of the following is true:

- 1) The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- 2) the worker performs work that is outside the usual course of the hiring entity's business; and
- 3) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Through the enactment of AB 5, which becomes effective on January 1, 2020, the "ABC test" will apply not only to legal claims brought under California's Wage Orders, but also to claims brought under the California Labor Code and California Unemployment Insurance Code.

While the new law provides exceptions for several occupations that will remain subject to the *Borello* balancing test, notably, AB 5 creates no exception for companies that operate in the "gig economy," which poses a significant threat to ride-sharing companies like Uber and Lyft. Further, even under the *Borello* test, there is significant risk in classifying a worker as an independent contractor versus an employee. Nevertheless, many workers and companies are relieved not to be subject to the more rigid and inflexible ABC test. The list of excluded occupations are too extensive to lay out in full, but here are a few examples of positions that will remain subject to the former balancing test in California:

- Insurance brokers
- Physicians and surgeons
- "Direct sales salespersons"
- Real estate licensees
- Hairstylists, barbers, electrologist, aestheticians, and workers providing natural hair braiding
- Attorneys
- Architects
- Engineers
- Private investigators
- Accountants

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- Commercial fisherman

Again, this list is not exhaustive, and this brief summary is not a comprehensive review of the new law. [Click here](#) for the full text of the statute.

Further, companies like Lyft and Uber continue to lobby to create additional exceptions to the law before it goes into effect on January 1, 2020. Please stay tuned for updates and be sure to attend Hoge Fenton's Annual Employment Law Update seminar in January 2020, where we will discuss AB 5 and its impact on your business in much greater detail.

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