

California's New Employment Law (AB 5)

What it means for Your Church

New legislation can be challenging to interpret and California's new employment regulations regarding the legal status of workers who provide services to business is no exception. Additionally, nonprofits and religious organizations have come to understand that sometimes their organizations have been exempted from having to comply. In this case however, the new California statute appears to apply to all nonprofits operating in the State, regardless of type.

While we at CMA don't consider ourselves to be experts in this area of compliance here is some guidance on California's new AB5 law that can help you begin to better understand and apply the regulations to your organization.

Background

AB 5 codifies the *Dynamex Operations West v. Superior Court of Los Angeles (Dynamex)* case, decided by the California Supreme Court in April of 2018. In that case, the court abandoned the 20-year-old test for independent contractors set forth in *Borello & Sons v. Department of Industrial Relations (Borello)*. The *Borello* test considered many factors related to the amount of control an employer exerted over a purported independent contractor, none of which was determinative on its own.

In, *Dynamex*, the court embraced a standard that presumes workers are employees rather than independent contractors, unless the hiring entity can show that the workers meet all three prongs of the so-called "ABC test," and thus can qualify for independent contractor status.

The "ABC" requirements are that:

- (A) The hiring entity does not control or direct the performance of work;
- (B) The person performs work outside the usual course of the hiring entity's business; and
- (C) The person is customarily engaged in an independently established trade, occupation or business.

If the church cannot meet the ABC test, the worker is considered an employee and thus may be eligible for a number of rights and benefits previously unavailable to them, including minimum wage, overtime pay, and meal and rest breaks, among other protections under the Labor Code; employee benefits such as health benefits, retirement programs, coverage under the employer's workers' compensation, unemployment and disability insurance; and eligibility for paid sick days and paid family leave.

Our interpretation of AB5 for churches.

Independent Contractor

A worker who has their own business, with the church as one of their clients, and who performs work that is not central to the "usual course of the church's business" can still be treated as an independent contractor. In general, independent contractors use their own tools and have limited interaction with congregants. The church is only concerned with results.

Examples of Independent Contractors: piano tuner, outside lawn or janitorial services

Employee

In general, any worker with ongoing responsibilities in your church is an employee. Even very part-time workers and offsite workers are employees if the church "controls their work." Workers with direct responsibilities for the care of people and those who directly handle money should be employees, as it is especially important for the church to maintain behavioral control (provide guidance and oversight regarding the "how" of the job, not just the "what").

Ministerial Staff

Ministers are treated as self-employed individuals for Social Security/Medicare tax purposes. So, this will continue to have some impact on how you handle their payroll, but they are employees for all other purposes. So, there is no longer any situation under which a minister working in California can be treated as an independent contractor and have their earnings reported using Form 1099.

Examples of Employees: ministers and pastoral staff - whether called, hired (including "contract" ministers), interim, etc.; childcare worker; office workers.

One Time & Occasional Workers

In the past, one-time and very occasional workers have often been classified as independent contractors because their role has been so limited and the cost of adding them to the payroll system. Based on AB5, however, if they are directly involved in the usual course of the churches "business" (e.g., worship, religious education), they must now be treated as employees.

Examples of Employees under AB5: guest preachers, guest musicians, childcare workers.

Exemptions

A number of professions have been exempted from AB5. A basic list has been provided at the end of this article. It is important to remember however, that the statute itself goes into great detail on many of the exemptions, so you should not count on an exemption without first reading the specifics.

Also, keep in mind that (in almost all cases), being exempt from the ABC test does not mean the individual is an independent contractor. It just means that the person will then have to meet the *Borello* test instead, and although it's an easier test than the ABC test, it is not all that easy to meet either.

Clarifications are ongoing. We're aware that lawsuits are pending and some "softening" of the law is likely to occur in the coming months. For now, however, the safest route is to assume staff are "employees" of the church and should be paid accordingly and receive a Form W-2 annually.

If you do come across a situation where you need professional assistance, we encourage you to seek advice from your church's legal counsel. If you do not have an attorney we would recommend contacting Ms. Rona Layton (<http://www.laytonlawfirm.com/attorney.html>), an employment law attorney located in the Silicon Valley who specializes in serving small- to medium-sized businesses and nonprofit corporations.

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Occupational Exemptions

- Doctors, surgeons, dentists, podiatrists, psychologists, or veterinarians performing professional or medical services provided to or by a health care entity;
- Lawyers, insurance brokers, architects, engineers, private investigators, or accountants;
- Securities brokers/dealers or investment advisers and their agents and representatives registered with SEC, FIRA or State of CA
- Real estate agents, repossession agencies, direct-sales persons, commercial fishermen;
- Individuals performing services under a contract with a licensed “motor club.”

Professional Services Exemptions

- marketing professional;
- human resources professional;
- travel agents
- graphic designers
- graphic artist
- fine artist;
- freelance writer
- barber or cosmetologist;
- esthetician;
- electrologist;
- manicurist;
- payment processing agent;
- IRS licensed tax professional.

Referral Agency Exemption

- graphic design
- photography
- tutoring
- event planning
- moving
- minor home repairs
- home cleaning
- errands
- furniture assembly
- animal services
- dog walking;
- dog grooming
- web design

- picture hanging
- pool cleaning
- yard cleanup

Construction Industry Exemption* *Construction is a particularly challenging area*

- Subcontracts must be in writing and the subcontractor must be properly licensed;
- The subcontractor must be “customarily engaged in an independently established trade”—like a carpenter, plumber, or electrician; and
- The subcontractor must be licensed by the Contractors State License Board.
- The subcontractor must maintain a business location, separate from the hiring entity;
- The subcontractor must be free to hire and fire its own workers;
- The subcontractor must assume financial responsibility for mistakes in written warranties or indemnity agreements, or as evidenced by insurance or bonds;
- Special restrictions apply to trucking services.

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