



Understanding the Legal Landscape for the Use of Independent Contractors

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Agenda

- AB 5 and the Legal Standard for Independent Contractor Services
- “ABC” Test
- Usual Course of Business
- Impacts
- Steps to Take Going Forward

What is AB 5?

- Signed into law on September 18, 2019 (effective January 1, 2020) – Labor Code § 2750.3
- Codifies the “ABC” test for determining independent contractor status that the California Supreme Court adopted in its 2018 decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903
- Sets forth specified occupations that are exempt from the ABC test requirements
- Applies the ABC test to the Labor Code and Unemployment Insurance Code

Prior I.C. Tests in California

- *S.G. Borello & Sons* (1989) decision regarding whether farmworkers were employees for workers' compensation purposes
- *Borello* multifactor test
 - “Right to control” (principal factor)

Prior I.C. Tests in California

- Plus nine additional factors (not all required)
 - Right to discharge without cause
 - Whether worker is engaged in an occupation or business
 - Whether work is usually done by a specialist without supervision
 - The skill required in the particular occupation
 - Whether the worker supplies the tools and place of work
 - Length of time services will be performed
 - Whether payment is by time or by job
 - Whether work is part of the regular business of the principal
 - What relationship the parties believe they are creating

Dynamex Operations West, Inc. v. Superior Court (2018)

- Case interpreted “suffer or permit to work” standard for California wage orders
 - Note: wage orders do not generally apply to public agencies with some exceptions
- Presumption that all workers are employees, ***unless the employer can prove all 3 parts of the ABC test***
 - ***Employer has the burden of proof***

The ABC Test

- The ABC Test:
 - A. Worker is free from the control and direction of agency in connection with performance of work; **and**
 - B. Work performed is outside the usual course of the agency's business; **and**
 - C. Worker is customarily engaged in an independently established trade



Part A – Degree of Control

- Is the worker free from the control and direction of the agency in the performance of work?
 - Both contractually *and actually*
- Typically agency tells independent contractor *what* work to perform, and independent contractor decides *how* to perform work
- Does agency exercise same type and degree of control over worker as its employees?

Part B – Work Outside Usual Course of Business

- Does the worker perform work that is outside the agency's usual course of business?
- Individuals are employees if they are reasonably viewed as providing services to the business in a role comparable to that of employees

Usual Course of Business

- Uber, Lyft, Grubhub, Postmates – what is their usual course of business?
- Challenge for cities – what is a city’s “usual course of business?”

Case Study

The City of Kingswood provides community enrichment courses through a program in its Recreation Department. Bernard is an instructor and teaches art classes through this program.

Is Bernard an independent contractor?

Part C – Worker Has Own Business

- Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the agency?
 - Does worker have multiple clients?
 - Incorporated as a business?
 - Markets to other entities?
 - Own office? Business cards?
 - Uses own tools and equipment?

Case Study

Bernard, our art instructor, also teaches art classes through a local art gallery. He teaches these art classes on days he does not teach through the City's Recreation Department program.

Is Bernard an independent contractor?

How Does AB 5 Impact Public Agencies?

Dynamex was limited to an analysis of California wage orders, which do not generally apply to public agencies

BUT...

AB 5 now explicitly applies the ABC test in *Dynamex* to the Labor Code and Unemployment Insurance Code

Labor Code

- If an individual is an employee of an agency under the ABC test, the corresponding Labor Code provisions applicable to agency employees now apply to that individual
 - Workers' compensation coverage
 - Paid sick leave benefits

Unemployment Insurance Code

- Employers are required to pay UI for employees through tax contributions
 - Short-term and part-time employees may file for UI
- AB 5 amends Unemployment Insurance Code section 621 to define an “employee” according to the ABC test

Case Study

The City of Birchville has had difficulty filling Maintenance Worker positions. The City contracts with Labor Temps to supply contractors to perform duties identical to the City's other Maintenance Workers. The contractors work alongside Maintenance Workers in performing their duties. Avi, one of the Labor Temps workers, is injured on the job. The City's contract with Labor Temps does not indicate that Avi is a Labor Temps employee.

Is Avi entitled to workers' compensation coverage from the City?

Case Study

Would the analysis change if the City's contract with Labor Temps explicitly provides that Avi is a Labor Temps employee?

Occupations Exempt from ABC Test

- AB 5 carves out a number of exemptions for occupations that remain subject to the old, multifactor *Borello* test, including:
 - Physicians and psychologists
 - Attorneys, engineers, accountants, and financial advisers
 - Some contracts for professional services for marketing and human resources administrators
 - Bona fide business to business service providers
 - Construction contractors
 - Referral service providers

Professional Service Contract Exemption from ABC Test

- Personal service contracts for marketing and human resources administrators remain subject to the old, multifactor *Borello* test only if they meet specified requirements, including:
 - The individual maintains a separate business location
 - The individual has a business license, in addition to any required professional licenses or permits
 - The individual has the ability to set or negotiate his/her own rates

Professional Service Contract Exemption from ABC Test (Cont.)

- Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours
- The individual is customarily engaged in the same type of work performed under contract or holds himself out to other potential customers as available to perform the same type of work
- The individual customarily and regularly exercises discretion and independent judgment in the performance of the services

Business to Business Exemption

Requirements for contractor business:

- Free from control and direction
- Provides services directly to the city rather than to the “customers”
- Engaged in a business of the same nature as work performed
- Holds itself out to public as available to provide same/similar services

Retirement Impacts

- *Metropolitan Water District v. Superior Court (Cargill)* (2004) decision holding that the common law definition of “employee” applies for CalPERS membership purposes
 - In 2004, *Borello* multifactor test formed the common law definition
 - Now, in light of AB 5, the ABC test may form the common law definition

Post-Retirement Work Impacts

- **Risk #1:** Misclassifying CalPERS retirees as independent contractors
 - Retiree meets common law definition of employee (and is not a true independent contractor)
 - Without reinstatement of employment
 - Not enrolled in CalPERS
 - Not complying with post-retirement work restrictions

CalPERS Enrollment Impacts

- **Risk #2:** Misclassifying any worker (not just retirees) as an independent contractor:
 - Worker meets common law definition of employee
 - Not enrolled in CalPERS when eligible
 - Penalties: Both member and agency must pay contributions and an administrative fee to CalPERS

Fair Labor Standards Act Impacts

- Employees are subject to the FLSA's requirements while independent contractors are not
- No single FLSA independent contractor test
 - Courts and the DOL have used different tests
 - July 2018 - DOL indicated use of the “right to **control**” multifactor test (DOL Field Assistant Bulletin 2018-4)

What Steps Should We Take?

- Review and assess independent contractor services with AB 5 in mind
 - Consult legal counsel
- Consider organizational changes to mitigate risk
- Provide training and guidance to employees who are responsible for retaining contractors

Questions?

Thank You

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