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# The ABCs of A.B. 5: Get Ready For The New Independent Contractor Law

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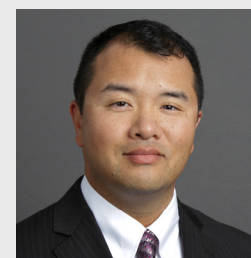
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## *Dynamex Operations West Inc. v. Superior Court*

California Supreme Court, 4 Cal.5<sup>th</sup> 903 (April 30, 2018)

Starts with the presumption that a worker who performs services for a hiring entity is an employee for purposes of claims for wages and benefits under the Wage Orders.

Adopted the ABC test to distinguish an independent contractor from an employee.



## Assembly Bill No. 5 (A.B. 5)

Approved by the Governor on September 18, 2019.

Purpose: To codify the *Dynamex* decision and clarify the decision's application in state law.

For the Labor Code

For the Unemployment Insurance Code

For the Wage Orders of the State Industrial Welfare  
Commission

A person providing labor and services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates the ABC test.



## Public Policy Behind The ABC Test

The new law is intended to prevent:

1. Harm to employees who lose significant workplace protections.
2. Unfairness to employers who must compete with companies that misclassify.
3. Loss to the State of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for Workers' Compensation, Social Security, unemployment and disability insurance.

“Misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality.”



## The ABC Standard

Hiring entity must prove all three to properly classify a worker as an independent contractor:

- A. The worker is free from the control and direction of the hiring entity in connection with performance of the work.
- B. The worker performs work that is outside the usual course of the hiring entity's business.
- C. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.



## The A Part - Control

Much like the focus of the old *Borello* test

Who controls the work?



## The B Part – Usual Course of Business

- The most troubling factor.
- Clear examples offered by the California Supreme Court: the plumber brought in to fix the retail store's plumbing is an independent contractor; the cake decorator brought into a bakery is not an independent contractor.
- The website developer hired to design the website for your small accounting business is an independent contractor.
- A software engineer hired to help other developers finish a project at your database company is not an independent contractor.



## The C Part – Same Work for Others

- Can be satisfied if the worker is performing the same work for other companies.
- Not just getting a business license, a business card or using their own tools.





## Retreat to *Borello*

However, there are many exceptions.

If the exceptions apply, then the determination of employee or independent contractor status shall be governed by the old test adopted in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.



## The *Borello* Factors

The most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) 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.



## **The *Borello* Factors** (continued)

Additional factors that may be considered:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal or alleged employer;
3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;



## **The *Borello* Factors**

*(continued)*

5. Whether the service rendered requires a special skill;
6. 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;
7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;
8. The length of time for which the services are to be performed;



## **The *Borello* Factors** *(continued)*

9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job;  
and
11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.



## The Exceptions to the “ABC” Test of A.B. 5: An Overview

- A.B. 5 specifically excludes more than 20 professional and licensed positions from A.B. 5 and *Dynamex*
- Regarding the exceptions, A.B. 5 author Assm. Lorena Gonzalez has stated:
  - “The exceptions we have included will ensure that independent contractors in professions where people have the ability to negotiate for themselves — such as doctors, lawyers, insurance agents, real estate agents, accountants, hairstylists and freelance journalists — are protected.”



## The Healthcare Exceptions

- In the absence of collective bargaining agreements, worker status of individuals licensed by the State of California in the following healthcare fields is governed by *Borello*:
  - Physicians
  - Surgeons
  - Dentists
  - Podiatrists
  - Psychologists
  - Veterinarians



## Other Professional Exceptions

- Active State of California licensees in the following recognized professions are also governed by *Borello*:
  - Lawyer
  - Architect
  - Engineer
  - Private investigator
  - Accountant





## Sales, Securities and Insurance Exceptions

- The following occupations are also governed by *Borello*:
  - Insurance agents licensed by the State of California
  - Securities broker-dealer or investment advisers, their agents and representatives registered with the SEC, FINRA or licensed by the State of California
  - Direct sales salespersons.



## Exceptions for Contractual Providers of Other Specific Professional Services

- *Borello* factors apply to contracts for certain other professional services if **all** of the following are satisfied:
  - The individual maintains a business location separate from the hiring entity; that individual's business location may include their residence and the individual may perform services at the hiring entity location;
  - The individual maintains a business license, in addition to any required professional licenses or permits;
  - The individual has the ability to set/negotiate their own rates;
  - The individual has the ability to set individual's own hours (outside of project completion dates and reasonable business hours);
  - The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers for the same type of work;
  - The individual customarily and regularly exercises discretion and independent judgment in performance of services
  - The individual provides services through a sole proprietorship or other business entity.



## Exceptions for Contractual Providers of Other Specific Professional Services

- Marketing that is original, creative and depends on invention, imagination or talent of the employee that is an essential part of contracted work
- Human resources administrators performing predominantly intellectual and varied work that cannot be standardized in relation to a given period of time
- Certain travel agents
- Graphic design
- Grant writers



## Exceptions for Contractual Providers of Other Specific Professional Services

- Fine artists
- Payment processing agents through independent sales organizations
- Enrolled agents licensed with the US Department of Treasury to practice before the IRS
- Services provided by a still photographer or photojournalist (outside of motion pictures) who do not license content submissions to the putative employer more than 35 times per year
- Services provided by a freelance writer, editor, or newspaper cartoonist who do not provide content submissions to putative employer more than 35 times per year



## Exceptions for Contractual Providers of Other Specific Professional Services

- Services provided by licensed estheticians, electrologists, manicurists, barbers, or cosmetologists are also governed by *Borello* provided that such individuals:
  - Set their own rates, process their own payments, and are paid directly by clients;
  - Set their own hours of work, and have sole discretion to decide the number of and which client to serve;
  - Have their own book of business and schedule their own appointments;
  - Maintain their own business license;
  - If the individual performs services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they are renting their business space.



## Real Estate and Repossession Agents? Look to the Business and Professions Code

- At first glance, A.B. 5 appears to defer the status of real estate agents to existing B&P Code sections:
  - Per B&P section 10032, licensed California real estate agents may contract themselves as either independent contractors or employees, with withholdings and unemployment compensation governed by the Unemployment Insurance Code and workers compensation governed by the Labor Code.
  - However, for all other purposes in the Labor Code, *Borello* applies.
- By contrast, A.B. 5 defers to existing B&P Code sections such that repossession agencies shall be engaged on an independent contractor basis provided that they are:
  - Free from control and direction of the hiring entity in performance of work (both in fact and per the relevant contract)



## What about fisherman and construction trucking subcontractors?

- *Borello* applies to commercial fisherman working on American vessels until 1/1/2023
- *Borello* also applies to subcontractors providing “construction trucking services” until 1/1/2022 if:
  - Subcontractor is a business entity formed as sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation;
  - Subcontractor is registered with the Department of Industrial Relations as a public works contractor regardless of whether the subcontract involves public work;
  - Subcontractor utilizes its own employees to perform construction trucking services unless it is a sole proprietor with a valid motor carrier DMV permit; and
  - Subcontractor negotiates with and contracts with and is directly compensated by the licensed contractor
  - “Construction trucking services” is defined as hauling and trucking in the construction industry pursuant to a contract with a licensed contractor utilizing vehicles requiring a commercial driver’s license



## And Referral Agencies?

- A.B. 5 exempts certain relationships between referral agencies and service providers from *Dynamex* where referral agencies connect clients with the following services:
  - graphic design, web design, photography, tutoring, event planning,
  - minor home repair, moving, home cleaning, errands, furniture assembly, picture hanging
  - animal services, dog walking, dog grooming,
  - pool cleaning, or yard cleanup





## And Referral Agencies?

- The exemption from A.B. 5 and *Dynamex* only applies if all of the following is satisfied:
  - The service provider is free from the control and direction of the referral agency in connection with the performance of the work;
  - The service provider must have a business license or business tax registration if required;
  - The service provider must have a state contractor's license if required;
  - The service provider must deliver services to the client under its own name;
  - Service provider must provide own tools and supplies;



## And Referral Agencies?

- The exemption from A.B. 5 and *Dynamex* only applies if all of the following is satisfied:
  - Service provider must customarily be engaged in an independently established business of the same nature as the work for the client;
  - Service provider must maintain a clientele list without any restrictions from the referral agency and the service provider is free to seek work elsewhere;
  - Service provider sets own hours and terms of work and free to accept/reject clients/contracts;
  - Service provider sets own rates without deduction by referral agency;
  - And service provider is not penalized for rejecting clients or contracts.



## The Business To Business Exception

The *Dynamex* test does not apply to:

- a ***bona fide*** business-to-business contracting relationship
- which meets 12 separate criteria

*Bona fide* (adj.): genuine, real

Note: This subdivision **does not apply to an individual worker**, as opposed to a business entity



## The Business To Business Exception 12 Criteria

- Free from the control and direction of the contracting business, both under the contract and in fact;
- Provides services directly to the contracting business rather than to customers;
- Written contract;
- If license or tax registration needed, contractor has it;



## The Business To Business Exception

### 12 Criteria *(continued)*

- Business location separate from contracting business;
- Customarily engaged in an independently established business of the same nature as work performed;
- Actually contracts with other businesses to provide the same or similar services, separate clientele;
- Advertises and holds itself out to the public as available to provide the same or similar services;



## The Business To Business Exception

### 12 Criteria *(continued)*

- Provides its own tools, vehicles, and equipment;
- Negotiates its own rates;
- Sets its own hours and location of work; and
- Not performing the type of work for which a license from the Contractor's State License Board is required (construction industry).



## The Business To Business Exception Major Takeaways

1. You need a written contract.
2. Contract must specify that contractor is free from your control.
3. Ensure contractor has:
  1. Appropriate licenses and tax registrations
  2. Other clients
  3. Advertisements (web presence)
  4. Tax ID number



## **Do These Fall In The Business-To-Business Contracting Exception?**

Outside IT Consultant

Fitness Class Instructor

Regional Sales Representatives

Entertainment Industry “Loan Out” Companies





## Retroactivity

Exceptions to A.B. 5 under the  
Wage Orders apply  
“retroactively to existing claims  
and actions to the *maximum  
extent permitted by law.*”



## Retroactivity *(continued)*

What does that mean? Answer: not very clear.

In all likelihood, a court is to presume that the exceptions apply retroactively.

Are there any instances which would not be “permitted by law”?



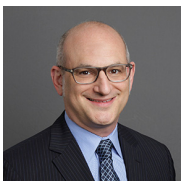
## Consequences For Non-Compliance

### In California:

- Fine between \$5-15k per worker
- Missed meal/rest break penalties
- Unpaid OT
- Ancillary Violations (Paystubs, Waiting Time)
- Worker's Comp Penalties, Damages
- Unemployment Insurance Penalties
- PAGA Penalties

What about an arbitration agreement?

The logo for Hirschfeld Kraemer features a circular icon with the letters 'HK' in white on an orange background. To the right of the icon, the firm's name 'Hirschfeld Kraemer' is written in a bold, black, sans-serif font. Below the name, three overlapping orange circles are arranged horizontally, each containing a service area: 'Training', 'Counseling', and 'Litigation'. Underneath these circles, the tagline 'We work for employers. We work for you.' is written in a smaller, italicized font. At the bottom of the logo, the office locations 'SAN FRANCISCO | SANTA MONICA | NAPA' are listed in a small, orange, sans-serif font.



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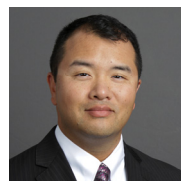
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