

BILLS ALREADY PENDING TO AMEND AB-5



It should come as little surprise that the wheeling and dealing around AB-5 did not end with 2019. AB-5 is last year's bill enshrining the California's Supreme Court's adoption of the ABC test for independent contractors into statutory law, and expanding it beyond the wage order context. Less than a month into 2020, and there are already five pending bills related to AB-5.

One such bill, SB-806, simply seeks to correct AB-5's many typos. On the other extreme, AB-1928 seeks to repeal AB-5 and instead enact the previous multifactor test set out in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d. 341.

Three other pending bills each seek to "tweak" one of AB-5's statutory exemptions:

- SB-867 would eliminate the January 1, 2021 expiration of the newspaper carrier and distributor exemption.
- AB-1925 would add an exemption for "independently owned and operated" small businesses with less than 100 employees and \$15 million or less in gross receipts in the last three years. As currently drafted the exemption would not apply to a small business that is "dominant in its field of operation." What does it mean to be "dominant in a field of operation?" Should this bill pass, the

What is the ABC Test?

The ABC test is a three-part test adopted by the California Supreme Court in 2018's *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903 for determining when a worker is an independent contractor. Under the ABC test, employers seeking to show that a worker is an independent contractor must show each of the following:

A—Autonomy—the worker is free from control of the hirer, both in contract and in fact

B—Business Scope—the work performed is outside the hirer's usual course and scope of business

C—Customarily Independent—the worker is engaged in an independently established trade, occupation or business

What is the Borello Test?

The *Borello* test is the multifactor test previously followed by California courts. The ABC test incorporates many aspects of the *Borello* test. Unlike the ABC test, no one factor of the *Borello* test is determinative.

absence of a definition for this critical caveat is sure to trigger litigation.

- SB-868 seeks to eliminate the 35 article per year limit for freelance writers, editors and newspaper cartoonists who are subject to the professional exemption. The proposed change would not extend to submissions by photojournalists, who would still be subject to the 35 submission limit.

As of this writing, all five of these bills are pending referral to committee, but expect these bills to be the first of many to appear in 2020.

In addition to legislative tweaks, there are multiple court cases seeking to invalidate parts or all of AB-5. The trucking industry has already successfully obtained a preliminary injunction on the grounds that AB-5 is preempted by federal law and cannot be applied to motor carriers. A suit brought by Uber and Postmates is pending in the Central District. The Uber/Postmates suit asks the court to invalidate AB-5 in its entirety on constitutional grounds, with its core premise being that the law discriminates against on-demand, app-based services. A motion for a preliminary injunction in the Uber/Postmates lawsuit is set for hearing in early February.

Employers who are watching AB-5 legislation and litigation should keep in mind that with very few exceptions, the AB-5 exemptions *only change the test applied* to decide if a worker is an independent contractor. Even under the former *Borello* test, many workers were misclassified as independent contractors because employers mistakenly believed that workers who worked from home or on a flat-fee or commission-only basis could be treated as independent contractors for those reasons alone.

Barring a major shift in the wind, expanding the AB-5 exemptions legislatively will not mean that a specific class or type of worker is always an independent contractor. Rather, it would mean that courts would apply the *Borello* test instead of the ABC test. The AB-5 litigation, if successful, would leave in place the California Supreme Court's *Dynamex* ruling, meaning that employers would still have to grapple with the ABC test, at least in the wage order context, and possibly in other contexts, as well.

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