



Bill Analysis

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Bill Number: AB 1850

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Introduced: January 6, 2020

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Related Bills: See Legislative
History

Amended: February 14, 2020,
February 27, 2020 and May 12,
2020

SUBJECT

Employee Classification - Employees and Independent Contractors

SUMMARY

This law exempts additional occupations and business relationships from the presumption under Labor Code section 2750.3 that a worker is an employee unless certain conditions are met. It recasts the exemption for referral agencies. It also added specialized performers hired by a performing arts company or organization to teach a master class, real estate appraisers, videographers and photo editors to the professional services exemption. This law would also exempt certain individuals in the music industry, insurance inspectors and competition judges.

RECOMMENDATION

No position

SUMMARY OF AMENDMENTS

This bill was initially introduced as an intent bill, and then subsequently amended to reorganize and modify Labor Code section 2750.3.

On February 27, 2020, the bill was amended to eliminate the content submission limit for still photographers, photojournalists, freelance writers, editors, and newspaper cartoonists and to require alternative criteria for these occupations to apply the test in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3rd 341 (Borello)*.

The May 12, 2020, amendments modified provisions of the bill related to exemptions for a bona-fide business to business relationship, referral agencies, contract for professional services, and persons who provide underwriting, inspections and loss control work for the insurance industry and replaced them with the provisions discussed in this analysis.

This is the department's first analysis of the bill and only addresses the provisions that impact the department's programs and operations.

REASON FOR THE BILL

The reason for the bill is to address ambiguities in existing law to provide workplace rules for individuals and independent businesses. The bill would also clarify treatment for specific industries and provide or modify exemptions for certain services, occupations, and relationships from the presumption that a worker is an employee if specified criteria are met.

ANALYSIS

This bill would amend Labor Code section 2750.3 to modify the exemptions for a bona-fide business to business relationship, referral agencies, contracts for professional services, and persons providing services for the insurance industry. It also adds additional occupations to be exempted from the presumption that a person providing labor or services for remuneration is an employee unless the hiring entity satisfies the "ABC" test established in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (*Dynamex*). The determination of employee or independent contractor status for individuals involved in referral agencies, contracts for professional service, and these occupations would be governed by the multifactor test adopted in *Borello*.

Relationship between a referral agency and service provider:

Regarding the relationship between a referral agency and service provider exemption, language was added that would require the referral agency at a minimum of one time per calendar year to check the validity of a service provider's business license in a location where the service provider performs work. It also would add definitions for business license and local jurisdiction.

The bill would add youth sports coaching to the list of service providers within the referral agency exemption and clarify the definition of a tutor and referral agency contracts.

Contracts for professional services:

Services provided by a specialized performer hired by a performing arts company or organization to teach a master class and a real estate appraiser are added to the professional services exemption. Also, the amendments added videographer and photo editor to exempted professional services and further define the exemption for services provided by still photographers, photojournalists, freelance writers, editors, and newspaper cartoonists, including services provided through a digital content aggregator.

Other occupations:

The bill would provide additional exemptions for persons providing underwriting inspections, premium audits, risk management, or loss control work for the insurance industry.

This bill would also exempt individuals engaged by the international exchange visitor program, certain competition judges, certain occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions, including, recording artists, musicians, and vocalists. This bill would also provide specific rules related to these industry exemptions.

Effective/Operative Date

Assuming the bill is enacted before September 30, 2020, this bill would become effective on January 1, 2021, and would apply for work performed on or after January 1, 2020. Under unspecified circumstances, certain provisions would apply retroactively to existing claims and actions to the maximum extent permitted by law if it would relieve and employer from liability.

Federal/State Law

Federal Law

To determine whether a worker should be classified as an employee or independent contractor, federal law applies a two factor test, the Control and Relationship Test.

Control. Behavioral control is exerted if the business controls what work is accomplished and directs how it is done. Financial control is exerted if the business directs or controls financial and certain relevant aspects of a worker's job. Some of the factors to consider include:

- The extent of the worker's investment in the facilities or tools used in performing services and the extent to which the worker makes his or her services available to the relevant market.
- How the business pays the worker, and the extent to which the worker can realize a profit or incur a loss.

Relationship. It is also important in determining the worker's classification to understand how the employer and worker perceive their relationship. Items to consider include:

- The extent to which services performed by the worker are a key aspect of the regular business of the company and if the worker has unreimbursed business expenses.

- Written contracts describing the relationship the worker and company intended to create.
- Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation or sick pay and the permanency of the relationship.

State Law

AB 5 was signed by Governor Newsom on September 18, 2019, which, among other things, added Section 2750.3 to the Labor Code. AB 170 was signed by Governor Newsom on October 2, 2019, which amended Section 2750.3 as it was added by AB 5. Section 2750.3 to the Labor Code provides under the Labor Code, Unemployment Insurance Code, and for the purpose of wage orders of the Industrial Welfare Commission, except for specified statutory exemptions, a person providing labor or services for remuneration will be considered an employee unless the hiring entity satisfies the "ABC" test adopted in *Dynamex* by demonstrating that all of the following conditions are satisfied:

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

Existing law exempts specified business relations and occupations from the application of the holding in *Dynamex* and the presumption that a worker is an employee unless the hiring entity demonstrated the "ABC" test, and instead provides that these exempt relationships and occupations are governed by the test adopted in *Borello*, specified provisions in the Business and Professions Code, the Unemployment Insurance Code, and the Labor Code, or a combination of these.

Borello:

The California Supreme Court, in *Borello*, adopted the "economic realities" test. In applying this test, a significant factor to be considered is whether the person to whom service is rendered has the right to control the manner and means of the work performed.

Additional factors that may be considered under this test include:

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;
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;
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.

However, all of the factors must be considered in light of the facts and circumstances surrounding the worker's relationship with the hiring entity and no one factor is given more weight than another.

AB 170 amended Labor Code section 2750.3 as it was added by AB 5 to delay the application of the "ABC" test adopted in *Dynamex* to the newspaper carrier or delivery industry until January 1, 2021.

Implementation Considerations

The department has identified the following implementation concern:

This bill uses terms that are undefined, e.g., "Specialized Performer", "Still photographer," and "Photojournalist". For clarity and to avoid potential disputes, it is recommended that the bill be amended to further define terms and when possible to reference industry standards or certifications.

Technical Considerations

For consistency of terminology, the following changes are recommended:

- On page 12, line 33, the term "Services provided" should be inserted at the beginning of this section.
- On page 20, line 35, strike out "paragraphs (1) and" and insert "paragraph"

Policy Concerns

None noted.

LEGISLATIVE HISTORY

AB 5 (Gonzalez, 2019/2020, Chapter 296, Statutes of 2019) created a presumption that a person providing labor or services for remuneration will be considered an employee rather than an independent contractor unless the hiring entity demonstrates that the "ABC" test provided for in the holding of *Dynamex* and in Labor Code section 2750.3 is satisfied.

AB 170 (Gonzalez, 2019/2020, Chapter 415, Statutes of 2019) amended Labor Code section 2750.3 as added by AB 5 to exempt newspaper distributors and carriers until January 1, 2021, from the "ABC" test adopted in *Dynamex*. This bill's operation was contingent on the enactment of AB 5.

PROGRAM BACKGROUND

None noted.

FISCAL IMPACT

This bill could impact the department's forms, education and processing costs. As the bill continues to move through the legislative process, costs will be identified.

ECONOMIC IMPACT

Revenue Estimate

This bill as amended on May 12, 2020, does not generally change the way income or franchise tax is calculated under the Revenue and Taxation Code. However, it could change the amount of income and expenses reported to the Franchise Tax Board and would have an unknown impact on general fund revenue.

This analysis does not account for changes in employment, personal income, or gross state product that could result from this bill or for the net final payment method of accrual.

Revenue Discussion

This bill could result in some workers who are currently treated as employees being reclassified as independent contractors under the proposed exclusions. This reclassification would shift responsibility for a number of business related expenses from businesses to the workers. An increase of qualified business expenses to the workers would likely decrease their tax liability, while the decrease in expenses to businesses would increase their tax liability. The net effect of these changes would depend on the marginal tax rates of the businesses and workers involved, and any adjustment that may take place in compensation levels or related business expenses. The net effect of all these changes on tax liability is not known.

LEGAL IMPACT

None noted

APPOINTMENTS

None noted.

SUPPORT/OPPOSITION

To be determined.

ARGUMENTS

None noted.

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