



Bill Analysis

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Bill Number: AB 2257

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Introduced: February 13, 2020

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Related Bills: See Legislative
History

Amended: May 4, 2020,

May 6, 2020, and June 4, 2020

SUBJECT

Employee Classification-Employees and Independent Contractors

SUMMARY

This bill exempts additional occupations from the presumption that a worker is an employee unless certain conditions are met. Exemptions are applicable to occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions, and musicians and musical groups.

The professional services exemption for still photographers, photojournalists, freelance writers, editors, or newspaper cartoonists was also amended.

RECOMMENDATION

No position

SUMMARY OF AMENDMENTS

This bill as introduced made nonsubstantive changes to the annual tax on limited liability companies under the Revenue and Taxation Code (R&TC).

On May 4, 2020, and May 6, 2020, the bill was amended to replace the R&TC provisions with amendments to the Labor Code. The amendments exempt certain occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions and musicians and musical groups for the purpose of a single-engagement live performance event. The exemption for still photographers, photojournalists, freelance writers, editors, and newspaper cartoonists was also amended and replaced with provisions discussed in this analysis. The amendments also made several nonsubstantive changes.

On June 4, 2020, the bill was amended to add coauthors and an urgency clause. According to the bill, the clause was added to ensure businesses and workers have immediate clarity on the specific standards used to determine an individual's employment classification.

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 modify exemptions for certain services and provide new exemptions for specific occupations from the presumption that a worker is an employee unless specified criteria are met.

ANALYSIS

This bill makes amendments to multiple provisions. Therefore, the items are categorized below:

Music industry:

This bill would amend Labor Code section 2750.3 to exempt occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions, including, but not limited to, recording artists, songwriters, composers, record producers, musical engineers, musicians engaged in the creation of sound recordings, vocalist, photographers working on recording photo shoots and independent radio promoters from the presumption that a worker is an employee unless the "ABC" test is met and from the holding in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (*Dynamex*). The "ABC" test was adopted in *Dynamex* and required a hiring entity to demonstrate that all of the following conditions are satisfied for a worker to be considered an independent contractor:

- 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.

Instead, the holding in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341 (*Borello*) would be used to determine whether individuals in these occupations are employees or independent contractors.

The exemption from the "ABC" test would not apply to any of the following:

- Film and television unit production crews working on live or recorded performances for audiovisual works, including still photographers and cinematographers.
- Publicists who are not independent music publicists.
- Individuals subject to collective bargaining agreements and those hired by employers signed to collective bargaining agreements.
- Individuals who are deemed to be eligible in an appropriate collective bargaining unit solely for organizing purposes.
- The terms and conditions of any current or future collective bargaining agreements or agreements between the applicable unions and the respective employers.

The bill provides recording artists, musicians, and vocalists are not precluded from organizing under applicable labor laws or exercising their rights as employees under the National Labor Relations Act.

The bill also provides that musicians and vocalists who are not royalty-based participants in the work created during any specific engagement will be governed by state and local administrative and judicial bodies with respect to minimum wage and overtime requirements related to that engagement, and therefore treated as employees for that purpose.

Single-engagement live performance events by musicians or musical groups:

The presumption that a worker is an employee unless the "ABC" test is met and the holding in *Dynamex* do not apply to a musician or musical group for the purpose of a single-engagement live performance event (including rehearsals), and instead, the criteria in *Borello* would be used to determine employee or independent contractor status, unless one of the following conditions is met:

- The musical group is performing as a symphony orchestra, performing at a theme or amusement park, or a musician is performing in a musical theater production.
- The musical group is a headliner for a performance at a venue with more than 1,500 attendees.
- The musical group is performing at a festival selling more than 18,000 tickets per day.

The bill also provides various definitions related to single-engagement live performance events.

Professional services - still photographers, photojournalists, videographers, and photo editors:

This bill would extend the professional services exemption for services provided by still photographers or photojournalists based on the number of content submissions to include videographers and photo editors and would eliminate the limitation on content submission. It instead provides that services by a still photographer, photojournalist, videographer, or photo editor who works under a contract that specifies certain terms in advance are exempt from the holding in *Dynamex* and the presumption that they are an employee unless the "ABC" test is met. The *Borello* test would apply to whether the worker is an employee or independent contractor instead, as long as the hiring entity satisfies various factors and the following conditions are met:

- The individual providing the services is not replacing an employee performing the same work at the same volume;
- The individual does not primarily perform the work at the hiring entity's business location; and
- The individual is not restricted from working for more than one hiring entity.

Services provided to a digital content aggregator, as defined, by a still photographer, photojournalist, videographer, or photo editor would also be exempt.

Professional services - freelance writers, editors, illustrators or newspaper cartoonists:

This bill would also exempt from the holding in *Dynamex* and the presumption that a worker is an employee unless the "ABC" test is met professional services provided by a freelance writer, editor, illustrator, or newspaper cartoonist who works under a contract that specifies in advance certain terms. Instead, the *Borello* test would be used to determine whether the worker is an employee or independent contractor, as long as the hiring entity satisfies various factors, and the following conditions are met:

- The individual providing the services is not replacing an employee performing the same work at the same volume;
- The individual does not primarily perform the work at the hiring entity's business location; and
- The individual is not restricted from working for more than one hiring entity.

The bill includes an urgency clause to ensure the bill goes into effect immediately.

Effective/Operative Date

As an urgency measure, this bill would be effective immediately upon enactment, and would apply for work performed on or after January 1, 2020, unless the application of the provisions would relieve an employer from liability, then those provisions would be applied retroactively to existing claims and actions to the maximum extent permitted by law.

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 also signed by Governor Newsom on October 2, 2019, which amended section 2750.3, as it was added by AB 5, to include a temporary exemption for newspaper distributors and newspaper carriers from the presumption that a worker is an employee unless the "ABC" test is met.

Section 2750.3 of 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*.

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.

Implementation Considerations

The department has identified the following implementation concern.

This bill uses terms that are undefined, e.g., "still photographer," "photojournalist," "independent radio promoters," "musical engineers," and "mixers". 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 11, line 1, strike out "By" and insert "Services provided by".

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.

AB 1850 (Gonzalez, 2019/2020), would exempt 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 would recast the exemption for referral agencies. It would also add 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.

PROGRAM BACKGROUND

None noted.

FISCAL IMPACT

This bill would not significantly impact the department's costs.

ECONOMIC IMPACT

Revenue Estimate

This bill as amended on June 4, 2020, does not generally change the way income or franchise tax is calculated under the R&TC. 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 exclusion. 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

The Assembly Floor Analysis dated June 5, 2020, provides arguments in support and opposition and states:

Arguments in Support:

A coalition of business and labor groups, including the Recording Industry Association of America, write in support, "The language of the bill itself reflects the diversity of the many parts of our industry, large and small, including artists, songwriters and composers, managers, producers and engineers, musicians, record companies, singers, photographers, promoters, and many others. It also values existing and potential partnerships between labor organizations, their members, and the industry's business interests, as well as the freedom and variety of working relationships and venues that exist throughout the industry.

The demand for music has never been greater, and it is an especially poignant time for inspiration for many during the crisis we are all facing. Beauty and creativity have always arisen across our industry during some of the world's and country's toughest times, reflecting our struggles and victories. This legislation provides an important platform for such expressions of art, while also continuing California's seminal position as the bellwether for the industry worldwide."

Arguments in Opposition:

The National Press Photographers Association is opposed unless amended, and states,

"We greatly appreciate the language revisions of AB 1850 [(Gonzalez) of the current legislative session] and AB 2257 removing the 35-submission (per client, per year) limit along with the revision to the 'not replacing an employee' clause; we appreciate the promised removal of the requirement that a contract specifies 'intellectual property rights' in order to retain independent

contractor status; and appreciate the promised removal of the requirement that certain other terms be set 'in advance' which is a concern for journalists operating on tight deadlines; but we still have strong objections to the bill language related to videography found in the proposed section 2750.3(d)(2)(B)(xi)(l)(ia): Of specific concern is the definition of 'motion picture,' as including 'projects produced for theatrical, television, internet streaming for any device, commercial, productions, broadcast news, music videos, and live shows, whether distributed live or recorded for later broadcast, regardless of distribution platform.' Such convoluted, confusing and all-encompassing language would continue to bar 'a still photographer, photojournalist, videographer, or photo editor' from shooting video lest they lose their independent contractor status. Therefore, we propose that 'motion pictures' be more narrowly and clearly defined so as to be not so overly inclusive of what our members do unrelated to the actual motion picture industry." (Assem. Floor Analysis, A.B. 2257 (2019-2020 Reg. Sess.) as amended June 4, 2020, p. 3-4.)

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