



## Bill Analysis

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Sponsor:

Bill Number: AB 323

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Amended: August 7, 2020,  
August 20, 2020, August 25,  
2020, and August 27, 2020

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Related Bills: See Legislative  
History

## SUBJECT

Workers Status-Newspaper Distributors/Carriers and State Agency Advertising

## SUMMARY

This bill would extend the exemption for newspaper distributors or carriers to January 1, 2022, and deletes the condition that a newspaper carrier work under a contract with a newspaper publisher or distributor.

## RECOMMENDATION

No position

## SUMMARY OF AMENDMENTS

On August 7, 2020, the bill was amended to extend the existing exemption period for newspaper distributors or carriers from January 1, 2021, to January 1, 2023. The amendments also deleted the condition that a newspaper carrier work under a contract with a newspaper publisher or distributor and added a provision to require state agencies to give preferences to local news organizations in marketing or outreach advertising.

The August 20, 2020, amendments incorporated changes to Section 2750.3 of the Labor Code proposed by AB 2257 through double-jointing language. When two bills amend the same code section in different ways and the legislature wants both amendments to happen, double-jointing occurs.

The August 25, 2020, amendments added an exemption for an individual performing artist, registered professional forester, home inspectors, and the relationship between a feedback aggregator and an individual providing feedback in the double-jointing provision. These amendments also modified the provision related to local news preferences in marketing and outreach advertising by eliminating the requirement for state agencies to provide preferences to local new organizations and requiring the Department of General Services to annually report on contract and subcontracts of state agencies for marketing and outreach to specific communities. The amendments also made nonsubstantive changes to other provisions.

The August 27, 2020, amendments revised the exemption period for newspaper distributors or carriers to end on January 1, 2022, and replaced the previous double-jointing language with double-jointing language to incorporate the revised changes proposed to be added by AB 2577 if both bills are enacted.

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

## **REASON FOR THE BILL**

The reason for the bill is to modify the exemption related to newspaper distributors and carriers from the presumption that a worker is an employee unless specified criteria are met.

## **ANALYSIS**

This bill would revise provisions of the Labor code relating to worker status. It would extend the exemption period for newspaper distributors or carriers from January 1, 2021, to January 1, 2022, and remove the condition that a newspaper carrier work under a contract with a newspaper publisher or distributor.

This bill also includes double-jointing language to incorporate changes proposed to be added by AB 2577 in the event that both this bill and AB 2257 are enacted and become effective on or before January 1, 2021. AB 2257 repeals, and this bill amends, Section 2750.3 of the Labor Code; and this bill is enacted after AB 2257.

### *Effective/Operative Date*

This bill would be effective and generally operative on January 1, 2021, 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.

The provision amending Section 2783 of the Labor Code would only become operative if all of the following occur:

- 1) This bill and AB 2257 are enacted and become effective on or before January 1, 2021,
- 2) AB 2257 of the 2019-2020 regular session repeals, and this bill amends, Section 2750.3 of the Labor Code, and
- 3) This bill is enacted after AB 2257.

If these amendments to Section 2783 of the Labor Code become operative, the amendments to Section 2750.3 of the Labor Code will not become operative.

## *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 of the Labor Code, 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*

None noted.

### *Technical Considerations*

None noted.

### *Policy Concerns*

## **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 the hiring entity demonstrates that the "ABC" test provided for in the holding of *Dynamex* is 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. As of September 8, 2020, this bill is in the Senate Labor, Public Employment & Retirement Committee.

AB 2257 (Gonzalez, 2019/2020), would repeal Section 2750.3 of the Labor Code related to the presumption that a worker is an employee unless the "ABC" test is met and added a new article that contained language similar to Section 2750.3 of the Labor Code with revisions. AB 2257 would exempt additional occupations and business relationships from the presumption that a worker is an employee unless certain conditions are met. This bill would revise provisions of the Labor Code relating to worker status and clarify the bona fide business-to-business contracting relationship, referral agency, and professional services exemption.

It also amends the Revenue and Taxation Code (R&TC) to add provisions that require the determination of whether an individual is an employee under specific parts of the R&TC to be determined by the new article in the Labor Code added by this bill related to the above described presumption.

## **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 August 27, 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**

The Senate Rules Committee analysis dated, August 28, 2020, provides support and opposition for this bill:

### *Support:*

The California News Publishers Association, Los Angeles County Business Federation, and the Sacramento LGBT Community Center.

### *Opposition:*

None received.

## **ARGUMENTS**

The Senate Rules Committee analysis dated, August 28, 2020, provides arguments in support and opposition for this bill:

### *Arguments in Support:*

The California News Publishers Association.

### *Arguments in Opposition:*

None received.

## **LEGISLATIVE STAFF CONTACT**

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