



## Bill Analysis

Author: Levine

Sponsor:

Bill Number: AB 1227

Related Bills: See Legislative  
History

Introduced: February 19, 2021

## SUBJECT

Worker Classification: Employees and Independent Contractors; Workers in Seasonal Live Theatre

## SUMMARY

This bill would create a new worker classification exemption for seasonal live theatre workers.

## RECOMMENDATION

No position.

## SUMMARY OF AMENDMENTS

Not Applicable.

## REASON FOR THE BILL

The reason for this bill is to exempt seasonal live theatre workers from the application of the "ABC" test required in the Labor Code to determine their status as an employee or independent contractor.

## ANALYSIS

This bill would add an exemption under the Labor Code for seasonal live theatre workers from the application of the ABC test for the determination of employee or independent contractor status. If enacted, the determination of whether a seasonal live theatre worker is an employee or independent contractor would be based on the multi-factor test in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*). The 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;

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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.

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.

#### *Effective/Operative Date*

This bill would be effective and operative January 1, 2022.

#### *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.

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**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*

Revenue and Taxation Code (RTC), refers to the provisions of Labor Code for the determination of whether an individual is an employee for the purposes of Part 10, Part 10.2, Part 10.7, Part 11, and Part 32 of the RTC.

Labor Code section 2775 provides that a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that the "ABC" test is satisfied.

The "ABC" test was adopted in *Dynamex Operations W. Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*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.

Labor Code sections 2776-2784 provide exemptions for specified professional services, occupations, and business relationships from the presumption that a worker is an employee and the application of the holding in *Dynamex*, and instead provide that most of these exempt professional services, relationships, and occupations are governed by the multi factor tests adopted in *Borello*.

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### *Implementation Considerations*

This bill does not define "workers in seasonal live theatre ". For clarity, it is recommended that the author amend this bill.

### *Technical Considerations*

None noted.

### *Policy Considerations*

None noted.

## **LEGISLATIVE HISTORY**

AB 25(Kiley, 2021/2022) would replace the application of the 3-part test, commonly known as the "ABC" test as provided for in Article 1.5 (commencing with section 2775) of Chapter 2 of Division 3 of the Labor Code with the multifactor test in *Borello* for the determination of the worker classification as an employee or independent contractor. AB 25 is currently in the committee process.

AB 231(Nguyen, 2021/2022) would remove the inoperative date for determining the worker status of licensed manicurists under the multi-factor test in the Labor Code. This bill is currently in the committee process.

AB 612 (Mayes, 2021/2022) would create a new worker classification exemption for a bona fide business-to-business voluntary deposit arrangement. This bill is currently in the committee process.

AB 1561 (Committee on Labor and Employment, 2021/2022) would extend the worker classification exemption for licensed manicurists to January 1, 2025, and for construction trucking service providers for work performed before January 1, 2025. This bill would also make some non-substantive technical changes. This bill is currently in the committee process.

AB 323 (Rubio, Chapter 341, Statutes of 2020) amended Section 2750.3 of the Labor Code to modify the exemption related to newspaper distributors and carriers. AB 323 included double-jointing language with AB 2577.

AB 2257 (Gonzalez, Chapter 38, Statutes of 2020) repealed Section 2750.3, and added Sections 2775 – 2787 (collectively referred to as Article 1.5) of the Labor Code. The new law provided exemptions for specified business relations and occupations from the application of the holding in *Dynamex* and instead provided that most of these exempt relationships and occupations are governed by the tests adopted in *Borello*. This bill also amended RTC sections 17020.12, 23045.6, and 61001 and added RTC

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sections 18406 and 21003.5 with references to Article 1.5 (commencing with section 2775) of Chapter 2 of Division 3 of the Labor Code relating to the determination of employee status for the purposes of specified parts of the RTC.

AB 5 (Gonzalez, 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 is satisfied.

AB 170 (Gonzalez, 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. This bill's operation was contingent on the enactment of AB 5.

## **PROGRAM BACKGROUND**

None noted.

## **FISCAL IMPACT**

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

## **ECONOMIC IMPACT**

### *Revenue Estimate*

This bill could result in some workers who are currently treated as employees being reclassified as independent contractors. 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 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.

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## **ARGUMENTS**

To be determined.

## **LEGISLATIVE CONTACT**

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