



## Bill Analysis

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Bill Number: AB 1506

### SUBJECT

Worker Status: Employees and Independent Contractors – Newspaper Distributors and Carriers

### SUMMARY

This bill would modify definitions of “newspaper” and “newspaper carrier.” In addition, this bill would extend the worker classification exemption for newspaper distributors working under a contract and newspaper carriers to January 1, 2025, and would require newspaper publishers or distributors to report information about their workforce to the Labor and Workforce Development Agency (LWDA).

This bill also includes language to prevent chaptering issues with AB 1561 (Committee on Labor and Employment).

### REASON FOR THE BILL

The reason for this bill is to extend the worker classification exemption for newspaper distributors working under a contract and newspaper carriers to January 1, 2025, and to add a workforce reporting requirement to newspaper publishers and distributors.

### ANALYSIS

This bill would add to the definition of “newspaper” that it may also be published in print, posted in a digital format, and distributed periodically at daily, weekly, or other short intervals for the dissemination of news of a general or local character.

This bill would modify the definition of “newspaper carrier” to clarify that it would be a person who is not working as an app-based driver during the time when the newspaper carrier is performing the newspaper delivery services.

This bill would extend the inoperative date from January 1, 2022, to January 1, 2025, for the exemption of newspaper distributors working under a contract with a newspaper publisher and newspaper carriers, from the application of the “ABC” test, as described below, for the determination of employee or independent contractor status.

If enacted, the determination of whether a newspaper distributor working under a contract with a newspaper publisher, and a newspaper carrier 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.3rd 341 (Borello) until January 1, 2025.

This bill would also require, that on or before March 1 of 2022, 2023, and 2024, every newspaper publisher and distributor that hires or directly contracts with newspaper distributors to provide information, as defined, related to their current year's carriers to the LWDA. Furthermore, for the first report due on March 1, 2022, this bill would require every newspaper publisher and distributor to report the number of carrier wage claims filed with the Labor Commissioner for the last three years. Additionally, this bill would require that trade secrets or other proprietary business information submitted to LWDA can only be disclosed in accordance with subdivision (k) of Section 6254 of the Government Code.

This bill would incorporate changes to section 2783 of Labor Code (LC) proposed by AB 1561 that would be operative only if this bill and AB 1561 are enacted and this bill is enacted last.

These provisions would become inoperative on January 1, 2025.

#### *Effective/Operative Date*

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

The modification made to section 2783 of the LC, would only become operative if all of the following occur:

- 1) This bill and AB 1561 are enacted and become effective on or before January 1, 2022,
- 2) Each bill amends section 2783 of the LC, and
- 3) This bill is enacted after AB 1561.

#### *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*

Revenue and Taxation Code (RTC), refers to the provisions of LC 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.

LC 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 worker 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 worker performs work that is outside the usual course of the hiring entity's business.
- C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

LC sections 2776-2784 exempt certain business relationships, occupations, and professional services, as defined from the application of the "ABC" test, and instead make the multi-factor test in *Borello* or other statutory tests the deciding factor or factors. 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 and integral 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 their own employees;
5. 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;
6. Whether the service rendered requires a special skill;
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;
11. Whether the worker hires their own employees;
12. Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
13. 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.

The exemption provided to newspaper distributors working under a contract and newspaper carriers is set to become inoperative as of January 1, 2022.

#### *Implementation Considerations*

None noted.

#### *Technical Considerations*

None noted.

#### *Policy Considerations*

None noted.

### **LEGISLATIVE HISTORY**

AB 25 (Kiley, 2021/2022) would have replaced 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 LC with the multifactor test decided *Borello* for the determination of the worker classification as an employee or independent contractor. This bill was held by the Assembly Labor and Employment Committee without further action.

AB 231 (Nguyen, 2021/2022) would have removed the inoperative date for determining the worker status of licensed manicurists under the multi-factor test in the LC. This bill was held by the Assembly Labor and Employment Committee without further action.

AB 612 (Mayes, 2021/2022) would have clarified the subject of the worker classification exemption, in a bona fide business-to-business arrangement that involves a voluntary deposit. This bill was held by the Assembly Labor and Employment Committee without further action.

AB 1227 (Committee on Labor and Employment 2021/2022) would have created a new worker classification exemption for seasonal live theatre workers. This bill was held by the Assembly Labor and Employment Committee without further action.

AB 1561 (Committee on Labor and Employment 2021/2022) would: extend the worker classification exemption for licensed manicurists to January 1, 2025; extend the exemption from the license requirement available to construction trucking service subcontractors for work performed before January 1, 2025; modify the exemptions for the relationship between a data aggregator and the individual providing feedback; and add additional services provided by persons in the insurance and financial service industries in order to qualify for the exemption from the "ABC" test in *Dynamex*. This bill included double-jointing language with AB 1506. AB 1561 was enrolled on September 14, 2021.

AB 323 (Rubio, Chapter 341, Statutes of 2020) amended Section 2750.3 of the LC to modify the exemption related to newspaper distributors and carriers. AB 323 included double-jointing language with AB 2257.

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 LC. 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 sections 18406 and 21003.5 with references to Article 1.5 (commencing with section 2775) of Chapter 2 of Division 3 of the LC 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 LC 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 extension could result in some workers, who would be treated as employees, to be reclassified as independent contractors under the proposed law.

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 unknown.

## **LEGAL IMPACT**

None noted.

## **APPOINTMENTS**

None noted.

## **SUPPORT/OPPOSITION**

The Senate Floor analysis dated September 7, 2021, lists the following support and opposition.

### *Support*

California News Publisher's Association; Fresno Metro Black Chamber of Commerce; Oakland Chamber of Commerce; Orange County Business Council; Silicon Valley Leadership Group.

### *Opposition*

None noted.

**VOTES**

<b>Location</b>	<b>Date</b>	<b>Yes Votes</b>	<b>No Votes</b>
Concurrence	September 10, 2021	73	1
Senate Floor	September 08, 2021	38	0
Assembly Floor	June 01, 2021	60	14

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