



Bill Analysis

Author: Committee on Labor
and Employment

Sponsor:

Bill Number: AB 1561

Related Bills: See Legislative
History

Introduced: February 25, 2021

SUBJECT

Worker Classification: Employees and Independent Contractors – Licensed Manicurists, and Construction Trucking Services

SUMMARY

This bill would extend the worker classification exemption for licensed manicurists to January 1, 2025.

This bill would also extend the exemption from the license requirement available to construction trucking service subcontractors for work performed before January 1, 2025, in order to qualify for the exemption from the “ABC” test in Dynamex.

This bill would also make some non-substantive technical changes.

RECOMMENDATION

No position.

SUMMARY OF AMENDMENTS

Not applicable.

REASON FOR THE BILL

The reason for the bill is to extend the exemptions for manicurists and subcontractors providing construction trucking services for worker classification.

ANALYSIS

This bill would extend the inoperative date for the exemption of licensed manicurists to January 1, 2025, from the application of the “ABC” test for the determination of employee or independent contractor status.

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If enacted, the determination of whether a licensed manicurist 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*). 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;
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.

This bill would also extend the exemption from the licensure requirement for business entities providing construction trucking services under a contract with a contractor. If enacted, as long as the contractor can satisfy specified criteria, the subcontractor does not need to be licensed by the Contractors State License Board for work performed before January 1, 2025, to qualify for the worker classification test under *Borello* and Labor Code section 2750.5.

This bill would also make non-substantive technical changes to Labor Code sections 2778 and 2781.

Effective/Operative Date

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

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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 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.

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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 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 exemption provided to licensed manicurists is set to become inoperative as of January 1, 2022.

The multi-factor test in *Borello* may also be applied to a contract between a contractor and a business entity performing services under a subcontract in the construction industry, as long as the contractor can satisfy certain statutory criteria and the entity providing the subcontract service is licensed. Current law exempts business entities performing construction trucking services from the license requirement for work performed by January 1, 2022.

Implementation Considerations

None noted.

Technical Considerations

None noted.

Policy Considerations

None noted.

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LEGISLATIVE HISTORY

AB 231 (Nguyen, 2021/2022) would, under the Labor Code section 2778, remove the inoperative date for the exemption from the "ABC" test for licensed manicurists. AB 231 has been referred to the Assembly Committee on Labor and Employment.

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 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 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 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.

Introduced: February 25, 2021

ECONOMIC IMPACT

Revenue Estimate

This bill as introduced on February 25, 2021, does not change the way income or franchise tax is calculated under the RTC. 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.

LEGAL IMPACT

None noted.

APPOINTMENTS

None noted.

SUPPORT/OPPOSITION

To be determined.

ARGUMENTS

To be determined.

LEGISLATIVE CONTACT

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