



## Bill Analysis

Author: Committee on Labor  
and Employment

Sponsor:

Bill Number: AB 1561

Related Bills: See Legislative  
History

Amended: May 20, 2021

## SUBJECT

Worker Classification: Employees and Independent Contractors

## 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* that has been codified by statute.

This bill would also remove the minimum hourly wage requirement, add a definition, and make several technical changes to the existing Labor Code relating to the exemption from the “ABC” test for the relationship between a data aggregator and the individual providing feedback.

This bill would also add additional services provided by persons in the insurance and financial service industries to the exemption from the “ABC” test in *Dynamex that has been codified by statute*.

This bill would also make some nonsubstantive technical changes.

## RECOMMENDATION

No position.

## SUMMARY OF AMENDMENTS

The May 20, 2021, amendments modified two additional provisions under the Labor Code relating to the relationship between a data aggregator and the individual providing feedback and to persons providing certain services for the insurance and financial service industries. This bill also makes several technical changes.

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## **REASON FOR THE BILL**

The reason for the bill is to modify the exemptions for certain services and occupations from the presumption that a worker is an employee unless specified criteria are met.

## **ANALYSIS**

This bill makes amendments to multiple provisions as outlined below.

### *Licensed Manicurists*

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.

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.3<sup>rd</sup> 341 (*Borello*), if the hiring entity demonstrates various requirements.

### *Construction Trucking Service Contractors*

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.

### *Other Professional Services*

This bill would modify the exemption applicable to the relationship between a data aggregator and an individual providing feedback to the data aggregator, to instead refer to the relationship between a data aggregator and a "research subject." This bill would define the term "research subject" as any person who willingly engages with a data aggregator to provide individualized feedback on user interface, products, services, people, concepts, ideas, offerings, or experiences, and does not engage solely to complete individual tasks, unless the tasks relate to providing such feedback. The exemption would be allowed where the research subject is free from control and direction regarding the substance and content of the feedback, the feedback requested requires the research subject to exercise independent judgment and discretion, and the research subject has the ability to reject feedback requests, without being penalized in any form by the data aggregator.

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Furthermore, this bill would eliminate the definition of minimum wage and the minimum hourly wage requirement from the list of conditions to be met for the exemption under the “ABC” test in the relationship between a data aggregator and the research subject.

Additionally, this bill would expand the worker classification exemption for individuals who provide claims adjusting, and third party administration services for the insurance and financial industries.

This bill would also make several technical changes to these Labor Code provisions.

#### *Effective/Operative Date*

This bill would become 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.

**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.

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### 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 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.

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 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;

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- 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 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 before January 1, 2022.

Existing code also exempts the relationship between a data aggregator and an individual providing feedback from the holding in *Dynamex*, and instead, the holding in *Borello* may be applied, if certain conditions are met. Among other things, in order for the exemption to apply, the compensation for the information provided, if prorated to an hourly basis, must be equal or greater than the minimum wage.

The multi-factor test in *Borello* may also be applied in the case of an individual providing certain professional services for the insurance and financial industries.

#### *Implementation Considerations*

None noted.

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### *Technical Considerations*

To clarify the author's intent, it is recommended to insert a comma after "loss control work" in Labor Code section 2783(a).

### *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 decided *Borello* for the determination of the worker classification as an employee or independent contractor. This bill 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 clarify the subject of the worker classification exemption, in a bona fide business-to-business arrangement that involves a voluntary deposit. This bill is currently in the committee process.

AB 1227 (Committee on Labor and Employment 2021/2022) would create a new worker classification exemption for seasonal live theatre workers. 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 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.

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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 as amended on May 20, 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 (FTB) and would have an unknown impact on general fund revenue.

### *Revenue Discussion*

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.

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## **SUPPORT/OPPOSITION**

Assembly Committee on Labor and Employment analysis dated April 6, 2021, lists the following support and opposition.

*Support:* Engineering & Utility Contractors Association Db a United Contractor.

*Opposition:* None noted.

## **ARGUMENTS**

Proponents:

Assembly Committee on Labor and Employment analysis dated April 6, 2021, includes the following argument in support of AB 1561:

United Contractors argue in support of the bill, "During the 2019 legislative session and the legislature's consideration of AB 5 (Gonzalez), United Contractors negotiated language that was incorporated into the measure to provide much needed clarity for the industry in light of the California Supreme Court's decision in the matter of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. The legislative compromise addressed significant operational impacts to the heavy civil construction industry. Specifically, the language removed the holding in the *Dynamex* court decision from determination of employee or independent contractor status between contractors and independent owner operators providing construction specific trucking services. In its place, the bill created a new standard that allows for the previous and longstanding test adopted by the California Supreme Court in the case of *S. G. Borello & Sons, Inc.* to provide the determination of employee or independent contractor status in the construction trucking industry, so long as the independent owner operator providing the construction trucking service can demonstrate true independent contractor status. This standard sunsets on January 1st of 2022 and must be reauthorized to prevent significant industry operational interruption."

Opponents: None noted.

## **LEGISLATIVE CONTACT**

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