



Bill Analysis

Author: Committee on
Labor and Employment

Bill Number: AB 1561

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 (LC) 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 add that the statutorily imposed duties of a manufactured housing dealer are not factors that would be considered under the *Borello* test.

This bill also includes language to prevent chaptering issues with AB 1506 (Kalra).

This bill would also make some nonsubstantive technical changes.

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.3rd 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 LC 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.

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 add statutorily imposed duties of a manufactured housing dealer as specified under Section 18060.5 of the Health and Safety Code are not factors that would be considered under the *Borello* test.

This bill includes double jointing language with AB 1506 (Kalra) to prevent chaptering issues if both bills are enacted.

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

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 1506 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 1506.

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 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.

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 LC with the multifactor test decided *Borello* for the determination of the worker classification as an employee or independent contractor. This bill was held at the Assembly Committee on Labor and Employment without further action.

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 LC. This bill was held at the Assembly Committee on Labor and Employment without further action.

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 was held at the Assembly Committee on Labor and Employment without further action.

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

AB 1506 (Kalra, 2021/2022) would modify definitions of "newspaper" and "newspaper carrier," extend the worker classification exemption for newspaper distributors working under a contract and newspaper carriers to January 1, 2025, and require newspaper publishers or distributors to report information about their workforce to the Labor and Workforce Development Agency (LWDA). This bill included double-jointing language with AB 1561. AB 1506 was enrolled on September 15, 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 bill 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.

SUPPORT/OPPOSITION

The Senate Floor analysis dated September 7, 2021, lists the following organizations in support and opposition of the bill:

Support

- Associated General Contractors of California
- Association of Claims Professionals
- California State Council of Laborers
- District Council of Iron Workers of the State of California and Vicinity
- Engineering & Utility Contractors Association Db a United Contractors
- Insights Association
- Northern California Carpenters Regional Council
- Precision Nails
- Southern California Contractors Association

Opposition

None noted.

VOTES

Location	Date	Yes Votes	No Votes
Concurrence	September 9, 2021	78	0
Senate Floor	September 8, 2021	38	0
Assembly Floor	May 27, 2021	75	0

LEGISLATIVE STAFF CONTACT

FTBLegislativeServices@ftb.ca.gov

Yolanda Richardson
Agency Secretary, GovOps
Work (916) 651-9011

Christina Spagnoli
Legislative Deputy, GovOps
Work (916) 651-9373

Selvi Stanislaus
Executive Officer, FTB
Work (916) 845-4543

Annette Kunze
Legislative Director, FTB
Work (916) 845-6333