



## Bill Analysis

Author: Nguyen

Sponsor:

Bill Number: AB 1818

Related Bills: See Legislative  
History

Introduced: February 7, 2022

## SUBJECT

Worker Classification: Employees and Independent Contractors – Licensed Manicurists

## SUMMARY

This bill would remove the inoperative date for determining the worker status of licensed manicurists under the multi-factor *Borello* test in the Labor Code (LC).

## RECOMMENDATION

No position.

## SUMMARY OF AMENDMENTS

Not applicable.

## REASON FOR THE BILL

The reason for this bill is to indefinitely exempt licensed manicurists from the application of the "ABC" test required in the LC to determine their status as an employee or independent contractor.

## ANALYSIS

This bill would, under the LC, permanently exempt licensed manicurists 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 the case of *S.G. Borello & Sons, Inc. V. Department of Industrial Relations ((1989) 48 Cal.3d 341 (Borello))* if the hiring entity satisfies various requirements. The *Borello* 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;
11. Whether the worker hires their own employees;
12. Whether the hiring entity has the 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.

*Effective/Operative Date*

This bill would become effective and operative January 1, 2023.

*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 the 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 section 2778 exempts certain professional services, including licensed manicurists from the application of the "ABC" test, and instead makes the multi-factor test in *Borello* the deciding factor, if the hiring entity satisfies various requirements. Additionally, an individual performing services as a licensed manicurist must meet certain conditions, including, among other requirements, setting their own rates, processing their own payments, and being paid directly by clients. The exemption provided to licensed manicurists is set to become inoperative as of January 1, 2025.

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### *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 multi-factor *Borello* test for the determination of the worker classification as an employee or independent contractor. This bill did not pass out of the Assembly Committee on Labor and Employment by the constitutional deadline.

AB 231 (Nguyen, 2021/2022), similar to this bill, would have removed the inoperative date for determining the worker status of licensed manicurists under the multi-factor test in the LC. This bill did not pass out of the Assembly Committee on Labor and Employment by the constitutional deadline.

AB 1506 (Kalra, Chapter 328, Statutes of 2021) modified definitions of “newspaper” and “newspaper carrier,” extended the worker classification exemption for newspaper distributors working under a contract and newspaper carriers to January 1, 2025, and required 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 1561 (Committee on Labor and Employment, Chapter 422, Statutes of 2021), extended the worker classification exemption for licensed manicurists to January 1, 2025; extended the exemption from the license requirement available to construction trucking service subcontractors for work performed before January 1, 2025; modified the exemptions for the relationship between a data aggregator and the individual providing feedback; and added 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.

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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.

### **PROGRAM BACKGROUND**

None noted.

### **FISCAL IMPACT**

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

### **ECONOMIC IMPACT**

#### *Revenue Estimate*

This bill as introduced February 7, 2022, 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**

[FTBLegislativeServices@ftb.ca.gov](mailto:FTBLegislativeServices@ftb.ca.gov)