



Bill Analysis

Author: Mayes

Sponsor:

Bill Number: AB 612

Related Bills: See Legislative
History

Introduced February 12, 2021,
Amended March 23, 2021

SUBJECT

Worker Classification: Business-to-Business Voluntary Deposit Arrangements

SUMMARY

This bill would create a new worker classification exemption, for a bona fide business-to-business arrangement that involves a voluntary deposit, as described, under specified conditions.

RECOMMENDATION

No position.

SUMMARY OF AMENDMENTS

The March 23, 2021, amendments clarified that the subject of the worker classification exemption are the owners and employees of the business entity that operates as a voluntary depository.

The amendments also changed certain qualifying conditions for the purposes of this bill and made several nonsubstantive technical changes.

This is the department's first analysis of the bill and only addresses the provisions that impact the department.

REASON FOR THE BILL

The reason for this bill is to prevent the owners and employees of the depository in a bona fide business-to-business voluntary deposit arrangement from being treated as employees of the depositor.

ANALYSIS

This bill would provide that certain bona fide business-to-business voluntary deposit arrangements¹ are exempt from the application of the “ABC” test adopted in *Dynamex Operations W. Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*) for the determination of employee or independent contractor status, and the multi-factor test in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*) would be utilized to determine the worker classification.

The provisions of this bill would apply to certain business-to-business voluntary deposit arrangement contracts that are executed by both parties, and meet all of the conditions specified in the bill. Among other conditions, this bill would require that:

- Both the depositor and depositary are business entities formed as a corporation, partnership, or limited liability company that do not engage in activities regulated in the financial code.
- The depositor has legal right to tangible personal property that has possession of and delivers it to the depositary to sell or rent to the public.
- The depositary collects and accounts for payments received from its customers, and remits them to the depositor who in turn pays the depositary a commission according to the terms of the deposit contract.
- The depositary employs at least three employees who are not the lessees, owners, officers, directors, or members of the depositor, and determines their salaries as well as their work schedule.
- The deposit is tangible personal property, excluding currency or financial instruments such as securities, digital currency, bank accounts, or deeds. For the purposes of this bill, the deposit may include bailments and consignments.

When a voluntary deposit arrangement meets all of the conditions set forth in the bill, the depositary’s owners cannot claim they are the depositor’s employees.

Effective/Operative Date

This bill would become effective and operative on 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.

¹ A voluntary deposit arrangement is made when an entity (the depositor) consensually gives the possession of its personal property [the deposit] to another entity (the depositary) to keep for the benefit of the depositor, or of a third party (CIV Section 1814.)

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.

The "ABC" test was adopted in *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 section 2776 exempts the following business-to business contracting relationships from the application of *Dynamex*:

1. The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
2. The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.
3. The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.
4. If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.
5. The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business.
6. The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.
7. The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.
8. The business service provider advertises and holds itself out to the public as available to provide the same or similar services.
9. Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.
10. The business service provider can negotiate its own rates.
11. Consistent with the nature of the work, the business service provider can set its own hours and location of work.
12. The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

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 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 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 1561 (Committee on Labor and Employment, 2021/2022) would extend the worker classification exemption for licensed manicurists to January 1, 2025, and for construction trucking service providers for work performed before January 1, 2025. This bill would also make some nonsubstantive technical changes. 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.

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 introduced February 12, 2021 and amended on March 23, 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 FTB and would have an unknown impact on general fund revenue.

This analysis does not account for changes in employment, personal income, or gross state product that could result from this bill or for the net final payment method of accrual.

Revenue Discussion

To determine the magnitude of this bill, the frequency and amount must be known. Because it is difficult to predict the frequency of those impacted by this bill, the revenue impact is unknown.

LEGAL IMPACT

None noted.

APPOINTMENTS

None noted.

SUPPORT/OPPOSITION

To be determined.

ARGUMENTS

To be determined.

LEGISLATIVE CONTACT

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