



## Bill Analysis

Author: Sanchez and  
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Sponsor:

Bill Number: AB 1928

Related Bills: See Legislative  
History

Introduced January 25, and  
Amended March 4, 2024

### SUBJECT

Employees and Independent Contractors Worker Classification

### SUMMARY

This bill would repeal Article 1.5 of Chapter 2 of Division 3 of the Labor Code, which provides rules for when a worker is classified as an employee.

### RECOMMENDATION

No position.

### SUMMARY OF AMENDMENTS

The March 4, 2024, amendments added an additional author and co-authors.

### REASON FOR THE BILL

The reason for the bill is to repeal the California Labor Code rules for worker classification.

### ANALYSIS

This bill would repeal Article 1.5 (commencing with Section 2775) of Chapter 2 of Division 3 of the Labor Code (LC), which provides rules for when a worker is classified as an employee. These rules include the codification of the "ABC" test as the default rule with exceptions for specific industries and business relationships. This bill would declare that the purpose of repealing this article is to suspend and nullify the *Dynamex* decision and to not apply *Dynamex* under California law.

#### *Effective/Operative Date*

As an urgency measure, this bill would be effective immediately upon enactment and operative for taxable years beginning on or after January 1, 2024.

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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 examines facts that fall into three main categories:

- A. **Behavioral Control.** These facts show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work.
- B. **Financial Control.** These facts show whether there is a right to direct or control the business part of the work, including if the worker has significant investment in their work, if the worker is not reimbursed for expenses, and if the worker has an opportunity for profit or loss.
- C. **Relationship of the Parties.** These are facts that illustrate how the business and the worker perceive their relationship.

### *State Law*

In *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) (Borello), the California Supreme Court found that whether a worker should be classified as an employee or independent contractor is heavily dependent on the facts of the case.

A significant factor to be considered is whether the person to whom service is rendered has the right to control the manner and means of the work performed.

Additional factors that may be considered 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;

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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.

All of the factors must be considered in light of the facts and circumstances surrounding the worker's relationship with its employer and no one factor is given more weight than another.

In *Dynamex*, the California Supreme Court found that a worker is properly considered an employee rather than an independent contractor unless the hiring entity establishes all of the following:

- A. that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- B. that the worker performs work that is outside the usual course of the hiring entity's business; and
- C. that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

This is known as the "ABC test."

The ABC test was codified with the passage of AB 5 (Ch. 296, Stats. 2019) and recast with the passage of AB 2257 (Ch. 38, Stats. 2020) under Article 1.5 (commencing with Section 2775) of Chapter 2 of Division 3 of the Labor Code. Under California Labor Code section 2775, the ABC test is used to determine worker classification. Moreover, section 2775 states that if a court of law determines that the ABC test is not applicable for reasons other than on grounds of an express exception provided by the Labor Code, then the determination of whether a worker is an employee or independent contractor is determined by application of *Borello*.

The determination of whether an individual is an employee for tax purposes is governed Article 1.5 of Chapter 2 of Division 3 of the Labor Code. (Revenue and Taxation Code (RTC) § 17020.12(a)) which would be modified by the provisions of this bill.

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### *Implementation Considerations*

The Franchise Tax Board (FTB) has identified the following implementation consideration and is available to work with the author's office to resolve this and other considerations that may be identified.

If enacted, AB 1928 would repeal Article 1.5 (commencing with section 2775) of Chapter 2 of Division 3 of Labor Code, rendering cross references in RTC sections 17020.12, 18406, 21003.5, 23045.6, and 61001 obsolete. As a result, taxpayers may be confused if the definition of "employee" under Article 1.5 of the Labor Code or the definition of "employee" under the Internal Revenue Code would apply. It is recommended to amend the bill to clarify what definition of employee would apply for purposes of California's income tax laws.

### *Technical Considerations*

None noted.

### *Policy Considerations*

None noted.

## **LEGISLATIVE HISTORY**

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 (Gonzales, Chapter 296, Statutes of 2019) under this bill a worker is considered an employee rather than an independent contractor unless the employer demonstrates that the worker is free from the control and direction of the employer, the person is worker engages in work that is outside the usual course of the employer's business, and the worker is customarily engaged in an independently established trade, occupation, or business. If a court rules that the aforementioned 3-part test cannot be applied, then the determination of whether a worker is an employee or independent contractor is governed by the multifactor test under *Borello*.

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AB 25 (Kiley, 2021/2022) this bill would repeal provisions exempting specified occupations from the ABC test and require the determination of whether a worker is an employee or independent contractor based on the multifactor test under Borello. This bill did not pass by the constitutional deadline.

AB 71 (Kiley and Melendez, 2019/2020) this bill would have required the determination of whether a worker is an employee based on the multifactor test under Borello. This bill did not pass.

AB 1928 (Kiley and Melendez, 2019/2020) this bill would have repealed existing provisions exempting specified occupations from the ABC test and would have instead, required the determination of whether a worker is an employee or independent contractor to be based on the multifactor test under Borello. This bill did not pass.

SB 806 (Grove, 2019/2020) this bill would have repealed the provision of the Labor Code to which the ABC test was codified. This bill would have instead, established a new test to allow an employer to classify a worker as an independent contractor if the employer demonstrates that elements "A" and either "B" or "C" of the ABC test were met. This bill did not pass.

## **PROGRAM BACKGROUND**

None noted.

## **FISCAL IMPACT**

The department's costs to implement this bill have yet to be determined. As the bill moves through the legislative process, costs will be determined.

## **ECONOMIC IMPACT**

### *Revenue Estimate*

This bill, as introduced on January 25, 2024, 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.

## **LEGAL IMPACT**

None noted.

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**APPOINTMENTS**

None noted.

**SUPPORT/OPPOSITION**

To be determined.

**ARGUMENTS**

To be determined.

**LEGISLATIVE CONTACT**

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