DYKEMA

Issue Brief

A.B. 5 Legislation Likely to Have A Greater Impact on California Employers Than Any Law Enacted in Decades

Governor Gavin Newsom signed A.B. 5 on September 18, 2019. This legislation is expected to have a greater impact on California employers than any law enacted in many decades. Every industry using independent contractors, from agriculture to entertainment, could be impacted. Although some lobbying groups succeeded in obtaining qualified exemptions, the vast majority of the several million workers currently classified as independent contractors (ICs), will need to be reclassified. The law also may have repercussions in other states causing them to implement similar legislation.

Essentially, A.B. 5 codifies the *Dynamex* "ABC test" to determine employee status as adopted by the California Supreme Court's April 2018 decision in *Dynamex v. Superior Court. Dynamex* replaced the historic *Borello* test in California (described below) with a streamlined "ABC test" under which a worker is considered to be an employee unless the business can demonstrate all of the following factors:

A. The business is not able to control or direct what the worker does, either by contract or in actual practice;
B. The worker performs tasks outside of the entity's usual business (aka "Killer B"); and
C. The worker is engaged in an independently-established trade, occupation, or business.

The Assortment of Carveouts of Worker Categories

Initially A.B. 5 consisted of only 34 words. But prior to passage, A.B. 5 was amended numerous times to create a hodgepodge of exemptions and exceptions for certain occupations and professions who were represented by lobby groups. As a result, those groups will not be subject to the *Dynamex* "ABC test" (and particularly "Killer B") but will remain subject to the historic *Borello* test (described below). Those include, among others, licensed insurance agents, health care professionals, investment advisers, direct sales salespersons, real estate licensees, and others performing work under a contract for professional services with another business entity. Other exemptions include licensed practicing lawyers, architects, engineers, private investigators and accountants.

For those professions described above that obtained exemptions from the *Dynamex* "ABC test" but remain subject to the *Borello* test, the key element is the amount of control the business exerts over the worker, which is similar to part "A" of the "ABC test." However, the *Borello* test includes several secondary factors to consider, such as whether the worker is engaged in a distinct occupation or business, supplies his/her tools and equipment, the method of payment, and the parties' intent, not all of which must be met to establish independent contractor status. To further complicate matters, the law adds varying criteria to qualify for an exemption to the "ABC test" for numerous other categories of workers. For example, those engaged under a contract for professional services in marketing, HR administration, graphic design, fine art, photography, freelance writing, etc. must meet a six factor test that focuses on their independent business relationship with clients. Different factors apply to cosmetology services and another set of criteria applies to home service workers.

Retroactivity

The law is not considered a change but rather "…is a declaration of, existing law and violations of the Labor Code relating to wage orders." To help mitigate against the retroactive impact, the law also provides that the newly created exemptions to the "ABC test" will apply "retroactively to existing claims and actions to the maximum extent permitted by law."

The Kicker: Employer Beware

Unfortunately, this new complicated law requires more individuals to be classified as independent contractors than was the case before its passage. By codifying the *Dynamex* "ABC test," A.B. 5 places the burden on the putative employer to establish that the worker is an independent contractor, meaning if the company cannot meet that burden, workers classified as ICs will need to be reclassified as employees or face huge penalties.

If it is determined an employer misclassified a worker as an IC, the company may be liable for intentional violation of Labor Code Section 226.8, and could be required to pay civil penalties of $10,000 to $25,000 per misclassified worker, along with back wages, meal and rest break penalties, along with a whole host of other statutory and civil penalties. By expanding the definition of an employee, the bill in effect expands the definition of a crime while also authorizing the attorney general or city attorney to seek injunctive relief to prevent the continued misclassification of workers.

What's Next? Get Ready

A.B. 5 becomes effective January 1, 2020, but as stated above it is retroactive. Undoubtedly it will prompt a spike in litigation challenging independent contractor classifications. It is anticipated that the law will be subject to numerous legal challenges. Meanwhile employee organizations are ready to vigorously defend the law and the plaintiffs' bar is gearing up as well. The cost of reclassification to employers is estimated to reach several billion.

What Can You Do Now? Effective Options for Employers

Dykema's Labor and Employment attorneys have extensive experience counseling clients regarding worker misclassification, as well as representing them across the nation before federal and state agencies and courts. Our team can assist with effective options to protect employers and mitigate the impact of reclassification.

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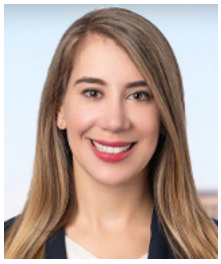

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