How to Operate Within the Guidelines of AB-5
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Introduction

- Introduced by Assembly Member Lorena Gonzalez (D-80)
- An Act to amend Section 3351 of and to add Section 2750.3 to the Labor Code
- To amend Sections 606.5 and 621 of the Unemployment Insurance Code.
- Signed into law on September 18, 2019.

Existing Law

- Establishes a comprehensive set of protections for employees, including a time-sure minimum wage, meal and rest periods, workers' compensation coverage in the event of an industrial injury, sick leave, disability insurance in the event of a non-industrial disability, paid family leave, and unemployment insurance. (Labor Code §§3300, 226.7, 246, 512, 1152.12, & 3600 and UI Code §§1201 & 2601)
Existing Law

- Creates the Industrial Welfare Commission (IWC), which promulgates industry-specific wage orders that set the wages, hours, and working conditions for employees. The IWC wage orders have the force of regulation and are enforced by the Division of Labor Standards Enforcement. (Labor Code §§870, 1171, 1177, 1195 & 1197)

- Provides that there is a rebuttable presumption that a worker performing services for which a contractor’s license is required, or who is performing such services for a person who is required to obtain such a license, is an employee rather than an independent contractor. (Labor Code §2750.5)

Existing Law

- States that in order to rebut the presumption described above, an employer must prove the following:
  a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor.
  b) That the individual is customarily engaged in an independently established business.
  c) That the individual’s independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is evidenced by the presence of cumulative factors, which includes substantial investment other than personal services in the business, holding out to be in business for oneself, and bargaining for a contract to complete a specific project for compensation by project rather than by time.

This test, also known as the ABC test, has been California law since 1979. (Labor Code §2750.5)
Existing Law

- Requires that an individual holds a valid contractor's license as a condition of having independent contractor status. (Labor Code §2750.5)

Existing Law

- Requires, for the purposes of IWC wage orders, that the specific work conditions of a worker must conform with the following three circumstances to be considered an independent contractor:
  a) 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) The worker performs work that is outside the usual course of the hiring entity's business; and
  c) 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.

AB 5

Dynamex Operations West v. Superior Court (2018) 4 Cal. 5th 903
This bill codifies and expands the recent decision in Dynamex Operations West v. Superior Court (2018) 4 Cal. 5th 903.

AB 5 ABC Test

- Provides that, for the purposes of the Labor Code and Unemployment Insurance Code and the IWC’s wage orders, where a definition for employee is not provided a person providing labor or services for remuneration must be considered an employee unless the hiring entity demonstrates that all of the following conditions are satisfied:

AB 5 Borello Test

- Provides that, if a court of law rules that the three-part test above cannot be applied to a particular context based on grounds other than an express exception to employment status as provided in this bill, then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court’s decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 347 (Borello).
**AB 5 Borello Test**

- Provides that, for the following occupations, the applicable test for determining if an individual is an employee or an independent contractor is the predecessor test to Dynamex developed by the California Supreme Court in Borello or relevant statute:

  a) Licensed insurance brokers.
  b) Licensed physicians and surgeons, dentists, podiatrists, psychologists, lawyers, architects, engineers, private investigators, veterinarians, and accountants, provided that the medical fields listed above are not covered by a collective bargaining agreement.
  c) Registered securities broker-dealers, investment advisors, or their agents and advisors.
  d) A direct salesperson, provided that the salesperson’s compensation is based on actual sales, rather than wholesale purchases or referrals.

- Commercial fishermen, except as per the provision of unemployment insurance benefits. This provision will become inoperative on January 1, 2023.

- Real estate licensees and repossession agents, as provided under existing licensure provisions in the Business and Professions Code.
AB 5 Borello Test

c) The individual has the ability to set or negotiate their own rates for services performed.
d) Outside of project completion dates and reasonable business hours, the individual has the ability to set their own hours.
e) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers for the same work.
f) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

AB 5 Professional Services

- Provides that an individual contracting for professional services can do so as a sole proprietor or other business entity.

AB 5 Professional Services

- Defines “professional services” as the following services:
  a) Marketing, provided that the contracted work is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the contracted work.
  b) Administrator of human resources, provided that the contracted work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.
  c) Travel agents.
  d) Graphic design.
  e) Grant writer.
  f) Fine artist.
  g) Enrolled agent.
  h) Payment processing agent through an independent sales organization.
AB 5 Professional Services

1) Services provided by a still photographer, provided the individual does not license content to the putative employer more than 35 times in a year, as specified.

2) Services provided by a freelance writer, provided the individual does not license content to the putative employer more than 35 times in a year, as specified.

AB 5 Borello Test

Provides that relationships between a contracting business and a business service provider is under the Borello test if all of the following criteria are satisfied:

a) 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.

b) The business service provider is providing services to the contracting business rather than to customers of the contracting business.

c) The contract with the business service provider is in writing.

d) 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.

e) The business service provider maintains a business location that is separate from the business or work location of the contracting business.

f) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

g) The business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.

h) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

i) The business service provider provides its own tools, vehicles, and equipment to perform the services.

j) The business service provider can negotiate its own rates.
b) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

l) The business service provider is not performing the type of work for which a license from the Contractors State License Board (CSLB) is required, pursuant to Section 7000 and following of the Business and Professions Code.

Provides that the Borello test governs the relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry if all of the following criteria are satisfied:

a) The individual is free from the control and direction of the contractor in connection with the performance of the work, both under the contract for the performance of the work and in fact.

b) The subcontract is in writing.

c) The subcontractor is licensed by CSLB and the work is within the scope of that license.

d) If the individual is domiciled in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor has the required business license or business tax registration.

e) The subcontractor maintains a business location that is separate from the business or work location of the contractor.

f) The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.

g) The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, legally authorized indemnity obligations, performance bonds, or warranties relating to the labor or services being provided.

h) The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.
AB 5 Borello Test - Referral Agency

- Provides that a relationship between a service provider and a referral agency is exempt from the ABC test and under the Borello test if the following is applicable:
  a) The service provider has formed a business entity as a sole proprietor, partnership, limited liability company, limited liability partnership, or corporation.
  b) The service provider is free from the control and direction of the referral agency as a matter of contract and fact.

AB 5 Borello Test - Referral Agency

c) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration, the service provider has the required business license or business tax registration.

d) If the work for the client requires the service provider to hold a state contractor's license, the service provider has the required contractor's license.

e) The service provider delivers services to the client under service provider's name, rather than under the name of the referral agency.

f) The service provider provides its own tools and supplies to perform the services.

g) The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client.

h) The service provider maintains a clientele without any restrictions from the referral agency and the service provider is free to seek work elsewhere, including through a competing agency.

i) The service provider sets its own hours and terms of work and is free to accept or reject clients and contracts.

j) The service provider sets its own rates for services performed, without deduction by the referral agency.

k) The service provider is not penalized in any form for rejecting clients or contracts. This subparagraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.
AB 5 - Referral Agency

- Defines a referral agency as a business that connects service providers with clients and provides the following services: graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup.

AB 5

- Provides that the codification of the ABC test is not a change in law, but rather declaratory of existing law. Also provides that provisions above are declaratory of existing law and should apply retroactively to existing claims to the extent permitted by law.
- Provides that the provisions above, except for the ABC test itself, apply to work on or after January 1, 2020.
- Provides that, beginning on July 1, 2020, any individual who is an employee as described above must be covered by workers' compensation insurance, but that this requirement is not retroactive to an earlier date.

Working with your Sub-Contractors

1. The sub-contractor should operate as either a LLC or corporation.
2. The vehicles of the sub-contractor should have the name of the firm, phone number and license numbers displayed.
3. There should be a phone number that is answered in the name of the firm, and not just a cell phone.
4. The e-mail addresses that are used by the sub-contractor should have the name of the firm, as opposed to a gmail.com or yahoo.com address.
5. The sub-contractor needs to take work from other contractors. They cannot work exclusively for one company.