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California's Assembly Bill 5 Expands *Dynamex's* "ABC" Test for Employee/Independent Contractor Status, Creates Exemptions, and Increases Enforcement Options

On September 18, 2019, Governor Newsom signed Assembly Bill 5 into law. The new law codifies and expands *Dynamex's* "ABC" test for determining employee vs. independent contractor status, creates certain exemptions, and increases the options for enforcement. While the new law leaves a great many questions unanswered, this much is crystal clear: Effective January 1, 2020, California businesses that utilize independent contractors must be prepared to comply with AB 5's "ABC" test, which states that in order to legally classify a worker as an independent contractor, the company must prove that (A) the worker is free from the company's control, (B) performs work outside the company's primary business, and (C) is regularly engaged in the trade the worker is hired for, independent of work for the company.

Background and overview of AB 5

Assembly Bill 5 codifies the California Supreme Court's 2018 decision in *Dynamex Operations W. v. Superior Court* and its "ABC" test for making the employee vs. independent contractor determination. In *Dynamex*, the court held that in order to prevail against claims arising under California's Wage Orders premised on independent contractor misclassification, a defendant-employer must prove all of the following:

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

However, while *Dynamex* was expressly limited to claims arising under the Wage Orders, AB 5 expands the reach of *Dynamex* by making the "ABC" test the default test for *all* Labor Code, Unemployment Insurance Code, and Wage Order claims. Consequently, misclassification claims may now include a great number of additional claims beyond just claims for unpaid wages. Lastly, AB 5 empowers the California Attorney General and certain city attorneys to pursue injunctions against businesses suspected of misclassifying workers.

Exemptions from AB 5's "ABC" test

Given the immense lobbying efforts by countless interest groups, AB 5 contains several statutory exemptions from the ABC test. For example, there are exemptions for: (i) "business-to-business" arrangements that apply to "business service providers" contracting to provide services to other businesses; (ii) certain "service providers," such as graphic designers, event planners, and web designers; (iii) "professional services," such as marketing, human resources administration, and freelance writers; and (iv) certain licensed occupations, such as doctors, attorneys, architects, engineers, real estate agents, and construction subcontractors. While several exemptions for agricultural employers were sought (e.g., an exemption for owner-operators of trucks hauling agricultural commodities), none were included in the final version of the new law.

One interesting thing to note about AB 5's exemption for "bona fide business-to-business" arrangements is that the new law expressly states that such contracting relationships will continue to be analyzed under the common law "control test" as upheld in the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*. However, the new law lists a litany of prerequisites that must be met before such test can be used. Accordingly, if a business contracts to provide services to another business, the determination of whether the "business service provider" is an independent contractor is governed by the common law control test, but only if the contracting business can demonstrate that it meets all of a list of criteria, including that: the business service provider is free from the control and direction of the contracting business in connection with the performance of the work; the contract with the business service provider is in writing; the business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the contracting business; and the business service provider provides its own tools, vehicles, and equipment to perform the services.

What This Means for Employers:

If your company uses any "independent contractors," whether individuals or entities, you should have the legality of such relationships evaluated as soon as possible under AB 5 to try to assure proper classification. This new law takes effect on January 1, 2020, which leaves employers with very little time to evaluate, plan, and implement any changes that might be necessary. Further, in performing these tasks, companies are strongly advised to work closely with the legal counsel. The "ABC" test is a fact-specific analysis and as such, classifications will need to be tailored to each individual business. In addition, the new law contains numerous uncertainties. Finally, given that this new law will undoubtedly cause a spike in litigation challenging independent contractor classifications, businesses should evaluate their liability and plan for any changes under the protection of the attorney-client privilege. After all, the last thing you want to do is create evidence (e.g., reports, communications, etc.) that can be used against you in a misclassification claim down the line. If you have any questions about AB 5 or how to respond to the changes going into effect on January 1, please call Barsamian & Moody at (559) 248-2360.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.