

LAW OFFICE OF
DENISE OLRICH

AB- 5 UPDATE

By Denise Olrich, Attorney at Law
Law Office of Denise Olrich
3558 Round Barn Blvd., Suite 200
Santa Rosa, CA 95403
Tel. (707) 236-6488
Email: olrich@olrichlaw.com

© Denise Olrich 2019

AB-5 UPDATE

Dynamex case ([Dynamex Operations West, Inc. v Superior Court of LA](#), 4 Cal.5th 903 (2018) - CA Supreme Court decision from April, 2018)

Made it much more difficult to qualify for Independent Contractor status

Restricts when employers can classify workers as independent contractors and deny them standard employee benefits including Workers Comp Insurance, Sick Leave, Minimum Wage law and sick leave.

ABC TEST

The Dynamex test has 3 parts and is known as the ABC test, which consists of the following:

1. The worker is free from the control and direction of the hirer in relation to the performance of the work;

2. The Worker performs work that it outside the usual course of the hirer's business; and

3. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hirer.

The Winner is

...

AB-5!

2 bills introduced in State Assembly

- AB-5 to codify Dynamex

- AB-71 to overturn Dynamex

AB-5 is the WINNER and was signed into law by Gavin Newsome on September 18, 2019

EXCEPTIONS TO THE NEW RULES

Amendments to AB-5 were made following an intense round of lobbying which excuse the following professions from compliance with the new independent contractor rules, including:

- INSURANCE BROKER AND AGENTS
- PHYSICIAN, SURGEON, DENTIST PODIATRIST, PSYCHOLOGIST OR VETERINARIAN
- CA LICENSED PROFESSIONS INCLUDING LAWYER, ARCHITECT, ENGINEER, PRIVATE INVESTIGATOR OR ACCOUNTANT
- CA OR FED LICENSED SECURITIES BROKER-DEALER OR INVESTMENT ADVISOR, OR THEIR AGENTS
- DIRECT SALES SALESPERSON
- COMMERCIAL FISHERMAN

TEMPORARY REPRIEVE FOR SOME PROFESSIONAL SERVICES

An exception for **Professional Services** is included *which will become inoperative on 1/1/2023* which says that Dynamex will not apply and will be governed by the Borello case if following factors are satisfied:

- Individual maintains business location separate from the hiring entity (even if work performed at hiring entity location);
- Individual has a business license (if after 6 months after law takes effect);
- Individual can negotiate their own rates;
- Outside of project completion dates and reasonable business hours, can set their own hours;
- Individual is customarily engaged in same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work;
- The individual customarily and regularly exercises discretion and independent judgment in performance of the services.

PROFESSIONAL SERVICES

For purposes of foregoing exception, Professional Services will include the following:

- Marketing professionals
- HR Professionals
- Graphic Design
- Grant Writer
- Fine Artist
- Enrolled Agent (with IRS)
- Payment Processing Agents
- Still Photographer or photojournalist
- Writer, Editor or newspaper cartoonist
- Travel Agent
- Real Estate licensee
- Repossession Agency

More Professional Services

Esthetician, Electrologist, Manicurist, Barber or Cosmetologist are also exempt until 1/1/2023 provided:

1. They set their own rates, process own payment and paid directly by clients;
2. Set their own hours and has sole discretion to decide number of clients and which clients for which they will provide services
3. Has their own book of business and schedules their own appointments;
4. Maintains their own business license;
5. If working at hiring entity's place of business, they issue form 1099 to salon;
6. Manicurist exception terminates on 1/1/2022.

B2B EXEMPTION

Business entity (not individual worker) contracting to provide services directly to contracting business and not their customers, if:

1. Agreement is in writing;
2. Contractor is licensed if license is required for their business;
3. Separate business location from hiring business;
4. Contractor engaged in independent business of same nature as the work performed;
5. Contractor actually works for other businesses to provide same or similar services;
6. Provides own tools, vehicles and equipment;
7. Can negotiate own rates;
8. Can set own hours and location of work.

Building Contractor Exemptions

Building contractors will be governed by old Borello test instead of Dynamex (see Supreme Court's earlier *S.G. Borello and Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*) if:

1. Subcontract is in writing;
2. Subcontractor is licensed by Contractor's State License Board;
3. Maintains business location separate from business or work location;
4. Maintains business license if required;
5. Authority to hire and fire ;
6. Assumes financial responsibility for E&O insurance, performance bonds or warranties;
7. Engaged in independently established business of the same nature as work performed;
8. Some construction trucking businesses will also be exempt.

Referral Agencies

Service providers providing services to referral agencies are exempt from Dynamex if certain requirements met, similar to those for B2B business, and applies to the following businesses who provide services through a referral agency:

Graphic Design

Photography

Tutoring

Event planning

Minor home repair

Moving

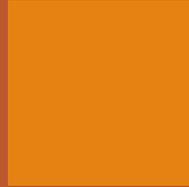
Home cleaning

Errands

Furniture assembly

Animal services (pet care and boarding)

Effective Date & Retroactivity



Applies to work performed after January 1, 2020, with a few exceptions.



Originally, the Ninth Circuit, where California is of course located, decided that *Dynamex* was retroactive. *Vazquez v. Jan-Pro Franchising Int'l*, 923 F.3d 575 (9th Cir. 2019). Then the court withdrew that opinion and referred the question of retroactivity to the California Supreme Court. *Vazquez v. Jan-Pro Franchising Int'l*, 930 F.3d 1107 (9th Cir. 2019).



A decision was issued in the California Second District Court of Appeal's Oct. 8, 2019, decision in *Gonzales v. San Gabriel Transit, Inc.* which concluded that *Dynamex* is retroactively applicable to pending litigation on wage and hour claims. This is binding now but CA Supreme Court could still review along with *Vazquez*.

Consequences of Misclassification

- Failure to pay overtime and minimum wages under Fair Labor Standards Act – going back 2 years for non-willful violations and 3 years for willful, including criminal penalties and liability for back wages
- Liability to reclassified employees could include for wage and hour claims, 401k, FMLA violations, health insurance benefits, rest time breaks and PTO that were available to employees during relevant time period.
- Penalties for failure to withhold state and federal payroll taxes
- Penalties for failure to comply with form I-9 requirements
- Penalties for failure to pay unemployment insurance fund
- Liability for unpaid workers compensation premiums and penalties for failure to maintain coverage
- Family and Medical Leave Act violations
- Liability for age discrimination claims applicable to employees over 40 years of age

Worker's Compensation Insurance



Labor Code Section 3700.5.

(a) The failure to secure the payment of compensation as required by this article by one who knew, or because of his or her knowledge or experience should be reasonably expected to have known, of the obligation to secure the payment of compensation, is a **misdemeanor punishable by imprisonment in the county jail for up to one year, or by a fine of up to double the amount of premium**, as determined by the court, that would otherwise have been due to secure the payment of compensation during the time compensation was not secured, **but not less than ten thousand dollars (\$10,000)**, or by both that imprisonment and fine.

(b) A second or subsequent conviction shall be punished by imprisonment in the county jail for a period not to exceed one year, by a fine of triple the amount of premium, or by both that imprisonment and fine, as determined by the court, that would otherwise have been due to secure the payment of compensation during the time payment was not secured, but not less than fifty thousand dollars (\$50,000).

In short, CA Labor Code Section 3700.5 requires a minimum \$10,000 fine for failure to carry Worker's Comp insurance, plus up to 1 year in jail for a first offense.



The Future of AB-5

-
- Court challenges are starting to be filed including Federal lawsuit by California Trucking Association filed recently challenging the statute under Federal law and the US Constitution.
 - Uber and Lyft are working on their own legislation to make separate set of contractor requirements applicable to their drivers and also promised to get a ballot measure on the next Statewide election ballot (for which they have contributed 30 Million Dollars each). Door Dash has also promised to add another 30 million to the fund.
 - Continued lobbying by other trade groups and independent contractors for further exemptions.
 - As to temporary exemptions, contractors will need to pass new legislation before the exemptions expire, obtain an extension of those exemptions or start complying with the ABC test.
 - STAY TUNED because the challenges will continue . . .



© Denise Olrich 2019