



Nibbling Around The Edges? California Continues To Make Changes To AB 5 And The ABC Test

Insights

9.10.20

A new law just went into effect that revises California's test for determining whether a worker is considered an employee or an independent contractor, slicing off a number of various work arrangements from having to comply with the stringent ABC test. The bad news is that the new list of exemptions doesn't go as far as most businesses would have liked. The good news is that the new law creates a better situation for "business to business" arrangements that had been troubled by California's recent adoption of the ABC test. What do California businesses need to know about this latest development?

Quick Background

Last year, no single subject dominated the California legislature as much as AB 5 – the legislature's effort to codify and expand the ABC test, governing whether a worker is considered an employee or an independent contractor – as well as grant over 50 exemptions for various industries and professions.

Just to recap, this saga began in April 2018 when the California Supreme Court issued an unprecedented ruling in the *Dynamex* case that adopted what is known as the ABC test for determining independent contractor status. The legislature codified and expanded the decision and the ABC test in AB 5 last year, but also carved out dozens and dozens of exemptions from the new standard.

When the 2020 legislative year began back in January, it appeared that AB 5 would continue to be the hot topic, as more than two dozen bill were introduced proposing further changes to the law. Many of these bills were introduced by Republican members and sought to undo or suspend AB 5, or add to the voluminous list of exemptions.

But then a little thing called COVID-19 happened, which not only interrupted the legislative process and session, but also changed the labor and employment policy focus of the legislature to focus almost exclusively on pandemic-related issues. Despite this, the legislature managed to pass one piece of AB-5 related legislation, Assembly Bill 2257 – and the governor has already signed it into law.

The dynamic this year was very similar to that which occurred last year – labor rallied behind and "blessed" one vehicle to make changes to AB 5, so that remained firmly in control of the outcome.

And AB 2257 was authored again by Assembly Member Lorena Gonzalez (D-San Diego), the original author of AB 5. Virtually every other bill fell by the wayside and either was never heard in policy committee, or was heard but voted down by labor-friendly majorities.

Nonetheless, AB 2257 does make some improvements and provide further relief to some industries and professions. Unfortunately, it simply doesn't go as far as many employers would desire to provide them with relief from some of the perhaps unintended consequences of AB 5.

You Get An Exemption! You Get An Exemption! (Not) Everybody Gets An Exemption!

The legislative free-for-all for exemptions from the application of the ABC test continued in AB 2257, as many more industries (but not all who wanted them) were provided exclusions by the legislature. In general, an "exemption" means you fall outside of application of the ABC test and revert back to the easier-to-satisfy *Borello* standard.

Many of these exemptions specify that certain criteria must be met, so you should review the specific language closely with counsel. AB 2257 provides new or expanded exemptions along these lines for the following (among others):

- Recording artists;
- Musicians;
- Freelance writers and similar occupations;
- Digital content aggregators;
- Data aggregators;
- Specialized performers that teach "master classes";
- "Fine artists" (establishes a definition for an existing exemption);
- Landscape architects;
- Appraisers and home inspectors;
- Professional foresters;
- Field services (inspections, audits, risk management, or loss control work) for the insurance and financial services industries;
- Manufactured housing salespersons;
- "Single-engagement" events;
- International and cultural exchange services; and
- Competition judging.

Mind Your Business-To-Business!

One of the more potentially expansive exemptions contained in AB 5 was the so-called "business-to-business" exemption that was designed to protect normal legitimate contracting between two

business-to-business exemption that was designed to protect normal, legitimate contracting between two business entities from being subject to the ABC test. However, AB 5 required that 12 separate criteria had to be met in order to satisfy the exemption, and some of the criteria were quite difficult to meet, even for legitimate business contracting relationships.

AB 2257 makes a few changes to these specified criteria that, for some, may make it easier to satisfy.

First, the business-to-business exempt in AB 5 required that the business service provider be providing services to the contracting business rather than to customers of the contracting business. This proved difficult to satisfy for some contracting relationships where direct customer service was at issue. AB 2257 specifies that this requirement does not apply “if the service provider’s employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.”

Second, AB 5 required that a business service provider “actually contracts” with other businesses and “maintains” a clientele without restriction from the hiring entity. AB 2257 loosens this requirement by instead requiring that the business service provider “can” contract with other businesses and maintain a clientele (but presumably does not have to be shown to “actually” do so).

Third, AB 2257 specifies that the contract with the business service provider (in addition to being in writing) must specify the amount of payment, including any applicable rate of pay and due date for payment.

Fourth, AB 2257 clarifies that a business service provider’s “business location” may include their residence.

Fifth, the existing business-to-business exemption requires that a business service provider provide its own tools, vehicles and equipment. AB 2257 specifies that this applies only when “consistent with the nature of the work” and does not include any proprietary materials that may be necessary to perform the work under the contract.

AB 2257 also specifies that the business-to-business exemption applies where a contractor is hired by a public agency or quasi-public corporation. In addition, AB 2257 clarifies that while this exemption test governs the relationship between two bona fide businesses, the determination of whether an individual worker is an employee or independent contractor of one of the two businesses is still governed by the ABC test.

Broadening “Referral Agency/Service Provider” Exemption?

AB 5 also enacted an exemption to relationships between “referral agencies” and “service providers” that meet certain specified criteria. AB 2257 makes some modest changes to these criteria in a manner that may make them easier to satisfy.

But more importantly, AB 2257 broadens the scope of individuals potentially included under this exemption. AB 5 limited the definition of “referral agency” to specified services. AB 2257 expands

this list of services to also include consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, and interpreting services. But most significantly, AB 2257 changes this list of covered services from an “exclusive” list to a “non-exclusive” list (“including, but not limited to...”). This raises the possibility that other types of services not listed could be included in the referral agency/service provider exemption if they meet the specified requirements.

However, as the legislature giveth, the legislature taketh away. AB 2257 also specifies that the referral agency/service provider exemption does not apply to the following industries: janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, construction services other than minor home repair, or high-hazard industries.

Instant Gratification

The good news for those who benefit from the changes made by AB 2257 is that it included an “urgency clause,” meaning that it went into effect *immediately* when Governor Newsom signed it into law on September 4, 2020.

In addition, a companion measure, AB 323, extends the AB 5 exemption for newspaper delivery for an additional year. AB 323 is currently on the governor’s desk awaiting further action.

What Comes Next?

This likely is not the end of the AB 5 saga before the California legislature. It is likely that there will be further legislative efforts to make changes to the law and enact further exemptions next year and beyond. *Dynamex* and AB 5 are simply the gifts that keep on giving!

In the meantime, if you have any questions about how the changes made by AB 2257 impact your ability to classify workers as employees or independent contractors, please contact your Fisher Phillips attorney or one of the attorney in any of our California offices:

Irvine: 949.851.2424

Los Angeles: 213.330.4500

Sacramento: 916.210.0400

San Diego: 858.597.9600

San Francisco: 415.490.9000

Woodland Hills: 818.230.4250

This article provides an overview of a specific state law change. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

not be construed as, legal advice for any particular fact situation.

Related People



Benjamin M. Ebbink

Partner

916.210.0400

Email