



# It's All-AB-5, All-The-Time, As The California Legislature Returns

Insights

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After reviewing the 2,203 pieces of proposed legislation introduced in the California legislature by the February 21 deadline, it's obvious that one issue will dominate debate in the 2020 session: the continued fallout from AB 5, the 2019 bill that codified and expanded the ABC test for determining independent contractor status. In fact, 34 separate pieces of proposed legislation that seek to modify or repeal AB 5, create new exemptions, or otherwise address the misclassification questions raised by the new law were introduced before the recent bill deadline. Let's take a look at some of the key issues and the more prominent pieces of legislation.

## Labor's Effort to Control the Discussion (Again)

Last year, labor insisted on controlling the terms of the debate by ensuring that there was only one legislative bill dealing with these issues – AB 5. They sent word very early on that they would only tolerate one bill, and that they would be in control and the discussion would be on their terms. Therefore, anybody who wanted an exemption or relief from imposition and codification of the “ABC test” had to go to labor and plead their case for special treatment in AB 5.

This year, labor appears to want to replicate that dynamic. While acknowledging that some “follow-up” and adjustments to AB 5 may be in order, the author of the bill (Assemblymember Lorena Gonzalez) very early introduced [Assembly Bill 1850](#). It appears that AB 1850 is intended to serve as the preferred vehicle for Gonzalez and labor to control the discussion in 2020 as well. Just last week, Gonzalez amended the bill to modify the exemption in AB 5 for freelance journalists and similar professionals, and vows that additional changes may be in the works.

Gonzalez has also introduced a separate follow-up bill, [Assembly Bill 2465](#), to modify the AB 5 exemption for barbers, cosmetologists, and similar professionals.

The rumor around Sacramento is that labor has delivered the not-so-subtle message to other Democrats that they don't want multiple bills dealing with these issues – they just want one follow-up measure. That's smart politics from labor's perspective, but can make things very difficult to have meaningful and transparent policy discussions about the need for potential changes to the law.

Gonzalez has publicly stated that she is actively negotiating with several groups to potentially provide relief – including with musicians and freelance writers, among others. So there is some sense that AB 1850 may contain further clarification and relief for some.

## **Republican Efforts to Repeal AB 5/Dynamex**

AB 5, and the California Supreme Court case that inspired the new law (*Dynamex*), have caused significant consternation for many individuals and industries. The volume of these concerns seems to have increased substantially since AB 5 went into effect on January 1, 2020. Smelling political “blood in the water,” Republican legislators have jumped on the opportunity to promulgate efforts to address or even outright repeal AB 5.

The most vocal thus far has been Assemblymember Kevin Kiley, who has introduced two efforts to essentially repeal AB 5 and the *Dynamex* decision. Assembly Bill 1928 would repeal the ABC test and require classification determinations to be made using the prior *Borello* standard. Similarly, his proposed Assembly Constitutional Amendment 19 would enshrine the *Borello* standard into the California Constitution.

These efforts have gained a lot of attention on social media and elsewhere, but it is difficult to see these efforts having any realistic shot at success given the political makeup of the legislature in Sacramento.

Last week, Senator Shannon Grove amended her Senate Bill 806 to modify the ABC test to make it more in line with the more flexible version of the standard utilized in other states. However, this effort is likely to face the same fate as Republican efforts to repeal AB 5.

## **“You Get an Exemption! And You Get an Exemption! And You Get an Exemption!”**

Republican legislators also introduced a veritable storm of bills seeking additional carve-out or exemptions to AB 5 and the ABC test. Many of these bills seek exemptions for industries that were denied a coveted carve-out by labor during last year’s discussions. But some include folks who were not part of the previous discussion but have become increasingly concerned once AB 5 took effect.

Separate (and sometimes multiple) bills have been introduced by Republican legislators to create additional exemptions for the following:

- Small businesses (AB 1925)
- Pharmacists (AB 2457/SB966)
- Physical therapists (AB 2458)
- Franchisors/franchisees (AB 2489/SB 967)
- Timber operators (AB 2572/SB 975)
- Licensed marriage/family therapists (AB 2793)
- Health care providers (AB 2794/SB965)
- Land surveyors, landscape architects, and similar professions (AB 2823)
- Interpreters and translators (AB 2979/SB 875)
- Certified shorthand reporters (AB 3134)

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- Youth sports referees/umpires (AB 3185/SB 963)
- Newspaper carriers (AB 2796/SB 867)
- Freelance journalists (SB 868)
- Musicians (SB 881)
- Transportation network companies (AB 2497/SB 990)
- Modified “business-to-business” exemption (AB 3281)

Most of the Republican bills will face a tough road in the legislature. Many may not make it out of the first policy committee, if they are even scheduled for a vote. For example, in the Assembly (which changed their procedural rules recently), there is a rumor that committee chairs may not even set some of these Republican measures for a vote.

However, to the extent these proposals address sympathetic constituencies, legislators could face significant pressure from their constituents to provide relief for certain industries – if not by approving these Republican bills, then perhaps incorporating the affected industries into the discussions around AB 1850 (the Gonzalez follow-up measure).

### **The Elusive “Third Way”?**

In a somewhat surprising move, a Democratic legislator also introduced a placeholder bill ([Senate Bill 1039](#)). This measure declares the intent of the legislature to “develop a modern policy framework that facilitates independent work for those who voluntarily choose it by creating a third classification of workers in order to offer basic rights and protections they deserve under the law relative to work opportunities and circumstances of work.”

This proposal seems aimed at discussing a middle ground approach where workers could remain independent but receive certain social safety net protections or “portable benefits.” This concept has been a hot topic in some circles in recent years (especially in academia). However, labor has been very cool to this concept and likely will not stand for anything less than full employment status for most workers.

While this bill may generate some discussion on a theoretical level, it’s not likely to have a very long shelf life in Sacramento either.

### **Democratic Alternatives?**

A few “placeholder” bills have been introduced by Democratic legislators (mainly in the State Senate) that may indicate a desire by some Democrats to have more than one potential vehicle for discussion around this issue. There were some rumblings last year that some Senators were not especially enamored with having one Assembly bill to approve, with little if any room for further discussion on a critically important topic.

This is a touchy subject, and involves intra-house politics between the two legislative chambers and members of the same party. Word on the street is there has been some pressure to have a Democratic alternative to AB 1850, to at least allow for more comprehensive and transparent discussion.

That's probably not something Gonzalez and labor view kindly, so it remains to be seen how this dynamic will play out in Sacramento.

## **Conclusion**

If there were any doubt, it is not clear that AB 5 will continue to be the most significant labor and employment policy issue in Sacramento for the near future. And it should – it's a very significant policy issue that impacts millions of individuals in California. This year's legislative activity may also portend how this issue develops in other states – or even at the federal level – as several states are exploring replicating AB 5. And most of the Democratic candidates vying for presidential nomination have endorsed enacting an "ABC test" at the federal level, so you won't be able to escape discussion on the subject for quite some time.

Stay tuned here and at our [California Employers' Blog](#) for updates as these measures move forward (or don't) in 2020.

## ***Related People***

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