



California Expands Exemptions to AB 5's Infamous Independent Contractor Test

SEPTEMBER 2020

On September 4, 2020, Governor Gavin Newsom signed into law California's newest legislation regarding the classification of workers as independent contractors. Assembly Bill No. 2257 ("AB 2257") exempts a number of additional professions from the onerous *Dynamex* standard codified in the now infamous [Assembly Bill No. 5 \("AB 5"\)](#). This is welcome news for employers and workers alike, particularly musicians, writers, and artists, who prefer the freedom of the independent contractor designation; however, the new law creates differing obligations for employers seeking its protections and is silent on the ongoing rideshare legal disputes.

AB 2257 comes a mere nine months after AB 5 codified the "ABC" test used by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018), 4 Cal. 5th 903. As a reminder, *Dynamex* held that in order to defeat claims arising under California's Wage Orders premised on independent contractor misclassification, a defendant must prove that (A) 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. AB 5 made *Dynamex's* "ABC" standard the default test for independent contractor status under the California Labor Code, Unemployment Insurance Code, and Wage Orders, and, importantly, shifted the burden onto the employer to prove that workers are indeed properly classified as independent contractors.

AB 5 exempts a number of occupations from this rigid requirement, including psychologists, doctors, dentists, podiatrists, insurance agents, stockbrokers, lawyers, accountants, engineers, veterinarians, direct sellers, hairstylists, barbers, aestheticians, real estate agents, fishermen, travel agents, marketing professionals, artists, graphic designers, grant writers, human resource administrators, payment processing agents, and repossession agents. Instead, the more lenient standard in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989), 48 Cal. 3d 341 applies for these exempted professions.

The new legislation expands, clarifies, and modifies the list of occupations and industries exempted from *Dynamex* and AB 5. Among other professionals, AB 2257 carves out exemptions for:

- **Musical Artists** – recording artists, songwriters, lyricists, composers, individual performing artists, musicians, and musical groups for the purpose of a single-engagement live performance event;
- **Promoters and Marketers in the Music Industry** – promoters and individuals involved in the creation, marketing, promotion, or distribution of a sound recording or musical composition;
- **Professionals in Real Estate and the Architectural Industry** – licensed landscape architects; registered professional foresters; real estate appraisers; home inspectors; individuals providing underwriting inspections, premium audits, risk management, or loss-control work for the insurance industry; and manufactured housing salespersons;
- **Content Creators and Aggregators** – digital content aggregators who serve as licensing intermediaries for digital content, specialized performers hired to teach a master class for no more than one week, and feedback aggregators.

AB 2257 also eliminates AB 5's requirement that freelance writers, photographers, photojournalists, and editors be classified as employees if they exceed more than 35 submissions per year to a single publisher. Instead, in line with the *Borello* standard, AB 2257 requires the employer to demonstrate that the worker provides services under a contract that specifies the worker's rate of pay and intellectual property rights.

While AB 2257 does not address exemptions for the gig economy and rideshare drivers, the newly added exemptions undoubtedly provide some flexibility and relief for writers, musicians, and other freelancers that can continue working as independent contractors.

Companies that employ workers in California should review their contracts with writers, musicians, photographers, and other artists to take full advantage of the relief afforded by the new law. Unquestionably, California and interested parties are not yet done tinkering and advocating for changes to the state's independent contractor laws.

Additional Information

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