



2021 Cal-Peculiarities Webinar

Series 3: Independent Contractor Intricacies

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Seyfarth Shaw LLP

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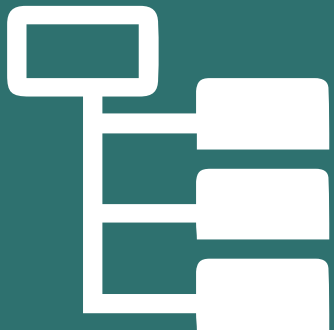
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Agenda



- 01** Background on AB 5
- 02** What Does AB 2257 Do?
- 03** AB 2257's New Exemptions from the ABC Test
- 04** The Revised Business-to-Business & Referral Agency Exemptions
- 05** Where Do Things Stand Now?
- 06** Proposition 22

AB 5: The Precursor to AB 2257



- Codified the “ABC Test” for employee status adopted by the California Supreme Court in *Dynamex*
- Expanded the reach of the ABC Test
- Applied to work performed on or after January 1, 2020
- Exempted numerous occupations from the ABC Test, making *Borello* the governing standard for employee status
- Prompted massive lobbying efforts by industries not given an exemption

What Does AB 2257 Do?



Replaces AB 5

- Effective Sept. 4, 2020
- Maintains ABC Test
- Maintains all of AB 5's exemptions
- Still applies to work performed on or after Jan. 1, 2020

Updates Exemptions

- Adds additional exemptions
- Revises business-to-business and referral agency exemptions
- All exemptions apply retroactively

Enhances Enforcement Powers

- District attorneys may now bring enforcement actions, in addition to the Attorney General and some city attorneys.

New Exemptions

AB 2257's New Exemptions



- **“Single Engagement” Business-to-Business Exemption**
- **Music Industry Exemptions**
- **Performer Exemptions**
- **Miscellaneous:**
 - Manufactured housing salespersons
 - Individuals engaged by international visitor exchange programs
 - Competition judges

Expanded Exemptions



Professional Services Exemption

- Certain content contributors, advisors, producers or cartographers
- Specialized performers hired to teach for no more than one week
- Translators
- Appraisers and home inspectors
- “Submission cap” removed for freelance writers, editors, photographers and newspaper cartoonists

Referral Agency Exemption

- Consulting
- Youth sports coaching and caddying
- Wedding/event planners and vendors
- Interpreting services

The Revised Referral Agency Exemption



- Service provider must certify compliance with business license & tax registration requirements
- More flexibility on requirement that service provider be customarily engaged in independent business
- Service provider must be able to set own hours and terms of work, or, to negotiate them with client
- Service provider may negotiate rates through the referral agency with the client
- ABC Test applies to “individual workers,” both as to the service provider and the client

The Revised B2B Exemption



- Still applies to “bona fide business-to-business contracting relationships”
- Service provider may provide services to the contracting business’s customers under some circumstances
- Contract must specify payment amount, rate of pay and due date
- No longer required that service provider actually contract with other businesses
- ABC Test applies to “individual workers,” both as to service provider and the contracting business

Where Do Things Stand Now?



- AB 2257 (which replaced AB 5) applies to all work performed on or after January 1, 2020
- *Dynamex* applies retroactively, per the California Supreme Court
- ABC Test applies to all non-final Wage Order claims arising before and after *Dynamex* published in April 2018
- Common law test for employment (*Borello*) applies to non-Wage Order claims arising before January 1, 2020
- AB 2257 doesn't address concerns from many industry groups, including those in the franchising and trucking industries; expect more lobbying

Proposition 22



Who Does It Cover?

- Transportation Network Companies; and
- Delivery Network Companies that:
 - Do not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the drivers must be logged into the app or platform;
 - Do not require the driver to accept any specific rideshare or delivery service request as a condition of maintaining access to the app or platform;
 - Do not restrict the driver from performing rideshare or delivery services for other network companies, except when the driver is working for the network company; and
 - Do not restrict the driver from working in any other lawful occupation or business.

Proposition 22



Benefits

- For drivers who work at least 15 hours a week (of “engaged time”), a health care subsidy consistent with the average contributions required under the Affordable Care Act;
- A new minimum earnings guarantee tied to 120% of minimum wage, with no maximum (tied to “engaged time”);
- Compensation for vehicle expenses (mileage compensation for “engaged miles”);
- Occupational accident insurance to cover on-the-job injuries; and
- Protection against discrimination & sexual harassment.

Open Questions

Proposition 22



- Engaged Time?
 - Defined in B&P Code 7463
 - What about jobs requested in advance?
- Retroactive?
- SEIU Lawsuit?
- Will this strategy be replicated?

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Webinar Series Schedule



2021 Cal-Peculiarities Webinar Series:

How California Employment Law is Different

- **Series 1: COVID-19 Supplemental Sick Pay**
Wednesday, June 23, 2021 | [Webinar Recording](#)
- **Series 2: Hero Pay/Industry Specific New Rehire Laws**
Wednesday, June 30, 2021 | [Webinar Recording](#)
- **Series 3: Independent Contractor Intricacies**
Tuesday, July 6, 2021 | [Webinar Recording](#)
- **Series 4: Rounding and Meal Periods**
Tuesday, July 13, 2021 | 1:00 p.m. – 1:30 p.m. PST

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Cal-Peculiarities Resources



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Thank You

