

Management Alert



California Senate Passes Hotly Contested AB 5 Independent Contractor Bill

By Eric M. Lloyd and Pamela L. Vartabedian

Background On AB 5

The California Senate passed a landmark bill, Assembly Bill 5 (“AB 5”), on the evening of September 10, 2019, which could impact businesses’ relationships with independent contractors. AB 5 now goes back to the State Assembly, which must approve amendments to the bill before sending it to Gov. Gavin Newsom’s desk. He is expected to sign the bill — which many industries and interest groups lobbied against — into law given his expressed support for it.

AB 5 codifies the “ABC” test for employee status adopted in the California Supreme Court’s 2018 decision in *Dynamex v. Superior Court*. In *Dynamex*, the California Supreme Court held that in order to defeat claims arising under California’s Wage Orders premised on independent contractor misclassification, a defendant must prove (A) the worker is free from control and direction of the hirer 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 hirer.

The bill expands the reach of *Dynamex* by making the “ABC” test the default test for *all* Labor Code, Unemployment Insurance Code and Wage Order claims. As a result, the ABC test will apply to a host of additional causes of action to which it previously did not apply, such as, for instance, claims for failure to reimburse necessary business expenses and failure to provide accurate wage statements. Consequently, the bill impacts businesses in industries across the board.

In addition to expanding the applicability of the ABC test, AB 5 also broadens the potential liability to businesses that are found to have misclassified independent contractors. The bill empowers the State Attorney General and certain city attorneys to pursue injunctions against businesses suspected of misclassifying independent contractors.

Exemptions From the ABC Test

Perhaps not surprisingly given the intense lobbying efforts by businesses, AB 5 contains numerous statutory exemptions from the ABC test.

For instance, the bill contains a “business-to-business” exemption from the ABC test that applies to “business service providers” that contract to provide services to another business, provided that certain criteria are met. Likewise, “service providers” in certain fields, including graphic design, photography, tutoring, event planning, moving, home cleaning, pool and yard cleanup, animal services, web design and dog grooming and walking, may also qualify for an exemption from the ABC test.

AB 5 also contains an exemption for “professional services” contracts, which covers occupations including: marketing, human resources administration, travel agents, graphic designers, grant writers, fine artists, agents licensed to practice before the IRS, payment processing agents, photographers and photojournalists, freelance writers, editors or cartoonists, and professionals providing cosmetic services (e.g., licensed barbers and manicurists).

Other occupations which may be exempted from the ABC test under AB 5 include, but are not limited to: certain medical professionals; attorneys; architects; engineers; private investigators; registered securities brokers and dealers; commercial fishermen; real estate agents; construction subcontractors; and individuals providing roadside services pursuant to a contract between a motor club and a third party business. Assuming a companion bill to AB 5 is also passed into law, newspaper carriers will be exempted from the ABC test until 2021.

What’s Next?

Assuming AB 5 is signed into law, it will become effective on January 1, 2020 and may prompt a spike in litigation concerning independent contractor classification. With that said, it is anticipated that the law will be subject to numerous legal challenges.

Want to Learn More?

San Francisco: Seyfarth Roundtable

Please join us for an interactive roundtable discussion in San Francisco, developed to provide a forum for in-house counsel to discuss and analyze some of the most pressing wage and hour issues arising in the marketplace space, and also impacting companies in the broader economy.

Some of the topics we expect to cover include:

- AB 5 and Strategies for Dealing with the New Legislation
- Post-Dynamex World: Worker Classification and Minimizing Risk
- Best Practices to Avoid Joint Employer Liability
- Class Action Waivers and the Influx of PAGA-Only Actions and Mass Arbitrations
- Successfully Managing Worker Reclassifications
- Strategies for Limiting Employer Liability With Respect to Mobile Devices and Remote Work
- On-Demand Pay: What to Watch Out For

Details:

Wednesday, October 23, 2019

5:00 p.m. - 5:30 p.m. Registration

5:30 p.m. - 6:30 p.m. Program

6:30 p.m. - 7:30 p.m. Networking Reception

Town Hall Restaurant
342 Howard Street
San Francisco, California

[Register Here](#)

Other Related Events

Houston: ACC-Seyfarth Roundtable

Thursday, October 10, 2019
The Hilton Americas - Houston
1600 Lamar St
Houston, TX

Boston: Seyfarth Roundtable

Tuesday, November 5, 2019
District Hall
75 Northern Avenue
Boston, MA

To get on the list, or to pre-register for either of these events, please [CLICK HERE](#).

AB 5 Webinar

We are finalizing details for an upcoming webinar to discuss the recent developments around AB 5. If you would like to receive additional information on this webinar, please [CLICK HERE](#).

For further information, please contact [Eric M. Lloyd](#) at elloyd@seyfarth.com or [Pamela L. Vartabedian](#) at pvartabedian@seyfarth.com.

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Seyfarth Shaw LLP Management Alert | September 11, 2019

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