

Hi, this is Chris Micheli, a principal at the Sacramento governmental relations firm of Aprea & Micheli and an adjunct professor at McGeorge School of Law in its Capital Lawyering program.

Today's podcast is on a new law from the 2019 legislative session. It's on the Dynamex decision and the ABC test. Essentially, California has adopted an ABC test for employee classification in the state.

AB 5 was enacted into law on September 18th of 2019. It is Chapter number 296, and the bill's provisions take effect on January 1st of 2020. They're applicable to provisions of the labor code, the unemployment insurance code, and the Industrial Welfare Commission's wage orders.

In Section 1 of the bill, there are a number of statements of legislative intent that are uncodified. The purpose of these findings and declarations is to set forth the Legislature's intent to codify the Dynamex ruling and to clarify its application to specific circumstances.

Now, first, the bill codifies the Dynamex decision and essentially provides that a person providing labor or services for payment shall be considered an employee, rather than an independent contractor, unless the hiring entity demonstrates that there's no violation of any of the three prongs of the ABC test.

Now, the ABC test in Dynamex essentially provided that a person can only be an independent contractor if all three prongs of the test are met. The A prong is that the person is free from the control and direction of the hiring entity in connection with the performance of the work.

The B prong is that the person performs work that is outside the usual course of the hiring entity's business. The C prong is that the person is customarily engaged in an independently-established trade, occupation, or business.

Thereafter, the bill states that, notwithstanding this ABC test, any statutory exception from employment status, or any extension of employer status, or even liability, will remain in effect, and that if a court rules that the three-part ABC test cannot be applied, then the proper determination of employee or independent contractor status must be governed by the test in the Borello case - which is *SG Borello and Sons v. the Department of Industrial Relations*, which is a 1989 Cal Supreme Court decision. Thereafter, AB5 sets forth more than 30 different exemptions from the ABC test.

The exemption means that those industries shall have to comply with the Borello test. The test exempts specified occupations from the application of the Dynamex decision and its ABC test, and instead provides that these occupations are governed by the Borello multifactor test in order to determine the proper classification and workers in those 30-plus occupations.

Now, these exempt occupations include, among others, licensed insurance agents, certain licensed healthcare professionals, registered securities, brokers, dealers, and investment advisers, direct sales salespersons, licensed real estate individuals, agents, and brokers, commercial fishermen, workers providing licensed barbering or cosmetology services, and others performing work under a contract for professional services with another business entity, or pursuant to a subcontract in the construction industry.

AB 5 also requires that the EDD, our Employment Development Department, on or before March 1, 2021, and every year thereafter by March 1, must issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry.

The bill makes the exemption for commercial fishermen applicable only until January 1, 2023, and the exemption for licensed manicurist applicable only until January 1, 2022. Now, a relatively new provision of the bill that was found in the last set of amendments authorizes an action for injunctive relief to prevent improper or employee misclassification.

Those cases may be brought by the attorney general, or even specified local prosecutorial entities. Note that AB 5 also recasts the definition of employee for purposes of unemployment insurance.

Essentially, to include an individual who provides labor or services for payment who has the status of an employee, rather than an independent contractor, unless the hiring entity demonstrates that the individual meets all of the specified conditions in the bill, including that that individual performs work that is outside the usual course of the hiring entity's business, i.e., the B prong of the ABC test.

Now, AB 5 states that the bill's provisions do not constitute a change in, but are declaratory of, existing law with regard to violations of the labor code relating to the IWC's wage orders.

The bill also states that specified labor code provisions apply retroactively to existing claims and actions to the maximum extent permitted by law, while other provisions apply to work performed on or after January 1, 2020.

Finally, the bill provides that the measure's provisions do not permit an employer to reclassify an individual who was an employee on January 1st, 2019 into an independent contractor, due to the enactment of AB 5.

Obviously, AB 5 represents a watershed moment in California labor and employment law and hiring entities must pay very close attention to its provisions. Thanks for joining this podcast. I hope you enjoyed it.