



AMERICAN SOCIETY OF
SAFETY PROFESSIONALS

San Diego Chapter

Independent Contractor (AB 5) Legislation: An Update

Enacted in January 2020, the independent contractor law (AB 5) amends Section 3351 of the California Labor Code, adds Section 2750.3, and amends Sections 606.5 and 621 of the Unemployment Insurance Code.

Aspen Risk Management Group – www.aspenrmg.com



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Since 2005, we've helped over
3,400 companies
 and **500,000**
 people work safer



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Why get involved

- Safety , loss control , risk management, insurance investigators, public claims adjusters, premium audit, industrial hygiene, environmental, and other insurance-related professionals have worked as independent contractors for over 50 years in California
- The law threatens the livelihood of thousands of fellow California safety and similar professionals
- Aspen has actively engaged senior, expert independent contractors
- The legislature made a mistake and caused harm.

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Since 2005, we've helped over
3,400 companies
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 people work safer



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Agenda/Topics

- Introduction
- Dynamex decision
- Origins and overview of AB 5
- Carve outs
- People impacted
- On the horizon and Q&A



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San Diego Chapter

Presentation will be available

on SD ASSP site after today

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February 11, 2020

Independent Contractor (AB 5)
Legislation: An Update

Before AB 5

Since 1989:

- Numerous factors for independent versus employee
- Significant difference... whether business had the right to control the work

Pre-AB 5 (Borello factors) include:

- Did hiring entity have ability to discharge worker at will
- Whether significant skill was required
- Worker used their own tools.

Independent Contractor (AB 5)
Legislation: An Update

Evolving workplace

Work from home:

- Telework/telecommute and other unique arrangements have sprouted up (in contrast to the 1980s workplace)

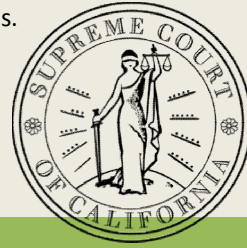
Tech:

- Technology absolutely enables greater opportunities for on-demand, freelance, and independence.

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Legislation: An Update

Dynamex decision

- Dynamex (pronounced “dynamics”) Operations West, Inc. v. Superior Court
- Prior to Dec 2004 – employee classification of courier drivers
- Jan 2005 – independent contractor classification of courier drivers
- Jan 2005 – Charles Lee (15 days of work as IC). Apr 2005 filed suit
- 4/30/2018 California Supreme Court issued a unanimous ruling in Dynamex Operations West, Inc. v. Superior Court of Los Angeles.



Independent Contractor (AB 5)
Legislation: An Update

California Court Reporters Association



Independent Contractor (AB 5)
Legislation: An Update

Origin of AB 5



The California State Senate approved [Assembly Bill 5](#) by Assemblywoman Lorena Gonzalez (D-San Diego) late on September 10, 2019. It was revealed during Senate debate that the AFL-CIO wrote AB 5.

Independent Contractor (AB 5)
Legislation: An Update

Agenda



WHAT IS AB5
AND HOW WILL IT
AFFECT CALIFORNIA'S
GIG ECONOMY?

Independent Contractor (AB 5)
Legislation: An Update

Independent Contractors - CA

- Ends pre-existing rules for evaluating independent contracting relationships
- The Dynamex ABC test
- AB 5's expansion and codification of ABC test
- AB 5's exceptions/carve outs
- Unresolved Issues

Enforcement
Priority



It's not just a labor issue,
it's a revenue issue.



It's easier to collect
income taxes from
employees / employers.



State unemployment,
workers' compensation .

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Legislation: An Update

AB 5 and Independent Contractors - CA

- In the new [ABC] standard employers may not engage an individual as an independent contractor unless that worker has established an independent business to provide **services that are unrelated** to the employer's own course of business.

Independent Contractor (AB 5)
Legislation: An Update

Especially Rigid

A – Free from Control of the sort exercised over employees.

B – Must perform work distinct from employees in the “usual course of business.”

C – Worker has “take[n] the usual steps to establish and promote his independent business...”

Independent Contractor (AB 5)
Legislation: An Update

A – no control

A – Free from Control of the sort exercised over employees

- Are employees and contractors treated the same
- In the Dynamex case, couriers were employees then switched to independent contractors.

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Legislation: An Update

B – distinct work

B – Must perform work distinct from employees in the “usual course of business.”

- Tremendous risk if contractors are integral to your business model
- Would he or she be viewed by others as working in your business?

Independent Contractor (AB 5)
Legislation: An Update

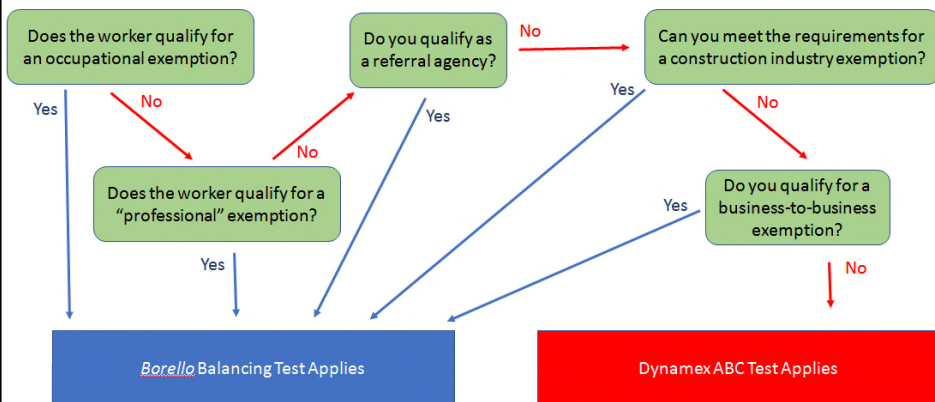
C – establish business

C – Worker has “take[n] the usual steps to establish and promote his independent business...”

- Requirements and documentation to establish that the consultant is truly an independent contractor, such as business cards, licenses, incorporation, advertising materials, certificate of insurance, website, desire to grow and add employees. Find office space.
- Use own tools, equipment, facilities, employees?

Independent Contractor (AB 5)
Legislation: An Update

Contractor or Employee



Occupational Carve outs

- Doctors, surgeons, dentists, podiatrists, psychologists, veterinarians
- Lawyers, insurance brokers, architects, engineers, private investigators, accountants
- Securities brokers/dealers or investment advisers and their agents and representatives
- Real estate agents, repossession agencies, direct-sales persons, commercial fishermen

REAL ESTATE AT AUCTION

The auctioneer will sell by Public Auction, on
Saturday, Nov. 22, '13

Independent Contractor (AB 5)
Legislation: An Update

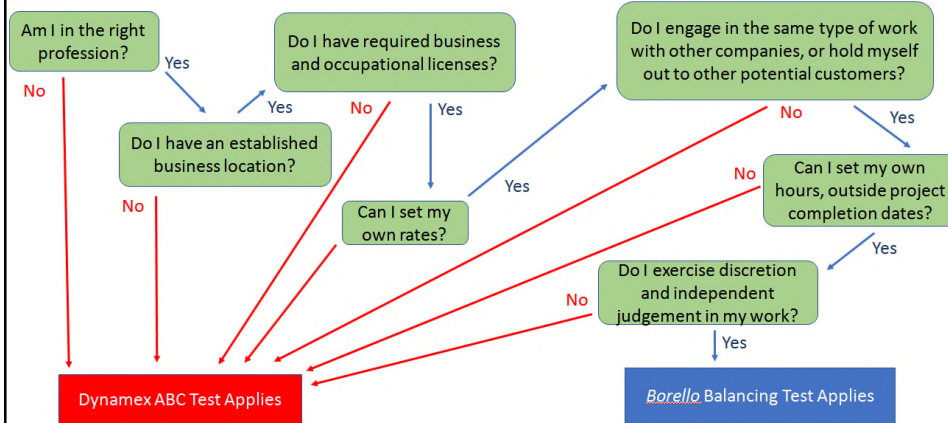
Professional Carve outs

- Marketing
- Human resources
- Travel agent
- Tax professional
- Graphic designer or artist, Fine artist
- Freelance writer
- Barber or Cosmetologist, Manicurist, Esthetician, Electrologist
- Payment processing agent.

* Free lance writer cannot publish more than 35 pieces in a year.

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Legislation: An Update

Professional Carve outs - qualifications



Independent Contractor (AB 5)
Legislation: An Update

Construction Industry Carve outs

- Agreements must be in writing
- Subcontractor must be "customarily engaged in an independently established trade"
- Licensed by the Contractors State License Board.
- Maintain a business location (separate from the hiring entity)
- Free to hire and fire its own workers
- Assume financial responsibility for mistakes in written warranties or indemnity agreements, or as evidenced by insurance or bonds
- Special restrictions apply trucking services



**Independent Contractor (AB 5)
Legislation: An Update**

Business to Business Carve out

- Work must be performed by another business entity (corporation, LLC, etc.)
- Customarily engaged in an independently established trade
- Have all required licenses and business tax registration
- Maintain a business location, separate from the hiring entity
- Contracts must be in writing
- Free from control and direction of “customer”
- Negotiate rates
- Set own hours., consistent with the nature of the work
- Use own tools, vehicles, and equipment
- Advertise and market its services (show initiative for growth, expansion, etc.)
- Maintain other clients, without restrictions.

***Services must be provided directly to
the contracting company, as opposed
to its customers***

Business to Business Danger

- (e) Subdivision (a) and the holding in *Dynamex* do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions:
- (1) If a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation (“business services provider”), the determination of employee or independent contractor status of the business services provider shall be governed by the following conditions, all of which must be satisfied:
- (A) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the services.
- (B) **The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.**
- (C) The contract with the business service provider is in writing.
- (D) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has such license or registration.
- (E) The business service provider maintains a business location that is separate from the business or work location of the contracting business.
- (F) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.
- (G) The business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restriction.
- (H) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.
- (I) The business service provider provides its own tools, vehicles, and equipment to perform the services.
- (J) The business service provider can negotiate its own rates.
- (K) Consistent with the nature of the work, the business service provider can set its own hours and location of work.
- (L) The business service provider is not performing the type of work for which a license from the Contractor’s State License Board is required, pursuant to the Business and Professions Code.
- (2) This subdivision does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.

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People Impacted by AB 5

- Jan 2020 ruled AB 5 does not apply to independent truckers because they are covered by federal law.
- Judge's restraining order for truckers seeking a preliminary or permanent injunction
- Ride-hailing and delivery services — Like Uber, Lyft, DoorDash and Postmates
- Truck drivers including Amazon delivery trucks; some tow truck companies
- Janitors and housekeepers — Commercial cleaning services
- Health aides — Nursing homes, assisted living facilities

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Legislation: An Update

People Impacted by AB 5

- Freelance writers — Newspapers, websites and other media (up to 35 articles/yr)
- Freelance photographers (35/yr)
- Newspaper carriers — (carve out expires 1/2021)
- Unlicensed manicurists — Licensed manicurists (carve out expires 1/2022)
- Land surveyors, landscape architects, geologists
- Campaign workers
- Language interpreters
- Strippers
- Cartoonists

**Independent Contractor (AB 5)
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People Impacted by AB 5

- Free lance court reporters — at a time when there is a severe shortage
- Free lance captioners — those people that help the deaf and hard of hearing
- Free lance sign language interpreters
- Free lance language interpreters and translators

**Independent Contractor (AB 5)
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Who got exemptions

- Doctors (Physicians, Surgeons, Dentists, Podiatrists, Veterinarians, Psychologists)
- Lawyers, Architects, Engineers.
- Insurance Brokers, Accountants, Securities Broker/Dealers, Investment Advisors.
- Real Estate Agents
- Some direct sales
- Commercial fishermen (Exempt until 2023)
- Builders & contractors (firms that build major projects/ and big buildings
- Marketing, Human Resources Administrator, Travel Agents, Graphic Designers, Grant Writers, Fine Artists
- Freelance Writers, Photographers (35 max submissions/yr)
- Hair Stylists, Barbers (as long as licensed barber/cosmetologist)
- Licensed Estheticians, Electrologists, Manicurists (see loss of exemption for manicurists)
- Tutors (provided they teach their own curriculum)
- AAA-affiliated tow truck drivers

California independent safety professionals (2019 [2 of 40])

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Independent Contractor (AB 5)
Legislation: An Update

California independent safety professionals

1150 %

Independent Contractor (AB 5)
Legislation: An Update

Independence – Freelance – Side Hustle



Independent Contractor (AB 5)
Legislation: An Update

Side hustle



Arlington Mills Band
Grandfather, John Wante, French Horn

Side hustle



Grandfather, John Wante

Independent Contractor (AB 5)
Legislation: An Update

Agenda

It's Not Just California with an Employee-Friendly Worker Misclassification Test: Massachusetts was an Early Adopter

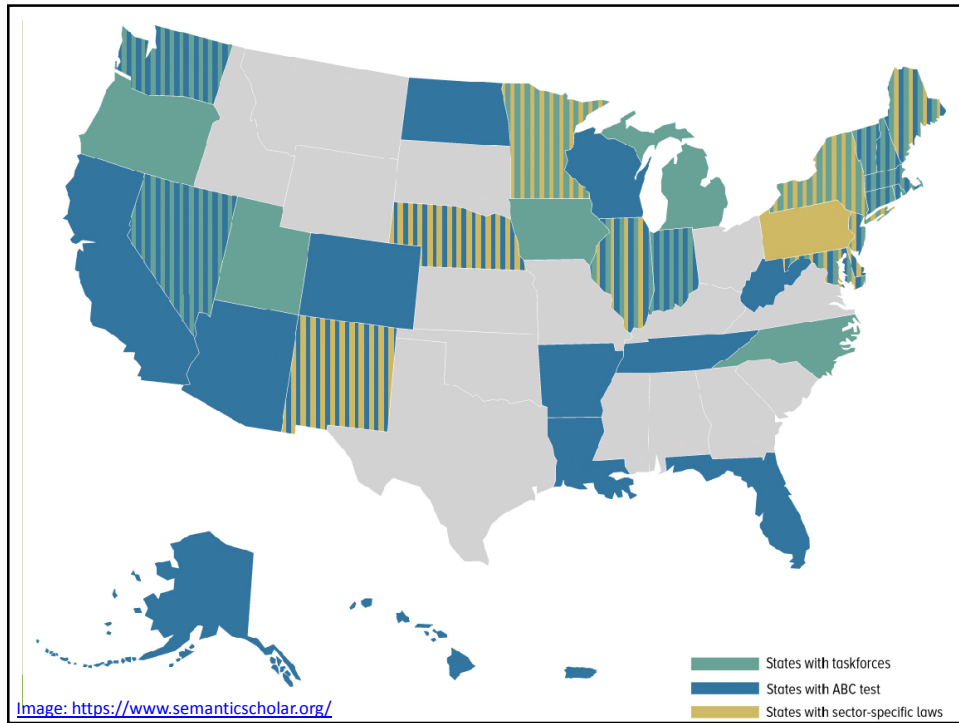
- 33 States use form of ABC
 - 8 states use A & C
 - Others have modified B
- 17 Common Law

Independent Contractor (AB 5)
Legislation: An Update

National Initiatives




**NATIONAL
EMPLOYMENT
LAW
PROJECT**



THE EPOCH TIMES

US POLITICS CHINA WORLD OPINION BUSINESS TECH SCIENCE WELLNESS FOOD ARTS ENTERTAINMENT

“The law essentially prohibits work on a freelance basis, with some exceptions.”



Retail space for lease in a strip mall in Fontana, Calif., on Oct. 8, 2009. (David McNew/Getty Images)


SOUTHERN CALIFORNIA

California’s Small-Business Owners Struggle With Contractor Law

BY BRAD JONES | January 14, 2020 Updated: January 14, 2020 A A Text size Print

https://www.theepochtimes.com/small-business-owners-struggle-with-californias-contractor-law_3203652.html

Steve Thompson is one of California’s many small-business owners struggling with a state law restricting freelance work that went into effect on Jan. 1.



Nearly 800 occupations are impacted by AB 5

https://twitter.com/hashtag/AB5stories?src=hashtag_click

<https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/82290-california-creatives-rally-to-repeal-ab5-legislation.html>

California Creatives Rally to Repeal AB5 Legislation

By Jason Boog | Jan 29, 2020

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Photo: Amanda Fortini

The crowd at the repeal AB5 rally in Sacramento.

Around 300 writers, translators, musicians, dancers, and other California creatives gathered on the steps of the California State Capitol in Sacramento Tuesday morning calling for the state legislature to repeal the California Assembly Bill 5 (AB5) that took effect January 1, 2020.

Independent Contractor (AB 5)
Legislation: An Update

Resources



- **AB-5 Worker status: employees and independent contractors:**
https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5
- **California Unemployment Insurance Code 621:**
<https://law.justia.com/codes/california/2007/uic/621-622.html>
- **California Unemployment Insurance Code 606.5:**
https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=UIC§ionNum=606.5
- **California Labor Code Section 2750.3 is added, to read:**
https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200AB5
- **California Labor Code Section 3351:**
https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB§ionNum=3351

Independent Contractor (AB 5)
Legislation: An Update

Resources



- **NFIB List of Carve Outs:** <https://www.nfib.com/content/legal-compliance/labor/understanding-ab-5-californias-new-independent-contracting-rules/>





Agenda/Topics

- Introduction
- Dynamex decision
- Origins and overview of AB 5
- Carve outs
- People negatively impacted
- On the horizon and Q&A



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**Presentation will be available
on SD ASSP site after today**

February 11, 2020