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California Senate Passes AB 5 Employee Status Bill

The California Senate passed a landmark bill, Assembly Bill 5 ("AB 5"), on the evening of September 10, 2019, which is designed to change the test for classification of workers as independent contractors as opposed to employees. 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 test for employee status articulated by the California Supreme Court in 2018 in the *Dynamex v. Superior Court* case. In *Dynamex*, the Court held that in order to establish that a worker is an independent contractor and not an employee, an employer must show that (i) the worker is free from control and direction of the hirer in connection with performing the work, both under contract and in fact; (ii) the worker performs work outside the usual course of the hiring entity's business; and (iii) 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 this the default test for *all* Labor Code, Unemployment Insurance Code and Wage Order claims. As a result, the test will apply to a host of additional claims, such as claims for failure to reimburse necessary business expenses and failure to provide accurate wage statements. Consequently, the bill affects businesses in industries across the board.

AB 5 also broadens the potential *liability* to businesses that are found to have misclassified workers as 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

However, AB 5 contains numerous statutory exemptions. For instance, the bill contains a "business-to-business" exemption from the 3 part 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 exemptions.

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

Other occupations which may be exempted 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 until 2021.

As currently drafted, the language of the bill would require employers to treat "gig economy" workers, such as drivers for Uber, Lyft, and other ride hailing companies, as employees. The bill would also apply to other types of temp and/project based workers, such as software programmers and delivery drivers (like Door Dash), and could apply to companies such as Airbnb and Etsy.

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, we expect that the law will be subject to numerous legal challenges.

If you have any questions about classification of workers, or whether your business falls into an exempted category, please do not hesitate to contact us.

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