
EMPLOYMENT ALERT

NEW LAW EXEMPTS ADDITIONAL WORKERS FROM AB 5

Last year Gov. Newsom signed into law Assembly Bill 5, enacted as California Labor Code § 2750.3. The law decreed that California considers workers to be “employees” of a hiring entity unless the worker is: (A) free from the control and direction of the hiring entity in the performance of the work; (B) performing work outside of the course of the hiring entity’s usual business; and (C) independently and customarily engaged in the same line of work being performed. This is commonly referred to as the “*Dynamex*” test after the legal opinion that first set it forth. The law created exceptions for workers in the music/recording industry; insurance industry; healthcare industry; legal field; architectural field; engineering; accountancy; private investigations; investment advising; direct sales; sales of manufactured homes; and fishing industries. Gig workers, truck drivers, and independent small business owners, among others, criticized the new law. Musicians in particular claimed that the law was unworkable in their industry.

On the last day of the 2020 session, the California Legislature passed AB 2257, which its author described as a “clean up” bill to AB5. The bill maintained the “*Dynamex*” test but states that it does not apply to the following:

(1) “business-to-business” contracts where the business service provider is free from the control and direction of the contracting business; service is provided directly to the contracting business, not the customers of the contracting business; the contract is in writing and specifies payment terms and work due dates; the service provider is licensed as required and maintains a separate business address; the service provider customarily engages in the business, has or can have other customers, provides its own tools and equipment, and sets its own rates, hours, and location of work.

(2) Business relationships between service providers and referral agencies, provided that the referral agency does not control the service provider, and with the same caveats that otherwise apply to “business-to-business” contracts.

(3) Individuals engaged in the following “professional services”:

(a) Marketing or advertising workers who maintain a separate business address (which can also be a residence address), have a license as required, have the ability to set their own rates and hours, are customarily engaged in the same type of work performed under the contract, have the ability to do the same work for other customers, and regularly exercise discretion and independent judgment.

(b) Human resource administrators, provided that the contracting party does not control the service provider, and with the same caveats that apply to marketing workers.

(c) Travel agents (subject to the same caveats).

(d) Graphic designers (subject to the same caveats).

(e) Grant Writers (subject to the same caveats).

(f) Fine artists (subject to the same caveats).

(g) Enrolled agents licensed to practice before the IRS (subject to the same caveats).

- (h) Payment processing agents who work for independent companies.
 - (i) Photographers/photojournalists/videographers/photo editors/digital content aggregators (subject to the same caveats).
 - (j) Freelance writers, translators, editors, illustrators, and cartoonists (subject to the same caveats).
 - (k) Licensed estheticians, electrologists, manicurists, barbers, and cosmetologists (subject to the same caveats).
 - (l) “Master class” teachers (subject to the same caveats).
 - (m) Appraisers who are governed by the Business and Professions Code.
 - (n) Professional foresters licensed under the Public Resources Code.
- (4) Individuals engaged in the following professions, which are governed by the Business and Professions Code:
- (a) Real estate licensees.
 - (b) Home inspectors.
 - (c) Repossession agencies.
- (5) Individuals who contract as sole proprietorships, corporations, or limited liability companies, where such individuals are self-controlled, have their own business location, provide their own tools or equipment, work pursuant to a written contract, are licensed as necessary, customarily engage in the same type of work, and retain the ability to service other clients.
- (6) Musical individuals or groups engaged in live performances.
- (7) Individuals performing their own creative works, who are free from the control of the hiring entity.
- (8) Individuals employed in the following occupations in connection with music, other than film/production crews and employed publicists:
- (a) Recording artists.
 - (b) Songwriters, lyricists, composers and proofers.
 - (c) Managers of recording artists.
 - (d) Record producers and directors.
 - (e) Musical engineers and mixers.
 - (f) Musicians engaged in creating sound recordings.
 - (g) Vocalists.
 - (h) Photographers working on recording photo shoots, album covers, and other publicity.
 - (i) Independent radio promoters.
 - (j) Other individuals independently engaged to promote musical compositions or sound recordings.

Note: Musicians and vocalists who are not paid royalties are treated as employees with regard to minimum wage and overtime laws.

(9) Construction contractors and subcontractors who are self-controlled (including construction trucking subcontractors).

(10) Data aggregators who are self-controlled and whose compensation under the hiring contract exceeds the minimum wage.

(11) Individuals employed in the following occupations:

(a) Underwriters, auditors, risk managers, and loss control workers in the insurance and financial services industries.

(b) Physicians, surgeons, dentists, podiatrists, psychologists, and veterinarians.

(c) Lawyers, architects, landscape architects, engineers, private investigators, and accountants.

(d) Securities broker/dealers and investment advisors.

(e) Direct sales persons (as defined at Unemployment Code § 650).

(f) Manufactured housing salespersons.

(g) Commercial fishers working on American vessels.

(h) Newspaper distributors and carriers working under contract.

(i) Individuals engaged by an international exchange visitor program.

(j) Competition judges with specialized skills who exercise discretion and independent judgment (including amateur umpires and referees).

(12) Individuals who contract with motor clubs to provide services to motor club customers, provided that the individual has a separate and independent business.

For any and all such workers, the determination of whether the worker is an employee or an independent contractor is determined by reference to existing law. The bill does not create exceptions for gig workers and/or rideshare company drivers.

Gov. Newsom is expected to sign the measure. If you have any questions concerning the status or classification of any individuals or entities that provide services to you and/or your company, we would encourage to consult with one of our employment law attorneys.

If you have any questions about the new employment laws, please do not hesitate to contact us.



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