

## **AB 2257 Enacts Significant Changes to AB 5 on Classification of Workers as Independent Contractors**

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California's statute governing the classification of independent contractors, enacted under Assembly Bill (AB) 5, underwent a significant renovation on September 4, 2020, when Governor Gavin Newsom signed [AB 2257](#). The emergency measure, which takes effect immediately, contains several new exemptions and revises existing law related to exemptions for business-to-business relationships, referral agencies, professional services, and performance artists, among others.

### **AB 5 Expanded and Contracted Application of Stringent ABC Test**

In September 2019, Governor Newsom signed [AB 5](#), which codified the ABC test as the legal test in California for determining whether a worker is properly classified as an independent contractor rather than an employee.

Under the three-factor ABC test, California courts determine whether a worker is an employee or an independent contractor by considering whether: (A) “[t]he worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract ... and in fact”; (B) “[t]he worker performs work that is outside the usual course of the hiring entity’s business”; and (C) “[t]he worker is customarily engaged in an independently established trade, occupation, or business of the same nature” as the work performed for the hiring entity. If a company is unable to demonstrate any of these three factors, then the worker is an employee, subject to a list of exceptions.

The ABC test first became California’s test for independent contractors the year before AB 5 was enacted. In 2018, the Supreme Court of California [replaced](#) the multi-factor *Borello* test, which had been in effect since 1989, with Massachusetts’s ABC test. As we previously [discussed](#), AB 5 both expanded and contracted the reach of the ABC test. On the one hand, AB 5 expanded its reach by applying the ABC test to all California Labor Code, Unemployment Insurance Code, and wage order claims. On the other hand, AB 5 significantly reduced the number of California workers subject to the ABC test by exempting a long list of occupations and types of service providers.

The older *Borello* test continues to apply to these exempted workers—and that test focuses principally

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on the first prong of the ABC test: whether a company has the “right to control” workers when determining if they are independent contractors or employees.

## **AB 2257 Exempts More California Workers From the ABC Test**

AB 5, which represented a sea change in California law, faced concerted pushback from many industries and professions, including the publishing and entertainment industries, [trucking industry](#), and companies that are part of the gig economy, whose workers were traditionally classified as independent contractors in California.

California Assemblywoman Lorena Gonzalez, who authored both AB 5 and AB 2257, acknowledged that the 2019 legislation significantly impacted California’s “freelance writers, photographers, videographers, journalists, individual musicians, the recording industry, and unions representing musicians and artists.” In response, AB 2257 introduced amendments to exempt these creative workers, including “writers, photographers, videographers, photo editors, and illustrators,” acknowledging the “existing flexibility California has allowed in the music industry while protecting the right for musicians to have basic employment protections just like every other worker.”

In all, there are now 109 categories of workers exempted from the ABC test in California under AB 2257. Notably absent from the new exemptions are the California trucking industry, the gig economy companies, and the motion picture and television industries, among others, despite significant lobbying efforts.

## **Amendments to AB 5 Clarify Existing Exemptions**

Although AB 5 is still fundamentally unchanged and the ABC test still applies in many circumstances when determining whether a California worker is an employee or an independent contractor, AB 2257 recasts and clarifies the business-to-business, referral agency, and professional services exemptions to the three-part ABC test for employment status and exempts additional occupations and business relationships. Some of the major developments are outlined below.

### ***The Business-to-Business Exemption***

AB 5 provided an exemption for California businesses contracting with other businesses, which is one of the narrowest in the statute and has 12 conditions to apply. AB 2257 clarifies the exemption by specifying the terms required in a written contract, providing that a business service provider’s residence is a permissible place of business, and limiting the type of work materials that must be provided by the business service provider. AB 2257 also extends the business-to-business exemption to include a “public agency or quasi-public corporation” that has retained an independent contractor.

### ***“Single-Engagement” Business-to-Business Exemption***

AB 2257 creates a “single-engagement” exemption from the ABC test for “a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week.” Under the bill, certain requirements must be satisfied for the new exemption to apply, including “control and direction” over the work (both by contract and in fact), mutual freedom to negotiate rate of pay, and a written contract that specifies the pay rate and the tools and materials to be provided by the worker. Both the hiring and performing entities must maintain separate business locations (which may include a personal address).

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## ***The Entertainment/Music Industry Exemptions***

AB 2257 creates several new entertainment industry exemptions from the ABC test, largely focused on the California music industry. Some positions are generally exempt from the ABC test, including, but not limited to: (1) recording artists; (2) songwriters, lyricists, composers, and proofers; (3) managers of recording artists; (4) record producers and directors; (5) musical engineers, mixers, and musicians engaged in the creation of sound recordings; (6) vocalists; and (7) independent radio promoters.

Where musicians or performers are engaged in a one-time live performance, they are generally exempt from application of the ABC test with certain exceptions: (1) “[t]he musical group is performing as a symphony orchestra”; (2) “the musical group is performing at a theme park or amusement park”; (3) “the musician is performing in a musical theater production”; (4) “[t]he musical group is an event headliner for a performance taking place in a venue location with more than 1,500 attendees”; or (5) “[t]he musical group is performing at a festival that sells more than 18,000 tickets per day.” These exceptions are “inclusive of rehearsals related to the single-engagement live performance event.”

## ***The Referral Agency Exemption***

AB 5 created an exemption for businesses referring customers to providers in certain services. AB 2257 clarifies how a service provider certifies proper licensure, the freedom of a service provider to maintain its own clientele, and the ability of a service provider to set or negotiate its terms with clients as well as establishing its rates without deduction by a referral agency. For example, AB 2257:

- expands the type of qualifying services for the exemption, including but not limited to “graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, ... yard cleanup, and interpreting services”;
- excludes services provided in an industry designated by the California Division of Occupational Safety and Health (Cal/OSHA) as a high hazard industry, or for referrals for businesses that provide, among other things, janitorial, delivery, transportation, trucking, and in-home care services; and
- defines “client” as “(A) [a] person who utilizes a referral agency to contract for services from a service provider, or (B) [a] business that utilizes a referral agency to contract for services from a service provider that are otherwise not provided on a regular basis by employees at the client’s business location, or to contract for services that are outside of the client’s usual course of business.”

## ***The Professional Services Exemption***

- AB 5 exempted a number of professionals from application of the ABC test, including lawyers, doctors, securities broker-dealers, and certain commercial fishermen.
- AB 2257 adds a category of professional services to be exempted that are related to an individual’s work as a content contributor, advisor, producer, narrator, or cartographer for specified publications.
- However, “[m]usicians and vocalists who are not royalty-based participants in the work created during any specific engagement shall be treated as employees solely for purposes of receiving minimum and overtime wages for hours worked during the engagement.”
- Additionally, AB 2257 clarifies the business licensing and tax registration requirements.

- AB 2257 exempts “licensed landscape architects, specialized performers teaching master classes, registered professional foresters, real estate appraisers and home inspectors, and feedback aggregators.”
- AB 2257 also adds the occupations of translator and copy editor to the freelancer exemption.

### ***Other Exemptions and Clarifications***

AB 2257 provides numerous other exemptions and clarifications, including but not limited to:

- persons who provide “underwriting inspections, premium audits, risk management, or loss control work for the insurance and financial services industries”;
- home inspectors, a category added to the exemption for specified occupations governed by the Business and Professions Code;
- individual performance artists, manufactured housing salespersons, competition judges, and individuals engaged in international exchange visitor programs; and
- data aggregators and the individuals providing feedback to the data aggregators, subject to specified conditions.

The new law also makes clear that the provisions included are severable.

### **Key Takeaways**

AB 2257 presents real progress in clarifying and amending AB 5. Companies may want to carefully evaluate the applicability of the new provisions to their businesses and business relationships. Although the ABC test may not apply as broadly as it originally did under AB 5, employers may want to keep in mind that the *Borello* test is still controlling in its stead.

Looking forward, additional changes may be on the horizon. Currently, there are lawsuits, legislation, and ballot initiatives pending that may further impact the application of AB 5 moving forward. For example, Proposition 22, titled “App-Based Drivers as Contractors and Labor Policies Initiative,” would classify drivers for app-based transportation (rideshare) and delivery companies as independent contractors—and not employees—unless the company sets the drivers’ hours, requires acceptance of ride and delivery requests, or restricts drivers from working for other companies.

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