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Will George Babbitt Catch A Break From Dynamex?

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In April, I wrote about [AB 5](#) that is currently pending in the California legislature. The bill would codify the California Supreme Court's adoption a three-factor test, known as the "ABC" test, for determining when a worker is an employee. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal.5th 903 (2018). Under this test, workers are *presumed* to be employees for purposes of the California wage orders under the Industrial Welfare Commission unless the hiring entity establishes each of the following:

- (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

AB 5 would extend the ABC test to all provisions of the California Labor Code, unless another definition of "employee" is provided. The bill was amended in March to exclude licensed securities broker-dealers and investment advisers. However, the statutory language with respect to these financial professionals is somewhat problematical.

More recently, the bill has been amended to exclude California licensed real estate brokers. Their employment relationships would be governed Business and Professions Code Section 10032(b). If that section is not applicable then classification will be governed as follows: (1) for purposes of unemployment insurance by Unemployment Insurance Code Section 650; (2) for purposes of workers compensation by Section 3200 *et seq.*; and (3) for all other purposes in the Labor Code by the test adopted by the California Supreme Court in *S.G. Borello and Sons, Inc.* Under AB 5, the statutorily imposed duties of a responsible broker under Business and Professions Code Section 10015.1 are not factors under the *S. G. Borello* test.

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