

AB2257: Not Much Better Than AB5 for Most Industries in California Using Independent Contractors

Labor & Employment Workforce Watch

WRITTEN BY

Richard Reibstein | Janet Barsky

Many independent contractors complained of dire consequences when Assembly Bill 5 (“AB5”) became effective in California on January 1, 2020. Following intense lobbying and public relations campaigns, independent contractors in 15 industries have been added to AB5’s list of freelancers eligible for exemption from California’s version of the so-called “ABC” test for determining independent contractor status. California Governor Gavin Newsom signed the new version of AB5 into law on September 4, 2020. However, except for those fortunate industries and service providers now eligible for exemption from the ABC test, the new law, Assembly Bill 2257 (“AB2257”), only tweaks AB5 and essentially is unchanged in any meaningful way for the overwhelming number of companies and freelancers doing business in California. But as noted below, there are strategies companies can use to comply with AB2257.

When AB5 became effective, it dramatically expanded the application of the 2018 Dynamex decision by the California Supreme Court. Dynamex had changed settled law in California based on a test pronounced by that same court nearly 30 years earlier which considered all factors relevant to the classification of workers as either independent contractors or employees. In contrast, AB5 considers only three factors, and all three must be met to establish independent contractor status.

AB2257 Adds Exemptions and Clarifies Others

In addition to the 50 or so industries exempted under AB5 (a list of which can be found [here](#)), AB2257 now exempts from the ABC test a group of freelance positions from another 15 industries, including independent contractors providing the following types of services:

- recording artists
- music
- performing arts
- landscape architecture
- translation of documents
- copy editing and illustrations
- registered professional forestry
- real estate appraising
- home inspections
- insurance underwriting inspections, auditing, and risk management and loss control
- manufactured housing sales
- international and cultural exchange services
- competition judging
- digital content and feedback aggregation
- teaching of master classes by specialized performers for limited periods of time.

AB2257 does not exempt many independent contractors who provide services similar to the types of freelancers that AB2257 specifically carves out from the strict ABC test. For example, while licensed psychologists are

exempted as professionals, other licensed professionals who provide mental health therapy (such as licensed marriage and family therapists, social workers, professional clinical counselors, and educational psychologists) were not excluded. Nor were physical therapists, occupational therapists, or speech pathologists. Similarly, there is no rhyme or reason why independent contractors in 65 specific industries are eligible for an exemption, yet contractors engaged in providing services in hundreds of other industries are not.

Operating in California with independent contractors after AB2257

An exemption from AB2257 is not a “get-out-of-jail-free” card; those businesses carved out from the Dynamex ABC test still must comply with the multi-factor Borello test. Also, businesses in industries that obtained a carve-out will be governed by the ABC test (and not Borello) if they are unable to satisfy any of the up to a dozen specific requirements for exempt status. Those businesses covered by Borello need to structure, document, and implement their independent contractor relationships consistent with the multi-factor test, which is similar in many ways to most of the tests for independent contractor status under federal and state laws.

For some companies governed by the ABC test, establishing all three prongs of the ABC test may be untenable. But the ABC test may well be interpreted by California courts in a manner that legally permits a number of companies to continue to use independent contractors. In that regard, few courts have issued decisions applying Dynamex, and the Supreme Court of California has not yet applied any of the three prongs in any case. Therefore, while it will now undoubtedly be more challenging to structure, document, and implement an independent contractor relationship for a business governed by the ABC test in California, it still can be accomplished by certain types of businesses.

Many companies seeking to enhance compliance with a multi-factor test and the ABC test have resorted to an enhancement process such as IC Diagnostics™, which elevates a company’s level of compliance with applicable state and federal laws by restructuring, re-documenting, and re-implementing IC relationships. This compliance approach can be accomplished in a customized and sustainable manner without changing a company’s business model.

A process such as IC Diagnostics™ also can be utilized in an effort to meet the specific requirements under AB2257 for selected professional service providers, business-to-business contracting, and referral agencies. In addition, this process can be used to suggest changes to an existing business model that falls outside the parameters of AB2257.

Additionally, companies operating in California and elsewhere with independent contractors should consider enhancing and updating their arbitration clauses with class and collective action waivers. In doing so, they can most effectively limit class and collective action lawsuits with respect to independent contractor classification issues.

AB 2257 presents California companies with another opportunity to review their existing independent contractor relationships, and consider what additional measures are available to further protect themselves from potential claims of misclassification.

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