

# **AB5: A PRACTICAL GUIDE FOR PUBLIC ADMINISTRATORS**

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## EXECUTIVE SUMMARY

Assembly Bill 5 (AB5) is California’s latest workplace legislation on the classification of workers as either employees or independent contractors. Public agencies should evaluate potential AB 5 impacts on both operations and public policy.

Misclassifying employees as independent contractors is common and carries potentially serious consequences for employers. AB 5 has greatly restricted an employers’ ability to designate workers as independent contractors. Although AB 5’s impact on public employers appears limited, AB 5 does apply to public agencies, and there are a range of potential consequences as this law unfolds. For an overview of AB 5, see [Appendix A](#).

Public employers should promptly conduct the analysis described below to determine whether workers are correctly classified as employees or independent contractors for purposes of applicable provisions of the Labor Code, the Unemployment Insurance Code, and any wage orders.

These issues often are complex, and agencies should work closely with their legal counsel in making these assessments.

## INTRODUCTION TO AB5

The challenge of differentiating between an employee and an independent contractor is not new, nor are the public policy implications. Historically, employees have certain legal rights, benefits, and protections—and because they work under the control of their employer, they have certain restrictions on how they can interact with the economic marketplace. Independent contractors operate (theoretically) as stand-alone businesses without the restrictions in their relationships to other businesses and the marketplace, but as a trade-off, they do not always have the same kinds of protections and benefits.

In practice, there is a lot of confusion between these two sources of “work”. Typically, conflict occurs when the “contract worker” finds him/herself without the tools or freedom to pursue a truly independent business and without the protections of employment. Much litigation and debate have ensued from this conflict! The “common law” tests developed in the past to try to identify who is an employee and who is not have focused on multiple factors, including control of work methods (not just what is accomplished, but how and where and using what tools) and control of economic factors (who sets the price of work, is a single source providing all the income, etc.?) These tests are very situationally specific and yield very few “bright line” indicators.

AB 5 contributes a new starting point for the discussion by shifting the foundational worker relationship assumption to employment for both public and private employers. FAQ’s from the

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CA Department of Labor Standards Enforcement (DLSE) note: “Labor Code section 2750.3 starts with an assumption that all workers are employees and provides the ABC test that a hiring entity would have to satisfy to prove that the workers are independent contractors.” Just like that, everyone who does work for you is your employee, unless you can prove they are not—or unless the relationship is exempt from the ABC test, in which case common law standards (generally known in CA as “Borello” standards) are applied to determine if the worker is an employee or independent contractor.

For businesses, the financial impacts of this new assumption are far-reaching. AB5 addresses the employment rights and benefits addressed in Labor Code and Unemployment Insurance Code sections (i.e., state wage and hour law, workers’ compensation, UI, SDI, mandatory paid sick leave, etc.)—potentially an expensive benefits package for employers to provide.

Public agencies are exempt from many requirements of state wage and hour laws, wage order provisions, and State Disability Insurance; and nothing in AB5 revokes these exemptions. So, for public employers, the impacts of AB5 may seem less important. Nevertheless, AB5’s foundational assumption of employment status still applies to public agencies; and all the labor code, worker’s compensation and unemployment code sections which are applicable to public agencies are in effect now or will be as of July 1. In addition, there is a practical and very challenging question in front of us: What does it mean if your independent contractors are “employees” for some purposes, but not for others?

Although different legal standards of employment vs. independent contractor still apply relative to many facets of an employment relationship (such as pension system enrollment, protected class anti-discrimination protections, family medical leave rights, labor relations rights, federal wage and hour and health care requirements, and tax-sheltering of benefits—to name a few!), it is hard to imagine how the evaluations of “common law” employment factors associated with these benefits can fail to take the implications of the ABC test into account when considering other aspects of employment.

Benefits administration is impacted also. The typical package of “employee benefits” includes a range of rights, eligibility and income tax treatments premised on different standards. Public employers who consider former independent contractors to now be employees and attempt to simply provide benefits only as required by the ABC test will encounter difficulties in both explaining to workers, and correctly administering the bewildering array of benefit packages which might result. To add to this challenge, eligibility for other benefits may not be met by the worker; and wrongly providing benefits create additional issues.

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## CHALLENGES OF THE ABC TEST

Although AB5's shift in employment relationship assumptions is clear, the ABC test provided to prove that a worker is NOT an employee and is instead an independent contractor is not quite so clear. ABC requires that an agency must demonstrate ALL of the factors below to establish that a worker is not an employee:

- a. The person is free from the control and direction of the agency in connection with the performance of the work, both under the language of the contract for the performance of the work *and in fact*;
- b. The person performs work that is outside the usual course of the agency's business;
- c. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed;

Factor A seems straightforward, and in many ways can and should be managed through proper behavior of both parties involved; however, it is often not the case that agencies spend much time on defining how to engage with contractors. Some common misunderstandings about contractors which RGS Advisors have encountered include:

- MISUNDERSTANDING: The existence of a contract between the agency and the worker is sufficient to make the worker an independent contractor.
  - FACT: Even the most precisely written contract does not make a worker a contractor if you treat the worker like an employee.
- MISUNDERSTANDING: It's important for the contractor to participate in our pre-employment screening procedures in order to allow the worker into our facilities and data systems.
  - FACT: For the most part, these requirements are a risk management strategy, and you should not confuse your employment risk management strategies with strategies for passing the appropriate risk to others. Best practices require that independent contracting businesses demonstrate appropriate risk management in their employment practices as a condition of contracting.
- MISUNDERSTANDING: It would be rude not to invite our contractors to the holiday party.
  - FACT: True contractors know that they are not your employees, and don't expect (or even want) to be invited. This is a mixed message that muddies everyone's understanding. If the party is for employees, why would you invite non-employees? If the party is for anyone, then why do the invitations say, "Employee Holiday Party"?

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- MISUNDERSTANDING: My project is very complicated, and I need to meet weekly with the contractor to be sure that all the right factors are being considered.
  - FACT: While project checkpoints are appropriate, the entire purpose of contracting is to remove this work from your span of control and make it someone else’s problem. You must relinquish control over the details of the project. Hold the contractor accountable to achieve the agreed-upon outcome, and don’t try to control how it is done.

Even in the best-managed contracting relationships, ambiguities occur. If a consultant’s report contains six possible action options, and the agency executive asks for this to be reduced to three for the purposes of manageable decision-making, is this an exercise of control? If the consultant revises the report, has he/she accepted control by the agency, or simply provided good customer service? If a contractor needs to research an agency’s files (public records), should he/she be given free access to the file room, or be required to request specific files to be provided by a staff member?

Factor B is potentially problematic when considering the incredible breadth of activities usually engaged in by municipal entities, counties, and some special districts. How does a public agency effectively define what is within/outside of the “usual course of business” in order to ensure that this factor is demonstrated appropriately? Agencies have long contracted a range of services, both administrative and operational, as the priorities and resources of the agency evolve; and in fact, there is a very common cycle of insource/outsource that many agencies experience with such functions as human resources, occupational safety, training, and more. The use of employees or contractors to achieve outcomes has been done at the discretion of their local governance bodies subject only to some specific legal limits and the necessity to confer with labor. In a recent conference presentation on this new law, attendees were sensibly pointed to enabling legislation as a place to start defining the core business of an agency. However, the presenter also noted that agencies who had historically chosen to accomplish non-core business functions via employment rather than contracting might have redefined such activities as core simply due to their performance by employees rather than contractors. This perspective is supported by some case law from other states; and contradicted by other court findings. There is no clear standard. The crux of the problem with the ABC test’s Factor B is that it assumes everyone knows and can define the business—and that the business never changes.

The “C” factor was initially described in *Dynamex*, the case that “launched” AB5, as requiring evidence that the worker has “take[n] the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like.” However, no clear standard is articulated in AB5 of what

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activity is “enough” to demonstrate the intent to establish a business. For example, if individuals do not incorporate and rely upon word-of-mouth advertising, have they taken the “usual steps to establish and promote” the business? And every new business has a first customer, but if the worker fails in his or her efforts to obtain other customers, does that put the first customer at risk of being the employer of the worker, regardless of intentions?

## EXEMPTIONS FROM THE ABC TEST

While AB5 makes employment the basic assumption of a work relationship, it also provides a number of exemptions from this assumption, with specific criteria for each exemption. Please note that if the ABC test does not apply, workers are still subject to the Borello common law test to evaluate whether or not they are employees or independent contractors—being exempt from the ABC test is not an automatic conclusion that the worker is an independent contractor.

Each of the exemptions listed includes specific criteria that must ALL be met in order for the relationship to be exempt from the ABC test. Overall, there are seven categories of exemptions, some of which are less likely to be relevant to most public agencies. You may read the full list in the text of the law [here](#). For your convenience, the specific professions which are exempt; and the criteria for professional services, and business service provider contract exemptions are provided in [Appendix B](#).

## IMPORTANT AGENCY ACTIONS TO MANAGE AB5 RISKS

- 1. Analyze all of your contractual relationships now – even if they fall into an AB5 exemption category, a check on common law elements is important.**

First, determine whether or not a contractual relationship is subject to the ABC test, or meets criteria for an exemption and is instead subject to the Borello common law test. (The Borello “test” considers a flexible set of criteria in [Appendix C](#) but does not absolutely require that any specific number or pattern of criteria be met.)

Second, if your contractor relationship is not exempt and is subject to the ABC test, begin with Factor B. Factor B represents an insurmountable obstacle if the work performed is TRULY within the usual course of your business. Both Factors C and A can be remediated (at least to some extent) through better practices and defined ways of engagement on both sides of the contractual relationship.

Questions to consider when evaluating Factor B:

- What is the purpose of this agency according to enabling legislation?

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- What “usual” business has been defined by the local governance body of this agency?
- Is only the outcome of the agency defined, or are the methods to accomplish the outcome also specified?

Given the analysis above, is the work of the contractor “outside” of this agency’s usual business?

- If yes, then your contractor is an independent contractor.
- If no, then your contractor is an employee for purposes of the employment rights and benefits addressed by AB5.
- If you are not sure, consult your legal counsel to discuss risks and mitigation approaches.

## Questions to consider when evaluating Factor A:

- Do I (the agency’s employee with contract oversight responsibility) have the RIGHT to control the manner and means of accomplishing the work, either contractually or in practice?
- If I don’t have the right to control, does my behavior demonstrate that I understand this, or do I try to exert control anyhow?
- Do the logistics of the working arrangements with the contractor (workspace, schedule, access to data and staff, frequency and manner of engagement, use of equipment and supplies, etc.) tend towards exercising control or not?
- Do I provide any degree of instruction or training beyond an orientation to my agency?
- Do I use an evaluation system to measure how the work is done or just evaluate the end result?

Given the analysis above, is the work of the contractor “free from control” of the agency?

- If yes, then your contractor is an independent contractor.
- If no, consider prompt mitigation action. If the language of the contract puts control in the contractor’s arena, and your agency has encroached on that right of control, stop the practices that attempt to exert control. Otherwise, your contractor is an employee for purposes of the employment rights and benefits addressed by AB5.
- If you are not sure, consult your legal counsel to discuss risks and mitigation approaches.

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## Questions to consider when evaluating Factor C:

Does your contractor:

- Have a written agreement with you?
- Have a business license and insurance?
- Negotiate service price by deliverable; or if the price is hourly, without regard to your salary schedule?
- Offer similar services to others?
- Actually have other customers?
- Use subcontractors or employees to accomplish work?
- Pay taxes on a business schedule?
- Have a work location other than your office?
- Come equipped to do the work?
- Pay his/her own expenses?

While not exhaustive or definitive, these questions are especially important if an agency has any contracts with individuals rather than businesses. While there are many sole proprietors who run appropriately-established small businesses, some individuals do not equip themselves with a business license, insurance, and other key elements of a business. In addition, individuals are often hired on the basis of former relationships with the agency or agency managers—without regard to whether or not they are sincerely offering services to others, and genuinely intending to build a business. If you don't know the answers to these questions, ask the contractor.

Given the analysis above, is the contractor “customarily engaged in an independently established business of the same nature as that involved in the work performed”?

- If yes, then your contractor is an independent contractor.
- If no, consider prompt mitigation action. If your contractor truly intends to run a business, ask the worker to obtain the proper license, insurance, equipment, etc. that is lacking to protect both parties. Otherwise, your contractor is an employee for purposes of the employment rights and benefits addressed by AB5.
- If you are not sure, consult your legal counsel to discuss risks and mitigation approaches.

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## 2. Evaluate and address any potential misclassifications of workers.

First, analyze what employment benefits or terms or conditions of employment the agency provides to employees under the Labor Code, Unemployment Insurance Code, or IWC wage orders that would be affected if this worker were found by a court to be an employee rather than an independent contractor. For each such benefit or term:

- Is there an existing definition of an employee that supersedes the AB 5 test?
- Is there an express exclusion for this type of agency or this type of employee under the statute or wage order provision in question?
- Is there otherwise relevant law or case authority to consider?

Reclassification should not take place until you understand what it is that you are going to do differently.

Second, if you are considering changing a worker's classification, make a plan for:

- What benefits and rights will actually be provided—and what will not! Review the eligibility criteria for benefits you intend to provide and consider the tax implications of providing benefits to “ineligibles”—tax mistakes impact both the agency and the worker personally.
- Communication to the affected worker(s) and other stakeholders about why this is occurring, how it will happen, and what will be different moving forward.

Before you act: consult your legal counsel. There are potentially significant legal and financial impacts connected to the classification and/or reclassification of your workers. It is essential to obtain proper legal advice on the implications of both past and future worker classification decisions.

## 3. Develop and formally adopt definitions and practices to clarify your agency's “usual course of business”.

The overall goal of this action is to increase a shared and reasonable understanding of what “usual” business is for your agency. There are no clear bodies of law that determine what is “outside the usual course” of a local government agency's “business.” The staff and governing body of an agency are the people most expert in what each agency's business is, and they should define and apply parameters for their practices of “usual” and “not usual” business. While such definitions may not ultimately be accepted as definitive in a legal proceeding, they provide a foundation for

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agencies to act appropriately and consistently; and to provide business justifications for their actions.

- Ensure clear and consistent language about what your agency’s business is throughout the entire organization, and in all publications and presentations.
- Consider adopting policy that explicitly allows for your agency to either employ or contract for “non-usual” activities, subject to law and any required engagement with labor groups. State clearly that having employed employees to perform work is not precedential or binding; nor is having used contractors. Give yourself permission to do what is best for the organization, based on the situational analysis. Specifics of such a policy should be guided by legal counsel. Each agency’s situation is likely to contain unique elements.
- Be familiar with and consistently apply the statutes, cases, and attorney general opinions that identify the “special services” for which local government agencies may contract. Foundational law includes Government Code sections [37103](#) and [53060](#).
  - Document your reasons for contracting for special services, including consideration of specific court-expressed criteria: “Whether services are special requires a consideration of factors such as the nature of the services, the qualifications of the person furnishing them and their availability from public sources.”

#### **4. Create a cycle of contract related action and centralize the management of “work” services contracting.**

Now more than ever, it is essential that services contracts be managed through a centralized process that guides both contract language and the service relationship. Expertise in the proper parameters of contracting is a primary qualification for this role, and past practices that relied on analysis driven by the value of the contract relative to a manager’s spending authority are obsolete. The agency should adopt a policy (sample in [Appendix D](#)) centralizing responsibility for contracting and follow defined documentation and relationship standards (see [Appendix E](#)) with regard to contracts for services.

- a. Contract language should be correct and fully reviewed
- b. Staff who interact with contractors should be educated on appropriate behavior
- c. Contract terms should be enforced
- d. Contractor working relationships should be monitored and adjusted if needed
- e. Contracts should be reviewed on a schedule, and revised to reflect changing conditions

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## 5. Understand short-term employment options and adopt policies to appropriately facilitate the methods of accomplishing work

Engaging an independent contractor may be the right solution for specific needs. In other cases, hiring employees for short-term assignments may be a better option than using IC's inappropriately. "On payroll" employment options for short-term work could include: extra-help appointments, properly hired retirees, use of temporary staffing agency personnel, and flexible classification and allocation of existing staff resources. Often, agencies lack both policy and hiring mechanisms that would allow them to quickly define short-term employment parameters and find and onboard qualified personnel. Agencies should consult with their HR management team to identify whether or not the agency's HR practices are able to quickly and effectively accommodate short-term assignment needs; and should work with HR staff to develop responsive systems.

### WHAT'S NEXT?

It is unlikely that this is the end of the discussion on the topic of worker classification. Already litigation has been filed alleging that AB5 is unconstitutional. Undoubtedly either more litigation or more legislation or both will follow as the implementation and enforcement of this law reveals the need for better definitions and user-friendly standards. Public agencies need to consider their role in this important public policy and join the dialog – it's our job as local government to create communities which are safe and sustainable for all members of the community—and so the rights and benefits of both employee and independent contractor workers are relevant issues to each agency. In considering both local practices and good public policies, agencies have a role in:

- Lobbying for clearer legislation;
- Creating better working conditions and economic access for all;
- Changing the paradigm about who should be responsible for worker wellbeing issues.

If you'd like to learn more, Littler Workplace Policy Institute has provided an excellent [AB5 analysis](#), which provides in-depth information on the history, challenges, implications and public policy alternatives associated with this new law.

# APPENDIX A – INTRODUCTION TO AB5

## INTRODUCTION TO AB5

- The ABC's of AB5 PowerPoint Deck (to follow)



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# The ABCs of AB5

# Yet Another New Labor Code Section

- September 18, 2019 – Assembly Bill 5 signed into law by Gov Newsom
- Creates Labor Code Section 2750.3
- Replaces Previous Common Law Tests Used to Determine Employee vs Independent Contractor Status (the **Borello** case)
- Expands on the California Supreme Court **Dynamex** Decision of 2018
- Impacts Wage Orders and Eligibility for Unemployment Insurance, Worker's Compensation and Paid Sick Leave Benefits

# How We Came to AB5

- There has always been a legal test to determine employee vs independent contractor status for the purpose of claims under California Wage Orders (It's not the employer's decision)
- For nearly 30 years, California employers have relied on the "**Borello Test**" to determine whether a worker was an employee or a contractor for the purposes of coverage under IWC wage orders
- Under Borello, courts primarily considered whether the hiring entity had the right to control the manner and means of work but also evaluated several additional factors such as the duration of the work, the method of payment, type of occupation, and whether or not the parties believed they were creating an employer-employee relationship
- Under Borello there is no default assumption of the worker's status

# The Dynamex Case

- In 2018 the CA Supreme Court heard the Dynamex Case (Dynamex is a nationwide on-demand same-day pick up and delivery service)
- Prior to 2004 California Dynamex drivers were considered employees
- In 2004 they converted drivers to independent contractors as a cost saving measure (What could possibly go wrong?)
- So not surprisingly, they were sued and the case eventually wound up in the state Supreme Court
- In an 84 page decision they ruled that the Borello tests were out and instead the new standard would be the so-called **ABC** tests for the purposes of claims under California Wage Orders
- Public Agencies were largely exempt because wage orders mostly do not apply to public agencies

# The New ABCs of Dynamex

- Unlike the Borello test which makes no presumption of employment status, ABC starts with the default assumption that the worker is an employee for the purposes of IWC Wage Orders unless **ALL THREE** of the following requirements are satisfied:
  - A. The worker is free from the control and direction of the hiring entity in connection with the performance of work, *both under the contract and in fact*, and
  - B. The person performs work that is outside the usual course of the hiring entity's business, and
  - C. The person is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed

# AB5 Broadens the Reach of Dynamex

- The CA legislature has now taken the Dynamex ABCs and applied them to the Labor Code and specifically to sections relating to worker's compensation coverage and unemployment insurance
- Public entities are clearly impacted – they are not exempt
- But the law is silent on whether the ABC test applies to joint employer relationships ( such as when an outside staffing agency or consulting firm places its employees with another entity to perform functions under that other entity)

# Considerations Under the Dynamex “A”-Control

- Is the worker free from the control and direction of the agency? (remember, both on paper and in practice)
- Usually under the independent contractor (IC) situation, the entity tells the IC what work to perform and the IC decides how to do the work
- Does the entity exercise the same type and degree of control over the worker as its employees?

# Considerations Under the Dynamex “B”- Outside Usual Course of Business

- Does the worker perform work outside the agency’s usual course of business?
- Individuals are considered employees if they are “reasonably” viewed as providing services to the business in a role comparable to that of existing employees

# Considerations Under the Dynamex “C”- Does the Worker Have Their Own Business?

- Is the worker customarily engaged in an independently established trade, occupation or business of the same nature as the work they are doing for the agency?
  - Multiple clients
  - Incorporated as a business
  - Sells their services to other entities
  - Own office, business cards
  - Use own tools and equipment
  - And/or.....??

# Lots of AB5 Exemptions

- A number of carve out occupational exemptions (But still subject to the former Borello tests)
  - Licensed physicians, dentists, psychologists performing services to or by a health care entity
  - Licensed attorneys, engineers, architects, private investigators, accountants, financial advisers
  - Licensed real estate agents
  - Construction contractors
  - Business services providers
  - Some contracts for professional services for marketing, HR Administrators, travel agents, graphic designers, grant writers, fine artists, freelance writers, photographers and photojournalists, cosmetologists

# Professional Services Contract Exemption— Borello Requirements Still Apply

- The person must maintain a business location (potentially their home) that is separate from hiring entity
- For work performed after January 1, 2020, must have a business license plus any required professional licenses or permits to practice their profession
- Must have the ability to negotiate their own rates for services performed
- Must have ability to set own hours (However entity can set completion dates and reasonable business hours)
- Individual customarily engaged in same type of work performed under contract with another hiring entity or is available to other potential customers to do the same work
- Regularly exercises discretion and independent judgment to perform the work

# Stay Tuned

- Lots of questions still to be addressed
- Experts agree that there will be much additional lobbying for more exemptions – especially in light of the dependence on the new “gig” economy
- There is talk about potential additional legislation and even a ballot initiative

# New Risks to Public Agencies Under AB5

- Liability for workers' compensation coverage (no retroactivity here)
- Unemployment benefits (unclear on retroactivity)
- Paid sick leave benefits
- CalPERS retirees misclassified as ICs under common law definition
  - Impacts to both the retiree and the agency
- Non-retirees misclassified as ICs
  - Employee and agency required to pay member contributions and administrative fees

# Things for Agency Managers to Do

- Be aware of how the Agency is staffed – and what work is being done by workers who are not staff
- Set up a process for contractor classification and conduct the necessary analysis
- Use the right language consistently to describe your business—and your relationship to contractors
- Ask your legal team for advice
- Pay attention—and join this important public policy discussion!

# APPENDIX B - EXEMPTION CRITERIA CHECKLIST

## “SPECIFIC OCCUPATIONS” CONTRACTS EXEMPTION

Is your contract with:

- A person or organization who is licensed by the Department of Insurance pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Part 2 of Division 1 of the Insurance Code.
- A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian? Are they:
  - Licensed by the State of California pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code,
  - Performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation as defined in Section 13401 of the Corporations Code.
  - Nothing in this subdivision shall apply to the employment settings currently or potentially governed by collective bargaining agreements for the licensees identified in this paragraph.
- An individual who holds an active license from the State of California and is practicing one of the following recognized professions:
  - lawyer,
  - architect,
  - engineer,
  - private investigator, or
  - accountant.
- A securities broker-dealer or investment adviser or their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed by the State of California under Chapter 2 (commencing with Section 25210) or Chapter 3 (commencing with Section 25230) of Division 1 of Part 3 of Title 4 of the Corporations Code.
- A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met.

If the answer is yes to ANY of the above, AB5 employment assumption and ABC test do NOT apply. Borello is the common law standard to evaluate employee vs independent contractor classification. If no, this exemption is not applicable to the contract in question.

# APPENDIX B - EXEMPTION CRITERIA CHECKLIST

## PROFESSIONAL SERVICES” CONTRACTS EXEMPTION

Is your contract for:

- Marketing, AND**
  - the contracted work is original and creative in character and depends primarily on the invention, imagination, or talent of the employee.
  
- Administrator of human resources, AND**
  - the contracted work is predominantly intellectual and varied in character and the output produced or the result accomplished cannot be standardized in relation to a given period of time.
  - Travel agent services
  - provided by either of the following: (I) a person regulated by the Attorney General under Article 2.6 (commencing with Section 17550) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, or (II) an individual who is a seller of travel within the meaning of subdivision (a) of Section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (g) of Section 17550.20 of the Business and Professions Code.
  
- Graphic design**
  
- Grant writer**
  
- Fine artist
  
- Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service pursuant to Part 10 of Subtitle A of Title 31 of the Code of Federal Regulations.
  
- Payment processing agent through an independent sales organization.
  
- Services provided by a still photographer or photojournalist [NOTE: The long list of contingencies around this service is omitted for the reader’s convenience. Refer to the law for full details if needed.]
  
- Services provided by a licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist. [NOTE: The long list of contingencies around this service is omitted for the reader’s convenience. Refer to the law for full details if needed.]

If yes to ANY of the above, complete the checklist below. If no, this exemption is not applicable to the contract in question.

## APPENDIX B - EXEMPTION CRITERIA CHECKLIST

*If* the contract is for one of the services described above, does the contractor:

- Maintain a business location, which may include the individual's residence, that is separate from the hiring entity.
- Have a business license, in addition to any required professional licenses or permits.
- Have the ability to set or negotiate their own rates for the services performed.
- Have the ability to set own hours outside of project completion dates and reasonable business hours.
- Customarily engage in the same type of work with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.
- Customarily and regularly exercises discretion and independent judgment in the performance of the services.

If yes to ALL of the above, AB5 employment assumption and ABC test do NOT apply. Borello is the common law standard to evaluate employee vs independent contractor classification. If no, this exemption is not applicable to the contract in question.

# APPENDIX B - EXEMPTION CRITERIA CHECKLIST

## “BUSINESS SERVICE PROVIDER” CONTRACTS EXEMPTION

Is your contract with a business (business service provider) formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation?

If YES, complete the checklist below. If no, this exemption is not applicable to the contract in question.

Does the business service provider?

- Act independently of your control and direction, both under the contract for the performance of the work and in fact.
- Provide services directly to your business rather than to your customers?
- Have a written contract with you?
- Have any required business license or business tax registration.
- Have a business location that is separate from the business or work location of the contracting business.
- Customarily engage in an independently established business of the same nature as that involved in the work performed.
- Actually contract with other businesses to provide the same or similar services and maintains a clientele without restrictions from you.
- Advertise and hold itself out to the public as available to provide the same or similar services.
- Provide its own tools, vehicles, and equipment to perform the services.
- Negotiate its own rates.
- Set its own hours and location of work, consistent with the nature of the work?
- NOT perform the type of work for which a license from the Contractor’s State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

If yes to ALL of the above, AB5 employment assumption and ABC test do NOT apply. Borello is the common law standard to evaluate employee vs independent contractor classification. If no, this exemption is not applicable to the contract in question.

# APPENDIX B - EXEMPTION CRITERIA CHECKLIST

## OTHER CONTRACTS EXCLUDED FROM THE ABC TEST

Subdivision (a) and the holding in *Dynamex Operations West, Inc. Superior Court of Los Angeles (2018) 4 Cal.5th 903 (Dynamex)*, do not apply to the following occupations as defined in the paragraphs below, and instead, the determination of employee or independent contractor status for individuals in those occupations shall be governed by *Borello*.

1. A person or organization who is licensed by the Department of Insurance pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Part 2 of Division 1 of the Insurance Code.
2. A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian licensed by the State of California pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation as defined in Section 13401 of the Corporations Code. Nothing in this subdivision shall apply to the employment settings currently or potentially governed by collective bargaining agreements for the licensees identified in this paragraph.
3. An individual who holds an active license from the State of California and is practicing one of the following recognized professions: lawyer, architect, engineer, private investigator, or accountant.
4. A securities broker-dealer or investment adviser or their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed by the State of California under Chapter 2 (commencing with Section 25210) or Chapter 3 (commencing with Section 25230) of Division 1 of Part 3 of Title 4 of the Corporations Code.
5. A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met.
6. A commercial fisherman working on an American vessel as defined in subparagraph (A) below. [Refer to the law for full details if needed.]

## APPENDIX C – BORELLO ANALYSIS CHECKLIST

### “COMMON LAW” EMPLOYEE VS. INDEPENDENT CONTRACTOR ANALYSIS

Under *Borello*, the primary test of an employment relationship, known as the "right to control" test, is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. In addition to the primary "right to control" test, courts considered numerous secondary factors.

Agencies should review the following criteria for each contractor exempt from the ABC test. Please note that the more you can answer “Yes”, the more likely it is that you have an independent contractor relationship:

- Does the contractor, not the agency, have the right to control the manner and method of work?
  - Does the contractor exercise that right?
- Does the agency have the right to discharge the contractor at will, without cause?
- Is the contractor engaged in a distinct occupation or business?
- Does the contractor work in the kind of occupation where the work is usually done by a specialist without supervision?
- Does the contractor possess the skill required in the particular occupation?
- Does the contractor supply the instrumentalities, tools, and the place of work for the person doing the work?
- Is the length of time for which the services are to be performed finite and relatively short?
- Is the method of payment by the job or deliverable product rather than by the hour?
- Is the contractor’s work outside of the regular business of the agency?
- Do both the agency and the contractor believe they are creating the relationship of an independent contractor, NOT an employer-employee relationship?

In this analysis, the assumption of “employment” is absent. And the totality of factors is considered, and no one factor or set of factors is determinative. This makes Borello both flexible and ambiguous. Agencies should use this review to identify potential contract risks and work with legal counsel to evaluate worker classification decisions and risk management options.

# APPENDIX D – SAMPLE POLICY FOR CONTRACT MANAGEMENT RESPONSIBILITY

## **POLICY**

AGENCY acknowledges and expects that it may engage independent contractors to perform work which supports the accomplishment of organizational objectives. The agency's identified Services Contracts Manager (SCM) is responsible for initiating and reviewing such relationships and ensuring that they conform to appropriate independent contractor (IC) parameters and are distinct from employer-employee relationships.

## **PROCEDURES**

1. Departmental supervisors/managers will contact the SCM to request authorization to obtain the services of an IC. The SCM will work with the supervisor/manager to properly scope the work and IC relationship parameters; or will identify other more appropriate options to accomplish the work. Options may require the review of agency's HR staff.
2. When approved, the SCM will work with department and purchasing staff to ensure that an appropriate process for contractor selection is developed, and that the selected IC is competent to maintain the IC relationship.
3. Contractual agreements must be negotiated in advance of work being performed by IC's, unless a compelling urgency can be demonstrated, and an early start is approved by the SCM.
4. The SCM is the designated agency representative authorized to enter into any legally binding agreement with any independent contractor.
5. The SCM will regularly monitor all IC relationships in the agency. Changes in scope or timeframe of any contract must be approved by the SCM.
6. Departmental managers should immediately notify the SCM of any work/product quality or IC conduct concerns, and the SCM will take the lead to resolve the situation.

# APPENDIX E – INDEPENDENT CONTRACTOR CHECKLIST

## PROCESS STEPS TO ESTABLISH AND MAINTAIN INDEPENDENT CONTRACTOR RELATIONSHIPS

### 1. Think this decision through BEFORE you contract:

- Develop a scope of work. Do NOT have contractors perform work that is substantially similar to that performed by current employees.
- Review other options for getting work done with HR management, and determine if independent contracting is the best method.
- Review relevant legal criteria governing employment vs IC classification.
- Identify potential independent contracting resources.
- Develop a written agreement, specifying IC criteria to be demonstrated as well as the scope and duration of work. If paying by the hour rather than the deliverable, be prepared to justify why this is appropriate. In addition, require the contractor to:
  - Provide applicable business licenses and permits.
  - Supply workers' compensation and liability insurance coverage.
  - Provide own work location and equipment.
  - Pay own expenses.
  - Demonstrate that relevant legal criteria are met for IC classification.

### 2. Starting the Contract Relationship:

- Require the contractor to complete a W-9 form. Do NOT have contractors complete an employment application or W-4 form, and do not complete an I-9.
- Do not issue company business cards, employee ID badges, or logo wear to contractors.
- Issue keys and access cards ONLY if essential to complete the work performed (such as nighttime IT services, or janitorial services).
- Do not provide an employee handbook or require a contractor to sign off on organizational policies.
- Do not enroll contractors in any benefit plans.
- Do not invite contractors to employee orientation events. Provide separate and limited orientation information as needed.
- Do not pay contractors from payroll accounts. Require them to provide appropriate invoicing through your accounts payable process.

# APPENDIX E – INDEPENDENT CONTRACTOR CHECKLIST

## 3. During the Contract Relationship:

- Do not pay contractors for sick days or holidays or vacations or allow them any “make up” or “time banking” arrangements.
- Do not invite contractors to attend general departmental or team meetings. Set up specific and relevant meeting to review progress on projects and work instead.
- Do not invite or permit contractors to attend company social or special events regardless of location.
- Do not authorize contractors to hire, discipline or fire your staff. Engagement with your staff should be advisory at most, not directive.
- Do not require contractors to have set schedules or numbers of hours worked. It is acceptable to set expectations regarding project schedules; and to ask for reasonable notification if the contractor is going to be present in your worksite(s).
- Do not conduct performance evaluations.
- Contractors can be asked to abide by safety and workplace conduct rules; it is preferable to provide for this in the language of the contract before work is initiated.
- Periodically review the contract and scope of work with both the employee responsible for the contracted work and the contractor to ensure that the work performed, and the working relationship are consistent with independent contractor classification.
- Set a records retention schedule and retain records of transactions and key communications with the contractor. This includes the contract and any amendments, billing, progress reports, delivered products, notices to proceed or notices of termination, etc.

## 4. Ongoing Tasks:

- Send 1099 forms to contractors annually
- Purge W-9 file according to retention policy annually
- Review any changes to relevant IC criteria, and adjust contracts, policies and practices as needed