

AB 2257 Becomes Law – California Law on Worker Classification Evolves Yet Again

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On September 4, 2020, California Governor Gavin Newsom signed AB 2257, a law that expands and clarifies the available statutory exemptions from AB 5, the controversial law regarding employee classification that went into effect earlier this year. AB 5 introduced the notorious and stringent “ABC” test – the standard now used to determine whether California workers should be classified as employees or independent contractors. AB 2257, which went into effect immediately, preserves the existing “ABC” test as the framework to be applied when classifying workers; however, it adds a variety of additional statutory exemptions from the test and significantly alters the scope of some existing exemptions.

Below is background on AB 5 and a summary of the key provisions of AB 2257.

AB 5 and the “ABC” Test

AB 5 went into effect on January 1, 2020, and codified California’s current employee classification standard – the “ABC” test – that determines whether a worker is an employee or independent contractor for purposes of the Labor Code, Unemployment Insurance Code, and Industrial Welfare Commission’s wage orders. This standard has been the subject of significant attention and criticism for substantially narrowing the opportunity to lawfully classify workers as independent contractors, even those who perform work traditionally performed by independent contractors.

Under the “ABC” test, a worker is presumed to be an employee unless the employer can establish that: (A) the worker is free from the direction and control of the company; (B) the worker performs work that is outside the company’s main business; and (C) the worker is normally performing work in an independent business or trade that is in the same vein as the work he or she performs for the company.

Notably, AB 5 exempts certain workers, including doctors and private investigators, from the “ABC” test. The classification and status of workers exempt from the “ABC” test is determined by the longstanding common-law *Borello* test. The *Borello* test considers many factors and is more flexible than the “ABC” test.

Changes Brought by AB 2257

While AB 2257 leaves the “ABC” test untouched, the law adds a host of new statutory exemptions to the test. Moreover, the law significantly alters certain existing exemptions. Where the exemptions are applicable, the prior *Borello* test must be applied for purposes of independent contractor classification.

Importantly, the law:

Exempts Additional Occupations from the “ABC” Test

AB 2257 exempts various professions and occupations from the “ABC” test, including: individuals providing underwriting inspections and other services for the insurance industry, real estate appraisers, manufactured housing salespersons, certain international exchange visitor program workers, certain animal services workers, specialized performers teaching master classes, registered professional foresters, competition judges, licensed landscape architects, and certain occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions.

Broadens and Clarifies the Existing Business-to-Business Exemption

AB 2257 also clarifies and significantly broadens the business-to-business exemption which, provided certain conditions are met, exempts from the “ABC” test “bona fide business-to-business contracting relationships” between business entities. Some of the most significant changes include:

- Extending the business-to-business exemption to apply where a public agency or quasi-public corporation retains a contractor,
- Applying the exemption in situations in which the contracting service providers are merely free to provide their services to other clients, rather than in fact providing services to more than one client, and
- Allowing business service providers directly to service the customers of a contracting business so long as its employees are providing services under the name of the business service provider and the business service provider regularly contracts with other businesses.

Clarifies the Referral Agency Exemption

AB 2257 also makes various amendments to the existing referral agency exemption which, provided certain conditions are met, exempt from the “ABC” test the relationship between a referral agency and a service provider.

Under AB 5, only a select few types of service providers were subject to this exemption. Importantly, AB 2257 significantly broadens the scope of this exemption by adding to the list of service providers subject to the exemption, including those providing consulting, youth sports coaching, caddying, wedding or event planning, and interpreting services. Moreover, AB 2257 leaves open the possibility that this exemption may also include service providers not explicitly referenced in the law.

Additionally, AB 2257 modifies the referral agency exemption so that service providers no longer actually need to maintain a separate clientele, but only need to be free to do so.

Excludes Certain Industries From Its Scope

Despite significant lobbying efforts, certain industries, and notably gig economy workers, did not obtain an exemption from the law. It is expected that their lobbying efforts will continue in the near future. In fact, the transportation industry is funding a ballot initiative (Proposition 22) which, if passed this November, would override AB 5 and consider app-based drivers to be independent contractors unless a company sets the drivers’ hours, requires acceptance of specific ride and delivery requests, or restricts working for other companies.

Next Steps for Employers

Employers of all sizes should evaluate whether each of their California workers is properly classified, paying close attention to whether independent contractors meet the “ABC” test or fall under one of the statutory exemptions. Navigating this evolving area of the law is challenging, and the consequences of misclassification can be very costly to employers. Therefore, employers should consult legal counsel if they need assistance with these complex considerations, including assessing whether their workers are properly classified and how to address possible misclassifications.

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