

The ABC Test Is Here to Stay: California Governor Signs AB 5

September 18, 2019

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On September 18, 2019, Governor Gavin Newsom signed [Assembly Bill \(AB\) 5](#), which codifies last year's Supreme Court of California decision establishing a new test to determine whether a worker is an independent contractor or an employee. In addition to codifying the ABC test, AB 5 contains carve-outs for several industries and professions including professional services, doctors, lawyers, real estate, insurance, referral agencies, and others, which will be subject to the multi-factor *Borello* test (or similar tests if they meet the conditions of the carve-outs). Several industries including the gig economy and trucking did not receive express carve-outs.

What Is the ABC Test?

Under the ABC test, as established in a [2018 Supreme Court of California case](#), a worker is an independent contractor only if the company hiring the worker establishes the following:

the worker is free from the control and direction of the hiring company “in connection with the performance of the work, both under the contract for the performance of the work and in fact”; “the worker performs work that is outside the usual course of the hiring company’s business”; and the worker is “customarily engaged in an independently established trade, occupation, or business of the same nature” as the work performed for the hiring entity.

A company’s “failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes

of the wage order,” the state’s highest court stated.

Key Takeaways

In his signing message, Governor Newsom stated that AB 5 “will help reduce worker misclassification . . . which erodes basic worker protections like the minimum wage, paid sick days and health insurance benefits.” Governor Newsom also expressed an intent to extend bargaining and organizing rights to workers:

Assembly Bill 5 is an important step. A next step is creating pathways for more workers to form a union, collectively bargain to earn more, and have a stronger voice at work—all while preserving flexibility and innovation,”

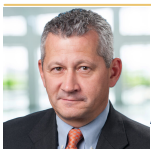
While some media outlets are reporting that this statement is aimed at the gig economy, California’s support of organizing efforts should be expected to extend to trucking and other industries as well. As a result, employers may be faced not only with the operational and litigation challenges presented by AB 5, but also increased union activity by organized labor’s efforts to leverage the new law.

Next Steps

AB 5 takes effect on January 1, 2020. The ABC test, however, already applies to several minimum labor standard requirements as a result of the state supreme court’s 2018 decision.

For a detailed discussion of AB 5 and the ABC test, join us for a one-hour webinar, “[The End of Independent Contractors? AB 5 Moves One Step Closer to Passage in California](#),” on Tuesday, September 24, 2019, at 11:00 a.m. Pacific. Our speakers, Los Angeles shareholders [Alexander M. Chemers](#) and [Robert R. Roginson](#), will explain the impact of this new law on employers of various industries. To register for this timely program, click [here](#).

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