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# Codifying Dynamex, AB 5 Could Turn Thousands of California Independent Contractors Into Employees

**Katherine Proctor**

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The labor and employment law landscape in California stands to undergo a major transformation with one of this year's most controversial pieces of legislation, [AB 5](#) – a bill that would reclassify thousands of independent contractors as company employees entitled to employment protections and benefits.

If AB 5 is signed into law, California, a longtime leader on employment legislation in the United States, would set a national example for regulating the gig economy. The bill passed the Assembly in May and is up for a floor vote in the Senate this week.

Authored by Assemblymember Lorena Gonzalez (D-San Diego), AB 5 would codify last year's landmark California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (*Dynamex*). That decision set out what's known as the "ABC test" for determining whether a worker is an employee or an independent contractor.

Under that test, a worker is only an independent contractor if (a) the worker is free from the hiring entity's control in connection with the performance of the work, (b) the worker performs work that is outside the usual course of the hiring entity's business, and (c) the worker is customarily engaged in an independently established business of the same nature as the work performed for the hiring entity.

Previously, California courts had determined independent contractor status using the standard established in *S.G. Borello & Sons Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), consisting of five disjunctive factors including the worker's opportunity for profit or loss and the working relationship's degree of permanence.

Although the legislation's highest-profile beneficiaries would be drivers for ride-share companies like Uber and Lyft, the bill could sweep up workers in dozens of sectors across the state. Certain professional groups have secured exemptions to AB 5, such as insurance brokers, physicians, hairstylists, and workers for repossession agencies. The status of those workers would remain subject to the *Borello* test.

Uber, Lyft, and the on-demand food delivery service DoorDash, however, have not been exempted, and those companies have [pledged](#) a total of \$90 million to a potential 2020 ballot measure designed to counteract the legislation if it becomes law.

Multiple Democratic presidential candidates, meanwhile, have voiced support for AB 5 – notable because candidates for national offices tend not to comment on proposed state laws. Sen. Elizabeth Warren went so far as to author an [op-ed](#) endorsing the bill in the Sacramento Bee last month.

A competing bill in the Assembly, [AB 71](#), seeks to codify the *Borello* test rather than the ABC test set out in *Dynamex*, but that bill has not yet passed out of committee in the Assembly.

Significantly, although the Supreme Court's decision in *Dynamex* applied only to California Wage Orders, AB 5 would also adopt the ABC test for purposes of the state's Labor Code and Unemployment Insurance Code.

And it's still an open question whether *Dynamex* – or AB 5, if passed – would have retroactive effect. In July the Ninth Circuit withdrew its opinion that *Dynamex* applied retroactively and [certified](#) that question to the California Supreme Court.

The high court is unlikely to decide the question before the legislature decides whether to pass AB 5. If the ABC test were applied retroactively, California businesses could face years of liability.

### **The bill is supported by many -- but not all -- gig workers**

Organized labor in California has generally lobbied in support of AB 5. Steve Smith, communications director for the California Labor Federation, says the bill solves a problem that predates the contemporary gig economy.

"We've seen over the last several decades this issue of employers misclassifying workers as independent contractors," Smith said.

"We've seen this trend continue to accelerate to the point where it really is eroding the basic protections that millions of workers should have on the job but don't. The gig economy is obviously part of that. But we've also seen this trend for many years before the gig economy was even born, in industries like trucking and construction."

AB 5, Smith said, would be "absolutely game-changing" for workers in California.

"It's turning the tide against the race to the bottom that currently exists as employers continue to find ways to cheat workers out of basic protections," he said.

"We see horror stories of workers having to sleep in their cars because they're making four dollars an hour, getting injured on the job and not having workers' comp to fall back on. Getting evicted as a result of not being able to earn wages. These abuses are things that we absolutely have to address in California."

Smith added that a common argument against AB 5 is that it would deprive gig workers of flexibility in their work hours, often touted as the greatest advantage of gig work. But Smith said there's nothing in the bill that would prevent companies from offering workers that same flexibility.

Although Uber and Lyft rely on on-demand drivers, he said, "there are similar businesses that have on-demand drivers that recognize those drivers as employees."

But not all gig workers take this point of view – for example, the I'm Independent coalition, a project of the California Chamber of Commerce made up of freelancers and contractors who oppose AB 5. The coalition argues that the state legislature should instead suspend the application of *Dynamex* to "prevent massive economic instability" and focus on protecting California workers' "freedom and choice."

### **Businesses see uncertainties and oversights**

Some stakeholders on the business side, meanwhile, believe AB 5 as drafted simply isn't ready to become law.

Michael Lotito, co-chair of Littler's Workplace Policy Institute and a longtime practitioner of labor and employment law, said that AB 5 is a "rush to judgment bill." Within the Institute, Lotito is on a task force to address the legislation. The task force authored a 40-page [report](#) on the bill's potential ramifications last month.

Lotito said that, in its current drafting, AB 5 overlooks several substantial concerns for businesses. For example, whether the ABC test will apply to franchises remains uncertain. A case is currently pending in the Ninth Circuit related to this question (*Salazar v. McDonald's*, case number 17-15673), in which a class of workers suing McDonald's franchises in California have argued that the McDonald's corporation was their joint employer and is therefore liable for wage and hour violations.

In addition, Lotito said, AB 5 could give rise to a host of suits under California's Private Attorneys General Act because it applies the ABC test to the Labor Code, subjecting businesses to "astronomical" liability.

And the bill's current business-to-business exemption – applying to a business who contracts with another business – is "extraordinarily difficult to meet." That subdivision of the bill subjects a business to a 12-part test to determine whether it may be governed by the *Borello* test instead of the ABC test.

What most concerns him, Lotito said, is that AB 5 could land a significant blow to California's economy if it becomes law. He worries that companies will take their business out of the state, unwilling to invest in the bill's compliance requirements.

"The real engine of the California economy came from that level of investment," Lotito said. "If that investment gets shied away, that's going to be very significant."

California's Department of Industrial Relations, for its part, has [estimated](#) that it loses \$7 billion in payroll tax revenue a year from companies that misclassify their workers as independent contractors.

Regardless of what he sees as the bill's deficiencies, Lotito said that if California adopts AB 5, it is likely to set an example for the rest of the country.

The principles of the ABC test are already embedded in the [Protecting the Right to Organize Act](#), introduced in May in the U.S. House of Representatives.

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