



DOCTORS GET THE GREENLIGHT TO BE INDEPENDENT CONTRACTORS UNDER AB 5 – BUT WHAT ABOUT OTHER HEALTHCARE PROFESSIONALS?

On September 18, 2019, Governor Gavin Newsom signed Assembly Bill 5 (“AB5”) which codifies, clarifies and grants exemptions to the state Supreme Court’s 2018 decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (“*Dynamex*”). Both AB5 and *Dynamex* make it harder for companies to classify workers as independent contractors. A person providing labor or services for compensation is presumed to be an employee rather than an independent contractor *unless* the hiring entity can pass the “ABC” test by proving that the worker: (A) is free from the control and direction of the hiring entity in connection with the performance of the work; (B) is performing work that is outside the usual course of the hiring entity’s business; and (C) is customarily engaged in an independently established trade, occupation, or business.

In light of the *Dynamex* decision, we heard concerns from many LACMA members about whether they were properly classifying certain categories of workers in their practices: medical billers, physician assistants, transcribers, moonlighting physicians, to name a few. With the passage of AB 5, we have some good news to share with you, and like every other employment law in California....some important caveats/requirements to consider.

I. Healthcare Exemptions to AB5

During the legislative process, a variety of powerful business interest groups asked for special rules for their industries. Many succeeded in obtaining exemptions to AB5, mostly on the grounds that they set or negotiate their own rates, communicate directly with customers (patients), and make at least twice the state's minimum wage. The medical community was successful in carving out the following:

AB 5 Section 2, (B) (2) provides an exemption for: 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. *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.*

In non legal-lease, if you are a doctor or a surgeon licensed in the State of California, you may work as an independent contractor for a health care entity. The classification of other workers within the healthcare industry is more nuanced and is evaluated in light a different standard, delineated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 ("*Borello*"). The *Borello* case evaluates many different aspects of control over the employment relationship and leaves more room for hiring entities to classify workers as independent contractors.

Professional workers providing services to your health care entity or practice may be exempt if there is a bona fide business to business contracting relationship, as defined below:

(A) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.

(C) The contract with the business service provider is in writing.

(D) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.

(E) The business service provider maintains a business location that is separate from the business or work location of the contracting business.

(F) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(G) The business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.

(H) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

(I) The business service provider provides its own tools, vehicles and equipment to perform the services.

(J) The business service provider can negotiate its own rates.

(K) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

(L) The business service provider is not performing 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. §

The bill defines an "individual" as an individual providing services through a sole proprietorship or other business entity. Thus, if you have professionals that are providing their services to your business, you should ensure that the above criteria can be satisfied, or you risk liability for non compliance with California's wage and hour laws, and other requirements, such as providing workers' compensation insurance for employees.

II. Enforcement

Various California agencies, including the Labor Commissioner, the Employment Development Department ("EDD") and the Franchise Tax Board, have authority over worker misclassification; however, their efforts typically happen as the result of individual cases. AB5 empowers the attorney general, city attorneys in large cities, and local prosecutors to sue companies over violations of the Labor Code, the Unemployment Insurance Code, and/or the wage orders of the Industrial Welfare Commission. The city attorneys of both San Francisco and Los Angeles appear ready to act upon this.

The new law takes effect January 1, 2020, however, recent California decisions have been applying the holding from Dynamex retroactively, claiming that it was a mere clarification of existing laws, and not a "new law."

III. What Should You Do

If anyone is providing professional services to your office, it is advised that you re-examine the employment relationship with counsel to make sure that you are in compliance with AB 5's requirements and that you have a protective written agreement with your contractors. If you have independent contractors working for your practice that cannot meet the above-described requirements, you should immediately re-classify them as W2 employees and ensure that they are properly onboarded per California's requirements.

If you have any questions about the above, the lawyers of WorkWise Law, PC, are here to help.