

Calif. Dynamex Law Shifts Employment Landscape Drastically

By **Eve Wagner** (September 18, 2019, 12:10 PM EDT)

The gig is up for Uber Technologies Inc., Lyft Inc. and thousands of other businesses that use independent contractor workers. On Sept. 18, California Gov. Gavin Newsom signed A.B. 5 into law, perhaps the single most impactful law to hit employers in decades.

The law affects companies in California but will have repercussions across the country, particularly as other states consider following suit. Uber and Lyft are where much of the focus has been, but every industry that uses independent contractors — from entertainment to personal trainers to clergy — is potentially affected.



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New California Labor Code Section 2750.3 codifies the California Supreme Court's 2018 decision in *Dynamex Operations West Inc. v. The Superior Court of Los Angeles County*,^[1] which established a streamlined test for determining who is an employee. Under the so-called ABC test, the vast majority of workers will be deemed employees for wage order purposes, a change projected to cost companies billions of dollars. Although *Dynamex* has been the law of the land for more than a year, it's a safe bet that those companies that have been hedging their bets will now pay a hefty price for that gamble.

It's been a long time coming. In 2016, a federal court, stymied by the challenges inherent in this category of workers, denied summary judgment to both Lyft and its drivers on classification issues.^[2] They weren't true employees, the court said, because they could work whenever they wanted, but they weren't classic independent contractors because they lacked special skills, couldn't negotiate with Lyft, were doing the same work Lyft did, and Lyft could end the relationship at any time. As the court lamented, the jury "will be handed a square peg and asked to choose between two round holes."

Clearly, gig workers don't fit the conventional employment model. They have been described as among the least powerful class of workers in today's marketplace, and the California Legislature expressly recognized this in enacting the new law:

By codifying the California Supreme Court's landmark, unanimous *Dynamex* decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law.

Dynamex replaced the historic *Borello*^[3] test with a streamlined ABC test under which a worker is considered to be an employee unless the business can demonstrate all of the following factors:

- A. The business is not able to control or direct what the worker does, either by contract or in actual practice;
- B. The worker performs tasks outside of the entity's usual business; and
- C. The worker is engaged in an independently-established trade, occupation, or business.

Over the course of its life, the law was amended numerous times to carve out occupations and professions that will remain subject to the Borello test. These include, "among others, licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry." [4] Other exemptions include licensed practicing lawyers, architects, engineers, private investigators and accountants.

To further complicate matters, the law adds criteria to qualify for an exemption to the ABC test for a whole host of categories. For those working under a contract for professional services in marketing, HR administration, graphic design, fine art, photography, photojournalism, freelance writing, grant writing and editing, among others, six factors have been added:

1. The individual must maintain a business location (which may include a personal residence) that is separate from the hiring entity;
2. If the work is performed for more than six months after the law goes into effect, the individual must have a business license;
3. The individual must be able to set or negotiate their own rates;
4. The individual must be able to set their own hours;
5. The individual must be customarily engaged in the same type of work performed under contract with another hiring entity or hold themselves out to potential customers for such work; and
6. The individual must customarily and regularly exercise discretion and judgment.

Other factors have been added for services provided by licensed estheticians, electrologists, manicurists, barbers and cosmetologists, including that they have their own book of business and schedule their own appointments.

Specific criteria have been included for referral agencies that connect service providers with clients for "graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup," as well as car repair services provided through a motor club by a third party not employed by the motor club.

This hodgepodge carveout of worker categories is telling. It underscores the political clout of certain interest groups, and it foreshadows dissension going forward. Removal from the Dynamex analysis doesn't end the classification inquiry; it simply invokes the more involved Borello analysis, under which multiple criteria are evaluated.

The principal factor of the Borello test is whether the "person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. " The test includes nine additional or secondary factors, not all of which must be met to establish independent contractor status:

1. Right to discharge at will, without cause;
2. Whether the one performing the services is engaged in a distinct occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Whether the principal or the worker supplies the instrumentalities, tools and the place of work for the person doing the work;
6. The length of time for which the services are to be performed;
7. The method of payment, whether by the time or by the job;
8. Whether or not the work is part of the regular business of the principal; and
9. Whether or not the parties believe they are creating a relationship of employer-employee.

Uber has already positioned itself as exempt from the law, claiming that it is a technology, not a transportation, company. However, that argument was rejected by the U.S. District Court for the Central District of California in 2015:

Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides). ... Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs, John Deere is a "technology company" because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a "technology company" because it uses modern irrigation techniques to grow its sugar cane. ... [It] is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one.... Even more fundamentally, it is obvious drivers perform a service for Uber because Uber simply would not be a viable business entity without its drivers.[5]

The law codifies Dynamex for purposes of the California Labor Code, Unemployment Insurance Code and wage orders, but curiously does not mention the California Government Code, under which workers may seek redress for harassment and discrimination, among other things.

As far as retroactivity, the law states that the "addition of subdivision (a) to this section of the Labor Code by this act is not a change in, but rather is declaratory of, existing law with regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders." [6] To help mitigate against the retroactive impact, the law also provides that the newly created exemptions to the ABC test will apply "retroactively to existing claims and actions to the maximum extent permitted by law."

By failing to reclassify its workers, Uber and others could be setting themselves up for substantial penalties. Dynamex has been the law of the land since April 2018.

If it's determined they intentionally violated the law, these companies could be required to pay civil penalties of \$10,000 to \$25,000 per misclassified worker under Labor Code Section 226.8, along with back wages, meal and rest break penalties, and a whole host of other statutory and civil penalties.[7] By "expanding the definition of an employee ... the bill would expand the definition of a crime..."[8] while authorizing the attorney general or city attorney to seek injunctive relief to prevent the continued misclassification of workers.

Unfortunately, the new law is far from clear. Rather than cutting down on litigation, the new section is likely to result in increased litigation with potentially devastating consequences for businesses that get it wrong. Significantly, the law allows more individuals to be classified as independent contractors than was the case before its passage. Where Dynamex allowed no exceptions to ABC for wage order purposes, for the enumerated categories an individual now might only have to meet Borello plus any additional applicable factors.

Companies with multistate workforces will need to weigh the costs of maintaining a two-class system — with the potential backlash from workers deprived of employment benefits that their co-workers have in other states — or migrating everyone to employee status. If other states follow California's lead, this last approach could save companies considerable pain in the long run. Meanwhile, stay tuned for future developments, as gig and other companies push for modifications and even a ballot proposition to overturn the new law.

Update: This article has been updated to reflect Newsom's signing of A.B. 5.

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[1] *Dynamex v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018).

[2] *Cotter v. Lyft*, No. 13-cv-04065-VC (N.D. Cal. Mar. 16, 2017).

[3] *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989).

[4] AB 5 Legislative Counsel's Digest.

[5] *O'Connor v. Uber Technologies Inc.*, 82 F.Supp. 3d 1133 (2015).

[6] California Labor Code §2750.3(i)(a)).

[7] California Labor Code § 226.8.

[8] AB 5 Legislative Counsel's Digest.