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Landmark Bill Passes: California Codifies “ABC” Test for Worker Classification

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On Thursday, September 12th, the California State Assembly passed Assembly Bill 5 (“AB 5”), the controversial new law that codifies the three-factor “ABC” test introduced by the California Supreme Court in its 2018 *Dynamex* decision. The passage of AB 5 marks a sea change in the way that companies doing business in California will be required to classify their workers. AB 5 now goes to Governor Gavin Newsom’s desk for his signature, and Governor Newsom has previously committed to sign the bill into effect.

Effective January 1, 2020, AB 5 adopts *Dynamex*’s rigorous three-factor test for determining how a company may classify its workers. Under the so-called “ABC” test, which will be codified in Section 2750.3 of the California Labor Code, a worker will be considered an employee unless the company hiring the worker establishes all of the following three prongs:

> (A) the worker is **free from the control and direction of the company** in connection with the performance of the work, both under the contract for the performance of such work and in fact;
>
> (B) the worker performs work that is o**utside of the “usual course” of the company’s business**; and
>
> (C) the worker is **customarily engaged in an independently established trade, occupation, or business** that is of the same nature as the type of work performed for the company.

Unlike *Dynamex*, which applied only to California Wage Orders (i.e., generally, minimum wage, overtime and meal and rest break liability), AB 5 is far more sweeping, and applies to California's Wage Orders as well as the Labor Code and Unemployment Insurance Code. This means that, in the wake of AB 5, companies that are found to misclassify workers could face broader liability than they would have under *Dynamex* (including for unemployment insurance, various benefits, paid sick days, and state family leave).

Notably, while AB 5 specifically exempts certain industries, in its current form AB 5 does not include an specific exemption for "gig" economy companies.

To learn more about the California Supreme Court's decision in *Dynamex*, listen to our podcast on The Proskauer Benefits Brief: Legal Insight on Employee Benefits & Executive Compensation.

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