

Snell & Wilmer

Committed to being your perfect fit.™

Can Independent Contractors Still Exist in California?

On September 18, 2019, Governor Newsom signed into law what has been called a landmark bill for workers – California Assembly Bill 5 (AB 5). AB 5 adopts the ABC Test for classifying a worker as an independent contractor. Under this test, workers are presumed to be employees unless the hiring entity can prove that: (a) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the terms of the contract and in fact; (b) the person performs work outside the usual course of the hiring entity's business; and (3) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Further, beginning on July 1, 2020, the ABC test will also apply to the determination of whether an individual is an employee for purposes of workers' compensation requirements.

Many industries fought for exemptions from the ABC Test, and as a result, numerous revisions have been made. In fact, more of AB 5 is taken up by addressing the exemptions rather than the test itself.

These exemptions include, among others, licensed insurance agents, certain California licensed professionals (lawyers, architects, etc.), real estate licensees, commercial fishermen, licensed barber or cosmetology workers, and others performing work under a contract for "professional services" as defined in AB 5, with another business entity, or pursuant to a subcontract in the construction industry.

However, even for some of the exemptions, there are factors that must be met for the worker to be deemed exempt from the ABC Test. In addition, the applicability of an exemption does not mean each of these individuals is automatically an independent contractor. Rather, for workers in most of the job categories, when evaluating whether they are an employee or independent

contractor, AB 5 still requires the application of the decades-old balancing test previously utilized.

An industry that did not receive an exemption from the ABC Test is the gig economy. Uber, Lyft, and several other gig companies have announced a new statewide ballot measure known as the Protect App-Based Drivers & Services Act that is due for the November 2020 ballot to create a third category of worker to address gig companies. The Act is aimed at allowing these workers to keep their flexibility and independence while also providing them with certain benefits and protections.



Erin Leach

While AB 5 was intended to create more clarity around the classification of workers, unfortunately, it seems to have created more confusion, including how the exemptions will be applied.

Although questions remain, now is the time for companies to analyze whether their currently classified independent contractors will pass this new test, and if they don't, take proactive steps to re-classify them as employees.

If you have questions about how AB 5 could affect your company, reach out to Erin Leach at: https://www.swlaw.com/people/erin_denniston_leach.

Snell & Wilmer

Committed to being your perfect fit.™

Our labor and employment attorneys assist clients through all phases of employment and labor-related counseling and litigation. We routinely provide management training intended to educate and motivate supervisory personnel in the proper handling of workplace issues. Our services cover a broad range of issues including:

- Arbitration and alternative dispute resolution proceedings
- ADR creation and implementation
- Class-action litigation
- Confidentiality agreements
- Contract disputes
- Discrimination
- Executive and other employment agreements
- Equal Pay Act issues
- Handbooks
- Immigration and worksite enforcement
- Non-competition and non-solicitation agreements
- OSHA issues
- Sexual discrimination/harassment
- Representation before the National Labor Relations Board
- Wage and hour issues
- Wrongful termination

swlaw.com

PLAZA TOWER | 600 ANTON BOULEVARD | SUITE 1400 | COSTA MESA, CALIFORNIA 92626
 ALBUQUERQUE | BOISE | DENVER | LAS VEGAS | LOS ANGELES | LOS CABOS | ORANGE COUNTY
 PHOENIX | RENO | SALT LAKE CITY | TUCSON | WASHINGTON, D.C.