

Effects of AB 5 and now AB 2257 and AB 323 and also Proposition 22: Employee vs. Independent Contractor

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Disclaimer

The opinions expressed by Judges Rassp and Ledger in the following presentation are solely those of the speakers. Judges Rassp and Ledger do not speak for or espouse any opinion of the Workers' Compensation Appeals Board, Department of Industrial Relations, the State of California, or any other entity.

P.S. We aren't independent contractors either!

Overview

What we will cover:

- Proposition 22 Overview
- A Brief History of the Definition of Employment
- *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County.* (4 Cal. 5th 903 [83 Cal. Comp. Cases 817].)
- AB 5 and now AB 2257 and AB 323
- How Does the ABC Test Work?
- Overview of new Labor Code Sections 2750.3, 2775 through 2786

Proposition 22

As the proposition appears to have passed by an overwhelming majority, we have included a brief discussion.

Added sections to Business and Professions Code

7451. Protecting Independence. **Notwithstanding any other provision of law**, including but not limited to the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations, **an app-based driver is an independent contractor and not an employee or agent with respect to his or her relationship with a network company if the following conditions are met:**

Conditions to Meet

Four Conditions:

- (a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform.
- (b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.
- (c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.
- (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.

Written Contract Required

7452. Contract and Termination Provisions. (a) A network company and an app-based driver shall enter into a written agreement prior to the driver receiving access to the network company's online-enabled application or platform.

(b) A network company shall not terminate a contract with an app-based driver unless based upon a ground specified in the contract.

(c) Network companies shall provide an appeals process for app-based drivers whose contracts are terminated by the network company.

New “Benefits” to App Drivers

Earnings Floor – 120% of minimum wage for “engaged time”

- "Engaged time" means, subject to the conditions set forth in paragraph (2), the period of time, as recorded in a network company's online-enabled application or platform, from when an app-based driver accepts a rideshare request or delivery request to when the app-based driver completes that rideshare request or delivery request.

Mileage - \$0.30 per mile for “engaged miles” – to be adjusted for inflation

The network company cannot steal a driver’s tips.

Health care contributions of 50 or 100% of average ACA contribution depending on hours put in.

Private “Workers’ Compensation”

7455. Loss and Liability Protection. No network company shall operate in California for more than ninety (90) days unless the network company carries, **provides, or otherwise makes available** the following insurance coverage:

(a) For the benefit of app-based drivers, occupational accident insurance to cover medical expenses and lost income resulting from injuries suffered while the app-based driver is online with a network company's online-enabled application or platform. Policies shall at a minimum provide the following:

(1) Coverage for medical expenses incurred, up to at least one million dollars(\$1,000,000).

“Temporary Disability”

(2)(A) Disability payments equal to sixty-six percent (66%) of the app-based driver's average weekly earnings from all network companies as of the date of injury, with minimum and maximum weekly payment rates to be determined in accordance with subdivision (a) of Section 4453 of the Labor Code for up to the first 104 weeks following the injury.

(B) "Average weekly earnings" means the app-based driver's total earnings from all network companies during the twenty-eight (28) days prior to the covered accident divided by four.

(b) For the benefit of spouses, children, or other dependents of app-based drivers, accidental death insurance for injuries suffered by an app-based driver while the app-based driver is online with the network company's online-enabled application or platform that result in death. For purposes of this subdivision, burial expenses and death benefits shall be determined in accordance with Section 4701 and Section 4702 of the Labor Code.

Death Benefits

(b) For the benefit of spouses, children, or other dependents of app-based drivers, accidental death insurance for injuries suffered by an app-based driver while the app-based driver is online with the network company's online-enabled application or platform that result in death. For purposes of this subdivision, burial expenses and death benefits shall be determined in accordance with Section 4701 and Section 4702 of the Labor Code.

3rd Party Liability Coverage / Safety

(f)(l) For the benefit of the public, a DNC shall maintain automobile liability insurance of at least one million dollars per occurrence to compensate third parties for injuries or losses proximately caused by the operation of an automobile by an app-based driver during engaged time in instances where the automobile is not otherwise covered by a policy that complies with Section 11580.1 (b) of the Insurance Code.

There are further requirements for safety training placed upon the companies.

Drivers cannot be logged on more than 12 cumulative hours in a day.

Zero-tolerance policy for driving under the influence of drugs / alcohol.

Sexual Harassment and Civil Rights

7456. Anti-Discrimination. (a) It is an unlawful practice, unless based upon a bona fide occupational qualification or public or app-based driver safety need, for a network company to refuse to contract with, terminate the contract of, or deactivate from the network company's online-enabled application or platform, any app-based driver or prospective app-based driver based upon race, color, ancestry, national origin, religion, creed, age, physical or mental disability, sex, gender, sexual orientation, gender identity or expression, medical condition, genetic information, marital status, or military or veteran status.

(b) Claims brought pursuant to this section shall be brought solely under the procedures established by the Unruh Civil Rights Act (Section 51 of the Civil Code) and will be governed by its requirements and remedies.

Criminal Background Checks

They have to do criminal background checks on all new drivers and may continually monitor for criminal activity.

New Crimes – Enhanced Punishments

Fraudulently impersonating an app-based driver while providing or attempting to provide rideshare or delivery services

- Misdemeanor – up to 6 months – up to \$10,000 fine

The following acts add 5 years to your sentence:

- Fraudulently impersonating an app-based driver to commit any of the following crimes: Kidnapping, Assault with intent to commit felony (other than murder), Rape, Sodomy, Oral Copulation, Lewd & Lascivious Acts, Other Acts of Sexual Penetration
- Fraudulently impersonating an app-based driver while committing or attempting to commit any other felony, which results in great bodily injury.

The following act adds 10 years to your sentence:

Fraudulently impersonating an app-based driver while committing or attempting to commit any other felony, which results in the death of a person.

Changes

The law can only be changed by 7/8th of the Legislature voting.

- That includes legislation authorizing labor unionization of app-based drivers.

No statute enacted after October 29, 2019, but prior to the effective date of this chapter, that would constitute an amendment of this chapter, shall be operative after the effective date of this chapter unless the statute was passed in accordance with the requirements of subdivision (a).

Overview

What we will cover:

- AB 5 has mostly been repealed and who is an employee has been modified in specific industries
- Labor Code Section 2750.3 has been repealed and replaced by 12 new Labor Code Sections and a new 2750.3
- AB 2257 is urgency legislation, passed by the legislature Monday night August 31, 2020 and signed into law in the early hours of September 1, 2020 and enrolled September 4, 2020; AB 323 is also urgency, approved by the Governor September 30, 2020.

Overview

- In March 2020, we asked: “As of July 1, 2020 will California suddenly have 1,000,000 more employees?”
- AB 2257 and AB 323 will impact:
 - Employers/Hirers
 - Insurance companies
 - Claims administrators
 - Attorneys
 - Claims professionals
 - Workers’ Compensation Judges

Employee / Independent Contractor

Labor Code 3357 defines an employee:

- Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.

Labor Code 3353 defines an independent contractor as follows:

- “Independent contractor” means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

Prior to AB 5 and now AB 2257 and AB 323, the most prominent case interpreting these sections was *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341

- Provided factors to consider in weighing a finding of employment based on the scope and purposes of statutes that address classification of employee v. independent contractor
- Was directly on point for workers’ compensation – interpreting Labor Code sections 3353 and 3357

Borello Factors*

(“statutory purpose” test of employment)

- (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) 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 the relationship of employer-employee.

**S.G. Borello & Sons, Inc. v. Dep't. of Industrial Relations* (1989) 48 Cal. 3d 341, at 351.

Dynamex

Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County. (4 Cal. 5th 903 [83 Cal. Comp. Cases 817].)

Interprets “suffer of permit work” language in 8 CCR 11090 to presume employment and places burden upon the employer to show that the worker was an independent contractor.

ABC Test:

- (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and
- (B) that the worker performs work that is outside the usual course of the hiring entity's business; and
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.
 - *Dynamex*, at 957-958.

Dynamex Summary

- Applied only to wage orders definition of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders (based on the suffer or permit to work standard in wage orders)
- There was a somewhat open question of how far the case law would apply to EDD and Workers' Compensation cases
- Up until the enactment of AB 5 and now AB 2257 and AB 323, the WCAB encouraged WCJs to use the *Borello* factors and not the ABC test of *Dynamex* (See, e.g. *Moorehouse v. Alisal Guest Ranch* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 328; *Perkins v. Knox* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 490)
- However that question was resolved by AB 2257 and AB 323.
- May apply to minors under 16 – (See Labor Code sections, 1290 and 1297)

AB 5: Legislative Rationale

- Intent of AB 5 and now AB 2257 and AB 323 is to codify the *Dynamex* decision
- Applies in claims involving the:
 - Labor Code
 - Unemployment Insurance Code
 - Wage orders of the Industrial Welfare Commission
- If a court rules that the ABC test does not apply then the determination of employee-independent contract status shall be determined under the *Borello* factors.
- There is a presumption that a worker is an employee of a hirer

AB 2257 and AB 323

- Codify the holding in Dynamex with many exceptions.
- AB 2257 Repealed Labor Code Section 2750.3, (LC Section 3351, Sections 606.5 and 621 of the Unemployment Insurance Code are retained as amended by AB 5) and replaced with a new LC section 2750.3 from AB 323
- Labor Code Sections 2775-2786 apply to workers' compensation cases beginning September 1, 2020
- Section 3351(i) refers to new Labor Code Section 2750.3 for specific determinations of employment for workers' compensation purposes

AB 2257

- LC Section 3351 states: “Employee” means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed” and includes: (a) through (i).
- LC Section 3351(i) refers to Labor Code Section 2750.3 for specific determinations of employment for workers’ compensation purposes: “Employee” includes: “Beginning on July 1, 2020 any individual who is an employee pursuant to Section 2750.3. This subdivision shall not apply retroactively.”
- The new LC 2750.3 states everyone is presumed to be an employee unless the *Dynamex* ABC test applies, or an exception where the *Borello* factors apply.

AB 2257

- Labor Code Section 2775 for specific determinations of employment for workers' compensation purposes:
- Repeals Labor Code Section 2750.3 (ignore it in your Blue book! Unless DOI is between 7/1/2020 and 9/3/2020); see new LC 2750.3.
 - Presumption that all workers are employees
 - Provides the ABC test to determine if a worker is an independent contractor (the answer to A, B, and C all have to be “yes” for there to be a determination that the worker is an independent contractor)
 - If the ABC test is statutorily excluded from a worker's classification or ABC test cannot be applied, then the *Borello* factors analysis occurs, or another specified applicable standard applies (e.g. Business and Professions Code standard for real estate licensees)
 - AB 2775 maintains any exceptions to the terms “employee,” “employer,” “employ,” or “independent contractor,” and any extensions of employer status or liability. See Labor Code Sections 2775(a)(2) and 2776-2786

AB 5 and AB 2257– Effective Dates

- For wage order claims, *Dynamex* is already in place and AB 5 and AB 323 merely codifies the holding.
- For all other Labor Code purposes not related to workers' compensation insurance, AB 5's effective date is January 1, 2020, July 1, 2020 for AB 5; AB 2257 effective date is September 4, 2020; AB 323 September 30, 2020
 - E.G. AB 5 is effective with respect to the Unemployment Insurance Code on January 1, 2020
- For purposes of defining an employee under workers' compensation insurance, effective date is July 1, 2020 for dates of injury on or after 7/1/2020 under AB 5 and on or after 9/4/2020 under AB 2257.

AB 2257 – The “ABC Test” in Labor Code Section 2775(b)(1)(A), (B), and (C)

- If the answer is “Yes” to each prong of the ABC Test of Section 2775(b)(1) then the worker is an independent contractor and is not an employee of the hirer, unless there is an expressed exception listed elsewhere in the statute.
- “A” = “Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?”
 - If the answer is “yes” to prong A, then the first part of the ABC Test means the worker is an independent contractor
 - The burden of proof is on the hiring entity to establish that the worker is free of such control in the performance of the work

AB 2257 – The “ABC Test” in Labor Code Section 2775

- “A” = “Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?”
 - A worker who is subject by contract or actual practice to control a business typically exercises over employees is considered an employee
 - Depending on the nature of the work and overall arrangement between the parties a business need not control the precise manner or detail of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees.

AB 2257 – The “ABC Test” in Labor Code Section 2775

- “B” = “Does the worker free perform work that is outside the usual course of the hiring entity’s business? See *Dynamex*, 4 Cal. 5th 959-960
 - The hiring entity has the burden of proving that the worker performs work that is outside the usual course of its business
 - Contracted workers who perform services like that of an existing employee will likely be viewed as working in the usual course of the hiring entity’s business
 - Examples of services that are part of the hiring entity’s business:
 - A clothing manufacturer hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will be sold by the company.
 - A bakery hires a cake decorator to work on a regular basis on custom-designed cakes

AB 2257 – The “ABC Test” in Labor Code Section 2775

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 - The hiring entity has the burden of proving that the worker performs work that is outside the usual course of its business
 - Contracted workers who perform services like that of an existing employee will likely be viewed as working in the usual course of the hiring entity’s business
 - Examples of services that are NOT part of the hiring entity’s business:
 - When a retail store hires an outside plumber to repair a leak in a bathroom on its premises
 - When a retail store hires an outside electrician to install a new electrical line

AB 2257 – The “ABC Test” in Labor Code Section 2775

- “C” = “Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity? See *Dynamex*, at 4 Cal. 5th 962-963
 - The hiring entity cannot simply call the worker an “independent contractor” or by requiring, as a condition of hiring, the worker to sign an agreement that they are an independent contractor
 - The independent business operation has to actually be in existence at the time the work is performed (See *Garcia v. Border Transportation Group* (2018) 28 Cal. App. 5th 558, 574).
 - A person who independently decides to go into business takes steps to establish and promote the business (incorporation, licensure, advertisements, routinely offers to provide services of the business to the public or potential customers)
 - If an individual’s work relies on a single employer, Part C is not met, e.g. Part C not established for a taxi driver who had to get a municipal license that could only be used while the driver was employed by a specific taxi company. See *Garcia, supra*.

AB 2257 – The “ABC Test” in Labor Code Section 2775(b)(2) and LC Section 2750.3

- More specific definitions of employment or independent contractor provisions in the Labor Code, IWC wage orders, or Unemployment Insurance Code remain in effect.
- Where a court determines the ABC test cannot apply for a reason other than an express exception, the Borello test will apply.
 - For example, if a court were to determine in a case that the ABC test is preempted by an applicable federal law, the Borello test would be used.

AB 2257 catch-all: Labor Code Section 2775(b)(3) and 2750.3(a)(3)

Statutory Exceptions:

General catch-all provision:

If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (Borello).

AB 257 and AB 323 - Exceptions

Statutory exceptions:

- (1) A person or organization who is licensed by the Department of Insurance pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Part 2 of Division 1 of the Insurance Code.
- (2) A physician under license, license applicant, or certificate holder issued by the State of California pursuant to the Medical and Podiatry Professions Code, performing professional 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 Code. 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.
- (3) An individual who holds an active license from the State of California and is practicing one of the following: registered professional, lawyer, architect, engineer, private investigator, or accountant.
- (4) A circus rider, clown, or investor, or a circus and representative of a registered circus and its subsidiary, circus, or circus-related industry, authorized or licensed by the State of California pursuant to Chapter 2 (commencing with Section 25210) or Chapter 3 (commencing with Section 25230) of Division 1 of Part 3 of Title 4 of the Corporations Code.
- (5) A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met.
- (6) A commercial fisherman working on an American vessel as defined in a subparagraph (A) below.
- (7) For the purposes of this paragraph:
- (A) "American vessel" has the same meaning as defined in Section 125.5 of the Unemployment Insurance Code.
- (B) "Commercial fisherman" means a person who has a valid, sea-returned commercial fishing license issued pursuant to Article 3 (commencing with Section 7620) of Chapter 1 of Part 3 of Division 4 of the Fish and Game Code.
- (C) "Working on an American vessel" means the taking of the attempt to take fish, shellfish, or other fishery resources of the state by any means, and includes each individual, aboard an American vessel operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, including maintaining the vessel or equipment used aboard the vessel. However, "working on an American vessel" does not apply to an employee of a licensed commercial fishing vessel as a visitor or guest who does not directly or indirectly participate in the taking.
- (8) For the purposes of this paragraph, a commercial fisherman working on an American vessel is eligible for unemployment insurance benefits if they meet the definition of "employment" in Section 609 of the Unemployment Insurance Code and are otherwise eligible for those benefits pursuant to the provisions of the Unemployment Insurance Code.
- (9) This paragraph shall become operative on January 1, 2023, unless extended by the Legislature.
- (10) On or before March 1, 2023, and each March 1 thereafter, the Employment Development Department shall issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry. This report shall include, but not be limited to, reporting the number of commercial fishermen who apply for unemployment insurance benefits, the number of commercial fishermen who have their claims disputed, the number of commercial fishermen who have their claims denied, and the number of commercial fishermen who receive unemployment insurance benefits. The report required by this subparagraph shall be submitted to the Legislature by January 15, 2023, unless extended by the Legislature.
- (11) Subdivision (a) and the heading in Dynamex do not apply to a contract for "professional services" as defined below, and instead the determination of whether the individual is an employee or independent contractor shall be governed by Borello if the hiring entity demonstrates that all of the following factors are satisfied:
- (A) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. Nothing in this subdivision prohibits an individual from choosing to perform services at the location of the hiring entity.
- (B) If work is performed more than six months after the effective date of this section, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession.
- (C) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.
- (D) The individual is customarily engaged in the same type of work performance under contract with another hiring entity, or holds themselves out to other potential customers as available to perform the same type of work.
- (E) The individual maintains a regular business schedule and independently judgment in the performance of the service.
- (F) For purposes of this subdivision:
- (i) "Individual" includes an individual providing services through a sole proprietorship or other business entity.
- (ii) "Professional services" means services that meet any of the following:
- (i) Marketing, provided that the contracted work is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the contracted work.
- (ii) Administrator of human resources, provided that the contracted work is predominantly intellectual and varied in character and of such character that the output produced or the result accomplished cannot be standardized to a given period of time.
- (iii) Travel agent services provided by either of the following: (I) a person regulated by the Attorney General under Article 2.6 (commencing with Section 17500) of Chapter 1 of Part 5 of Division 4 of the Business and Professions Code, or (II) an individual who is a seller or travel within the meaning of subdivision (a) of Section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (a) of Section 17550.20 of the Business and Professions Code.
- (iv) Grant writer.
- (v) Grant writer.
- (vi) Fine artist.
- (vii) Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service pursuant to Part 10 of Subtitle A of Title 31 of the Code of Federal Regulation.
- (viii) Services provided by a staff photographer or photographer who do not file current submissions to the putative employer more than 35 times per year. This clause is not applicable to an individual who works on motion picture, which includes, but is not limited to, projects produced for theatrical, television, internet streaming for any device, commercial productions, broadcast news, music videos, and live shows, whether distributed live or recorded for later broadcast, regardless of the distribution platform. For purposes of this clause a "submission" is one or more items or forms of content produced by a staff photographer or professionalist that (I) pertains to a specific event or specific subject; (II) is provided for in a contract that defines the scope of the work, and (III) is accepted by and licensed to the publication or stock photography company and published or posted. Nothing in this section shall prevent a photographer or artist from displaying their work product for sale.
- (ix) Services provided by a freelance writer, editor, or newspaper columnist who does not provide content submissions to the putative employer more than 35 times per year. Items of content produced on a recurring basis related to a general topic shall be considered separate submissions for purposes of calculating the 35 times per year. For purposes of this clause, a "submission" is one or more items or forms of content by a freelance journalist that: (I) pertains to a specific event or topic; (II) is provided for in a contract that defines the scope of the work; (III) is accepted by the publication or company and published or posted for sale.
- (x) Sets their own rates, processes their own payments, and is paid directly by clients.
- (xi) Sets their own hours of work and has sole discretion to decide the number of clients and which clients for whom they will provide services.
- (xii) Has their own book of business and schedules their own appointments.
- (xiii) If the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salaried business owner from which they rent their business space.
- (12) This subdivision shall become inoperative, with respect to licensed massage therapists, on January 1, 2023.
- (13) Subdivision (a) and the heading in Dynamex do not apply to the following, which are subject to the following, which are subject to the Business and Professions Code: If that section is not applicable, then this determination shall be governed as follows: (A) for purposes of unemployment insurance by Section 650 of the Unemployment Insurance Code; (B) for purposes of workers compensation by Section 3200 of sec. 1 and (C) for all other purposes in the Labor Code by Borello. The following imposed duties of a responsible broker under section 20013.1 of the Business and Professions Code are not factors to be considered under the Borello test.
- (14) If a person is acting as a responsible broker pursuant to Section 20013.1 of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by Section 7502.2 of the Business and Professions Code, if the responsible agency is free from the control and direction of the hiring person or entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- (15) If a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation ("business service provider") contracts to provide services to another such business ("contracting business"), the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied:
- (A) The business service provider is free from the control and direction of the contracting business 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 a written one.
- (D) The business service provider maintains a business location that is separate from the business or work location of the contracting business.
- (E) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.
- (F) 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.
- (G) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.
- (H) The business service provider provides its own tools, vehicles, and equipment to perform the services.
- (I) The business service provider sets their own rates.
- (J) 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.
- (K) The subdivision does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.
- (L) The determination of whether an individual working for a business service provider is an employee or independent contractor of the business service provider is governed by paragraph (1) of subdivision (a).
- (16) Subdivision (a) and the heading in Dynamex do not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.
- (17) The subcontractor is licensed.
- (18) If the subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.
- (19) If the subcontractor is domiciled in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor has the required business license or business tax registration.
- (20) The subcontractor maintains a business location separate from the business or work location of the contractor.
- (21) The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, legally authorized indemnity obligations, performance bonds, or warranties relating to labor or services being provided.
- (22) The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.
- (23) [A] Paragraph (1) shall not apply to a subcontractor providing construction trucking services for which a contractor's license is not required by Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, provided that all of the following criteria are satisfied:
- (A) The subcontractor is a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.
- (B) For work performed after January 1, 2020, the subcontractor is registered with the Department of Industrial Relations as a public works contractor pursuant to Section 1725.5, regardless of whether the subcontract involves public work.
- (C) The subcontractor utilizes its own employees to perform the construction trucking services, unless the contractor who operates their own truck to perform the entire subcontract and holds a valid motor carrier permit issued by the Department of Motor Vehicles.
- (D) The subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.
- (E) For work performed after January 1, 2020, any business entity that provides construction trucking services to a contractor shall be deemed the employer for all drivers of those trucks.
- (F) Nothing in this paragraph prohibits an individual who owns their truck from working as an employee of a trucking company and utilizing that truck in the scope of that employment. An individual employee providing their own truck for use by an employer trucking company shall be reimbursed by the trucking company for the reasonable expense incurred for the use of the employee owned truck.
- (24) Subdivision (a) and the heading in Dynamex do not apply to the relationship between a referral agency and a service provider, as defined below, under the following conditions:
- (A) A business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation ("service provider") provides services to clients through a referral agency.
- (B) The service provider is not domiciled in any foreign jurisdiction and the service provider is licensed by the Contractors State License Board under the same or similar contract and fee.
- (C) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration, the service provider has the required business license or business tax registration.
- (D) If the work for the client is performed in a jurisdiction that requires the service provider to have a license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor's license.
- (E) The service provider delivers services to the client under service provider's name, rather than under the name of the referral agency.
- (F) The service provider provides its own tools and supplies to perform the services.
- (G) The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client.
- (H) The service provider maintains a clientele without any restrictions from the referral agency and the service provider is free to seek work elsewhere, including through a competing agency.
- (I) The service provider sets its own rates for services performed, without deduction by the referral agency.
- (J) The service provider is not penalized in any form for rejecting clients or contracts. This subparagraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.
- (25) For purposes of this subdivision, the following definitions apply:
- (A) "Client" means services related to daytime and nighttime pet care including pet boarding under the Business and Professions Code.
- (B) "Client" means a person or business that engages a service contractor through a referral agency.
- (C) "Referral agency" is a business that connects clients with service providers through pet care design, photography, tutoring, event planning, motor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup.
- (D) "Referral agency" is a business that connects clients with service providers through pet care design, photography, tutoring, event planning, motor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup.
- (E) "Service provider" means a person or business who agrees to the referral agency's contract and uses the referral agency to connect with clients.
- (F) "Tutor" means a person who develops and teaches their own curriculum. A "tutor" does not include a person who teaches a curriculum created by a public school or who contracts with a public school through a referral company for purposes of teaching students of a public school.
- (26) This subdivision does not apply to an individual worker, as opposed to a business entity, who performs services for a client through a referral agency. The determination whether such an individual is an employee of a referral agency is governed by subdivision (a).
- (27) Subdivision (a) and the heading in Dynamex do not apply to the relationship between a motor club holding a certificate of approval issued pursuant to Chapter 2 (commencing with Section 12160) of Part 1 of Division 2 of the Insurance Code and an individual performing services pursuant to a contract between the motor club and a third party to provide motor club services utilizing the employees and vehicles of the third party and, instead, the determination whether such an individual is an employee of the motor club shall be governed by Borello, if the motor club demonstrates that the third party is a separate and independent business from the motor club.

AB 2257 – The Exceptions: LC Sections 2776-2787

- The Borello test applies instead of the ABC Test for:
 - Specific types of business relationships between a worker and hirer
 - “Worker” and “Hirer” are our terms and are not used in the statutory exceptions
 - Look for specific aspects of the business relationship
 - Is a license required by the worker?
 - Is a profession specifically excluded from the ABC test? E.G. Film production companies subject to a collective bargaining agreement between employer and film crew
 - What are the terms of a contract between the worker and hirer?
 - Statutory scheme is easier to follow than those created by AB 5 (which were pages long under one Labor Code Section 2750.3)

AB 2257 and AB 323

- You must read Labor Code Section 2275 and Labor Code Section 2750.3 together
- LC 2750.3(b) lists exceptions and for them, *Borello* factors apply:
 - Insurance agents, physicians, surgeons, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, securities brokers/agents
 - Fisherman on American vessel
 - Newspaper distributors
 - Professional service contracts (travel agents, photographers, HR, IRS registered agent, fine artist, graphic designers, grant writers etc., freelance writers, esthetician, manicurists)
 - Business to Business contracts
 - Contractor to sub-contractor in construction industry [both have to be licensed]

AB 2257 and AB 323

- You must read Labor Code Section 2275 and Labor Code Section 2750.3 together
- LC 2750.3(b) lists exceptions and for them, *Borello* factors apply:
 - Referral agencies and service provider
 - Motor Clubs and third-party tow truck companies
- Also read LC Sections 2775-2786 with LC 2750.3
 - It will be like navigating a mine field

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions:
 - LC 2776: Business to Business contracting relationship
 - LC 2777: Referral agency and Service Provider
 - LC 2778: Individuals who work under a contract for “professional services”
 - LC 2779: Between two individuals for “single-engagement event” excluding “high hazard” services
 - LC 2780: People involved in the audio recording profession
 - LC 2781: Sub-contractors in the construction industry

AB 2257 – The Exceptions: LC Sections 2776-2786: Read all of these sections with LC 2750.3!

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- Labor Code Sections 2776-2786 provide the exceptions:
 - LC 2782: Individual providing feedback to a data aggregator
 - LC 2783: Professionals in the insurance industry and individuals who require a license to perform services (amended in AB 323, sunsets 1/1/2023)
 - LC 2784: Motor club and individuals performing services for a motor club
 - LC 2785: Retroactive Wage Orders of the IWC remain in full force including work performed on or after 1/1/2020
 - LC 2786: Preserves the provision in AB 5 that allows injunctive relief to prevent misclassification of employees as independent contractors
 - LC 2787: Provisions of this Article are severable

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - **LC 2776: Business to Business contracting relationships**
 - Bona Fide business to business contracting relationship
 - A business can involve an individual acting as a sole proprietor, partnership, LLC, LLP, or corporation
 - “Business service provider” = “worker”
 - “Contracting business” = “hirer”
 - Worker contracts to provide services to another such business, public or quasi-public entity

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - **LC 2777: Referral agency and service provider**
 - Individual provides services to clients through a referral agency
 - This section defines every single type of service and has 11 criteria to follow to determine if the service provider is an employee of the referral agency or the client to whom services are being provided
 - This section defines “client,” “referral agency,” “referral agency contract,” “service provider” [the same as in Section 2776]; “tutor,” “youth sports coaching,” and includes “**interpreting services.**”

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2778: Covers individuals who work under a contract for **“professional services”**
 - Six criteria to determine level of independence of a person who performs professional services: Individual has a business address, a local business license [as of March 4, 2021], can set own rates, can set own hours unless contract has a deadline, is customarily engaged in same services with other hirers, and exercises discretion and independent judgement on performing services

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2778: Covers individuals who work under a contract for **“professional services”**
 - Includes: marketing, HR administration, licensed travel agents, graphic designers, grant writers, fine artists, enrolled agents by the IRS, payment processors through independent sales organization, still photographer, photojournalist, videographer, photo editor under a written contract as long as the person does not replace an employee of a hirer;

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2778: Covers individuals who work under a contract for **“professional services”**
 - Includes: freelance writer, translator, editor, copy editor, illustrator, newspaper cartoonist, author of intellectual property who works under a written contract and who does not replace an employee, licensed esthetician, electrologist, manicurist [sunsets on 1/1/2022], barber; cosmetologist who sets their own rates, processes payments and is paid directly by clients; performer who teaches a master class;

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2778: Covers individuals who work under a contract for **“professional services”**
 - Includes: appraisers, licensed foresters, real estate licensees (governed by B&P Code section 10032 which requires WC coverage for sales people), home inspectors, and repossession agencies.

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2779: **Two individuals where one provides services at a “single-engagement event.”**
 - **Eric, does that mean you and me?**
 - Eight criteria: one has no control over the other, each separately negotiates pay, contract specifies payment for each, each has own separate business location [can be residence]; each uses own tools/vehicle/equipment, customarily performs same service to others, has a business license if required by local government, has own clientele

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2779: **Two individuals where one provides services at a “single-engagement event.”**
 - **“Single-engagement event”** is a stand-alone event in a single location that does not recur more than once a week
 - Excludes “high hazard” services such as janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction other than minor home repair

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2780: Recording artists, songwriters, lyricists, composers, proofers; managers of recording artists, record producers, musical engineers, mixers, musicians engaged in sound recordings, vocalists, photographers working on photo shoots, independent radio promoters, others in the business of creative production and distribution of sound recordings [**This section covers musical groups and theater performers**]
 - Excludes film and television production crews working on live or recorded productions and groups subject to collective bargaining

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2781: This section covers **sub-contractors in the construction industry** and refers to Labor Code Section 2750.5(f)(8)(A) and the *Borello* factors.
 - There is a special provision for truck drivers: “Nothing in this subdivision prohibits an individual who owns their truck from working as an employee of a trucking company and utilizing that truck in the scope of that employment. An individual employee providing their own truck for use by an employer trucking company shall be reimbursed by the trucking company for the reasonable expense incurred for the use of the employee-owned truck.”

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2782: Individuals providing feedback to a Data Aggregator [data aggregation is taking raw data and expressed in summary form for statistical analysis – e.g. “how many homeless people live in Los Angeles County?”]
 - This section applies to businesses that gather feedback on user interface, products, services, people, concepts, ideas, offerings, or experiences from individuals willing to provide the information

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2783: **Professional licensees:** Insurance industry: - underwriter inspectors, premium auditors, risk management or loss control workers; physicians and surgeons, lawyers, architects. Landscape architects, engineers, private investigators, accountants, securities brokers. investment advisors, manufactured housing salespersons, commercial fishers on American vessels [sunsets on 1/1/2023]. Also covers newspaper distributors and newspaper carriers under contract with a publisher or distributor [sunsets 1/1/2023]; international exchange visitor program participants, competition judges

AB 2257 – The Exceptions: LC Sections 2776-2786

- Labor Code Sections 2776-2786 provide the exceptions: “Section 2775 and the ABC Test in *Dynamex* do not apply” and *Borello* factors do apply to determine employee or independent contractor:
 - LC 2784: Motor clubs and an individual providing motor club services [such as a tow truck operator for the Auto Club – is a tow truck operator an employee of the motor club, the towing company, or both?]
 - LC 2785: This section covers wage orders of the Industrial Welfare Commission
 - LC 2786: Provides injunctive relief for violations of Section 2775 to prevent misclassification of employees as independent contractors.
 - LC 2787: The provisions of this Article are severable

AB 2257 – *Res Judicata*?

- EDD, CUIAB, WCAB, OSHAB, and the Labor Commissioner's Office may issue determination as to employment or independent contractor status between a worker and a hirer
- Is a final determination or decision issued by one sub-agency binding on another sub-agency as to that finding of employment or independent contractor?
- The ultimate solution may be administrative or by appellate decision

AB 2257: HYPOTHETICAL

- If a worker signs a written agreement stating that they are an independent contractor, the hirer does not provide payroll deductions or withholding for taxes, or social security, or SDI for the worker and the end of the year gives the worker a IRS Form 1099 rather than a W-2 does this make the worker an independent contractor?
- No!! These factors do not determine employment status
- See Labor Code Section 226.8 that prohibits willful misclassification of individuals as independent contractors

AB 5 – Tidbits

- EDD: Can make employment determination through an employment tax audit, UI, or SDI claim. For work before 1/1/2020, see Unemployment Ins. Code Section 621(b) which requires EDD to use the *Borello* factors test
- A worker can be considered an employee under CA law but not under federal law due to different criteria
- Web sites for AB 2257 and AB 323 by Workforce Development Agency, EDD, and IWC need to be updated.

Questions???

