



## AB 2257 – Protecting Workers, Businesses, and Taxpayers Against Misclassification

### IN BRIEF

---

AB 2257 furthers the original intent of AB 5 (Chapter 296, Statutes of 2019) to protect workers, responsible businesses, and taxpayers from bearing the detrimental costs of misclassification. This legislation builds upon the standards already established in AB 5 to provide greater certainty for workers and employers regarding the application of the widely used legal standard known as the ABC test, which was established by the California Supreme Court's unanimous *Dynamex* decision in April 2018 and codified in AB 5. AB 2257 is an urgency measure which, if enacted, would be effective immediately.

While legitimate independent contractors can be classified as such if they meet the criteria under the ABC test, AB 2257 outlines additional instances when an individual who operates their own independent business is clearly subject to the previous *Borello* standard for the purposes of determining their employment classification. AB 2257 balances the need for clarifying changes to existing law that will help support compliance of AB 5, while ensuring misclassified workers who are subject to undue control and direction by their employers continue to be protected under the ABC test.

### BACKGROUND

---

In April 2018, the California Supreme Court issued the unanimous landmark *Dynamex* decision, which established a widely used legal standard known as the “ABC” test as the default test for determining an individual’s employment classification. Under the ABC test, an individual can be classified as an independent contractor if their hiring entity satisfies the following conditions:

- (A) The individual is free from the control and direction of the hiring company,
- (B) The individual performs work that is outside of the hiring company’s usual course of business, and
- (C) The individual has their own independently established trade, occupation or business performing that work.

The ABC test made it clear that workers who have been historically misclassified and kept off payroll as employees are entitled to basic rights and protections

under the state’s labor laws. This includes workers who have long been deprived under previous classification standards their right to a basic minimum wage, overtime, paid sick days, Social Security, the right to organize for better wages and working conditions, and access to critical worker safety-net programs like unemployment insurance, workers’ compensation, disability leave and paid family leave.

Following the *Dynamex* decision, businesses across the state were unsure of the case’s implications. To provide certainty to both workers and businesses, AB 5 codified the *Dynamex* decision for the purpose of creating a consistent definition for employment under the Labor Code and Unemployment Insurance Code. Codifying the decision also allowed the Legislature to clarify the circumstances under which contracts between bona fide businesses would be governed by the *Borello* classification test, which was the standard prior to the *Dynamex* decision. AB 5 went into effect as of January 1, 2020.

### HOW DOES AB 2257 ADD OR MAKE CHANGES TO EXISTING REQUIREMENTS UNDER AB 5?

---

#### Business-to-business Contracting

AB 2257 clearly states that a business contracted to provide services to another business’s customers can do so when the services are being performed by the business service provider’s employees under their employer’s name, provided that other criteria under the section are satisfied. AB 2257 also clarifies that a contracting business under this section includes public agencies and quasi-public corporations.

#### Referral Agency Contracts with Businesses

AB 5 clarified that *Dynamex* and the ABC test do not apply when a referral agency contracts with a business (“service provider”) that provides specified services to clients.

AB 2257 expands this section to be applicable when a referral agency provides clients with referrals for businesses providing **any** service, with the exception of services provided in industries that are designated by Cal/OSHA as “high-hazard” industries and other industries in which workers are at high-risk of

misclassification including janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, and construction services other than minor home repair.

Under AB 2257, a business must certify to a referral agency that they hold a business license if required by their local jurisdiction and any professional licensure, permit, certification, or registration applicable to the type of service they perform for the client, if one is available. For example, certification is available for interpretation services for some, but not all, languages in California. AB 2257 simply clarifies that **if** a certification or registration to provide interpretation services is available for a particular language, then the business certifies that they maintain the relevant certification or registration.

Finally, AB 2257 further specifies the purpose of a referral agency as a business that provides client referrals and other administrative services that are ancillary to a service provider's business operation.

### **Writers and Multimedia Professionals**

AB 2257 removes the existing requirement for the ABC test to apply after a freelance writer, still photographer, photojournalist, or editor has provided more than 35 content submissions to a single hiring entity.

Instead, AB 2257 requires a hiring entity to demonstrate that a freelance writer, translator, illustrator, editor, copy editor, or other type of content contributor fulfills the criteria below in order for the *Borello* test to govern the individual's employment classification.

- 1) The individual provides services under a contract that specifies their rate of pay, a defined time by which they must receive their payment, and the individual's intellectual property rights to the work.
- 2) The individual does not primarily provide services at the hiring entity's business location.
- 3) The hiring entity does not hire the individual to provide services that would directly replace an existing employee who does the same work at the same volume, or prevent the individual from providing services to more than one hiring entity.

AB 2257 outlines similar criteria for a still photographer, photojournalist, videographer, or photo editor that provide services under a contract. The bill additionally specifies that a still photographer, photojournalist,

videographer, or photo editor providing services to a digital content aggregator is also governed by the *Borello* test.

### **WHICH NEW PROVISIONS DOES AB 2257 ADD TO FURTHER CLARIFY THE IMPACT OF *DYNAMEX* AND AB 5?**

---

Under both the ABC test and the *Borello* test, employment classification is determined based on whether a hiring entity has the ability to impose control and direction on the manner and means by which a worker accomplishes their task. AB 2257 outlines additional instances where an individual's employment classification is governed by the *Borello* test, given they are not subject to undue control and direction by their hiring entity. Consistent with AB 5, any provision in AB 2257 that specifies an individual's employment classification is governed by the *Borello* test is retroactive.

### **Professionals in the Music Industry**

To remain consistent with this principle, new provisions clarifying employment arrangements in the music industry reflect the opportunity for musicians to collaborate with each other in instances where each musician is free of control from the hiring business and the nature of their work is primarily original and inventive. Musicians who are governed by the *Borello* test, instead of the ABC test, are those who retain a greater ability to influence their working conditions, and possess more creative independence and professional autonomy over their work when collaborating with other artists to produce a song or put on a live performance.

With respect to the production process, AB 2257 preserves the ability for the following industry professionals who operate autonomously to collaborate and contract with one another to produce sound recordings and musical compositions, without the application of the ABC test to determine their employment classification:

- Musicians, vocalists, and other recording artists
- Composers
- Songwriters, lyricists, and proofers
- Musical engineers
- Sound mixers
- Record producers and directors
- Other professionals involved in the creation, marketing, promotion or distribution of a sound recording or musical composition

With respect to single-engagement live performances, AB 2257 allows independent musicians whose work is self-directed to collaborate with one another, without being governed by the ABC test. Unless a musical group specifically falls into one of the categories below, a musician’s employment classification will be governed by the *Borello* test:

- The main featured act headlining at a concert venue with more than 1,500 attendees or;
- Musical group performing at a large festival with more than 18,000 attendees per day.

Instances where the nature of a musician’s work inherently draws a significant level of control and direction from their employer, musicians will continue to have protections under the ABC test. This includes under the following arrangements:

- A musician performing as part of a tour of live performances,
- A musical group regularly performing in a theme park or amusement park setting,
- A musician performing in a symphony orchestra,
- A musician performing in a musical theatre production.

### **Professionals in Performing Arts**

AB 2257 clarifies that when an individual performance artist who sets their own terms of work is performing material that is their original work for which they retain the intellectual property rights to and have full artistic control over, then their employment classification is governed by the *Borello* test. This does not include performers in theatrical productions who are subject to control and direction by their hiring entity.

The bill also specifies that a specialized performer with expertise in a recognized field of artistic endeavor who teaches a master class for no more than once a week for a performing arts company or organization is governed by the *Borello* test.

### **Two Businesses Contracting to Provide On-Site Services**

When two individuals, both of whom are acting as sole proprietors or are formed as business entities, contract with one another to provide services at single-engagement events, they are governed by the *Borello* test – given they are not subjecting one another to control and direction and otherwise operate their businesses independently. AB 2257 specifies this applies for any

type of service being provided, with the exception of services provided in industries that are designated by Cal/OSHA as “high-hazard” industries and other industries in which workers are at high-risk of misclassification including janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, and construction services other than minor home repair.

### **Data Aggregators**

AB 2257 clarifies that individuals who are providing feedback to businesses, research institutions, and other organizations that request and aggregate such feedback are governed by the *Borello* test.

### **Other Industry Specific Provisions**

AB 2257 adds additional clarifications for hiring entities across various industries that specify the following professions are governed by the *Borello* test to determine an individual’s employment classification. These include:

- An individual providing underwriting inspections, premium audits, risk management, or loss control work for the insurance and financial service industries.
- An individual providing appraisal services.
- An individual providing services as a home inspector or manufactured housing salesperson.
- An individual providing services as a registered professional forester.
- An individual who is conducting an international exchange visitor program that maintains full official designation by the United States Department of State and compliance with federal regulations.
- A competition judge with a specialized skillset or expertise providing services for the purposes of determining the outcome of a competition or enforcing the rules of a competition. This expressly includes, but is not limited to, an amateur umpire or referee.

Finally, AB 2257 clarifies that district attorneys are among the public entities that have the authority to enforce AB 5 by seeking injunctive relief to stop the exploitation of misclassified workers.

### **FOR MORE INFORMATION**

---

Shubhangi Domokos  
Office of Assemblymember Lorena Gonzalez  
916-319-2080 | [Shubhangi.Domokos@asm.ca.gov](mailto:Shubhangi.Domokos@asm.ca.gov)