



## MEMORANDUM

### AB 5 SUMMARY

#### BORELLO

- *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341
  - Most significant factor: Whether person/entity to whom service is rendered has control or right to control worker both as to work done and manner/means work is performed.
    - Additional factors:
      - Whether person performing services is engaged in occupation or business distinct from that of principal;
      - Whether or not work is a part of regular business of principal or alleged employer;
      - Whether principal or worker supplies instrumentalities, tools, and place for person doing work;
      - Alleged employee's investment in equipment or materials required by task or employment of helpers;
      - Whether service rendered requires a special skill;
      - Kind of occupation, with reference to whether, in locality, work is usually done under direction of principal or by specialist without supervision;
      - Alleged employee's opportunity for profit or loss;
      - Length of time for which the services are to be performed;
      - Degree of permanence of working relationship;
      - Method of payment, whether by time or by job; and
      - Whether or not the parties believe they are creating employer-employee relationship.

#### DYNAMEX

- *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903
  - A person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following are satisfied (claims brought under the IWC wage orders):
    - (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 contract for the performance of the work and in fact;
    - (B) The person performs work that is outside the usual course of the hiring entity's business; and

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- (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

**AB 5 (LABOR CODE 2750.3)**

➤ **Exempt Occupations**

- *Dynamex* does not apply and instead the determination of employee or independent contractor status for individuals in the following occupations shall be governed by *Borello*:
  - Licensed insurance agents
  - Physician, surgeon, dentist, podiatrist, psychologist or veterinarian (CA licensed)
  - Lawyer, architect, engineer, private investigator, accountant (CA licensed)
  - Registered securities broker-dealer or investment advisor and their agents and representatives
  - Certain direct sales salespersons
  - Commercial fisherman on American vessel (inoperative 1/1/23, unless extended)
  - Real estate licensee (CA licensed)
  - Workers performing repossession services for repossession agencies (if free from control and direction of hiring entity)

➤ **“Professional Services” Exemptions**

- “Professional services” means services that meet any of the following:
  - Marketing (provided certain criteria are met);
  - Administrator of human resources administrator (provided certain criteria are met);
  - Certain travel agent services;
  - Graphic design;
  - Grant writer;
  - Fine artist;
  - Services provided by an enrolled agent licensed by the US Department of Treasury;
  - Payment processing agent through an independent sales organization;
  - Still photographer or photojournalist (no more than 35 submissions per year; does not apply to motion picture work);
  - Freelance writer, editor, or newspaper cartoonist (no more than 35 submissions per year);
  - Licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist provided the individual:
    - Sets own rates, processes own payments, and is paid directly by clients;
    - Sets own hours of work and has sole discretion to decide number of clients and which clients for whom they will provide service;
    - Has own book of business and schedules own appointments;
    - Maintains own business license for the services offered to clients;
    - If individual is performing services at location of the hiring entity, individual issues a Form 1099 to salon or business owner from which they rent business space

- Inoperative with respect to licensed manicurist on 1/1/22
- *Dynamex* does not apply to a contract for “professional services” (as defined above) 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:
  - The individual maintains a business location, which may include the individual’s residence, separate from the hiring entity (the individual may choose to perform services at the location of the hiring entity);
  - 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 license or permits to practice their profession;
  - The individual has the ability to set or negotiate their own rates for the services performed;
  - Outside of project completion dates and reasonable business hours, the individual can set the individual’s own hours;
  - The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work;
  - The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

➤ **“Business-to-Business” Exemptions**

- *Dynamex* does not apply to a bona fide business-to-business contracting relationship and the determination of employee or independent contractor status shall be governed by *Borello* if the contracting business demonstrates that all of the following criteria are satisfied:
  - Business service provider is free from control and direction of contracting business entity in connection with the performance of the work, both under the contract for performance of the work and in fact;
  - Business service provider is providing services directly to contracting business rather than to customers of contracting business;
  - Contract with business service provider is in writing;
  - If the work is performed in a jurisdiction that requires business service provider to have a business license or business tax registration, business service provider has required business license or business tax registration;
  - Business service provider maintains business location separate from business or work location of contracting business;
  - Business service provider is customarily engaged in independently established business of same nature as that involved in work performed;
  - Business service provider actually contracts with other businesses to provide the same or similar services and maintains clientele without restrictions from hiring entity;
  - Business service provider advertises and holds itself out to the public as available to provide the same or similar services;
  - Business service provider provides own tools, vehicles, and equipment to perform services;
  - Business service provider can negotiate own rates;

- Consistent with the nature of the work, business service provider can set own hours and location of work;
- Business service provider is not performing type of work for which a license from Contractor's State License Board is required.
- This subdivision does not apply to individual worker, as opposed to a business entity, who performs labor or services for a contracting business.

➤ **Referral Agency Exemptions**

- "Referral agency" is a business that connects clients with service providers that provide 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.
  - *Dynamex* does not apply to the relationship between a referral agency and a service provider and the determination whether the service provider is an employee of the referral agency shall be governed by *Borello*, if the referral agency demonstrates that all of the following criteria are satisfied:
    - Service provider is free from control and direction of referral agency in connection with performance of work for client, both as a matter of contract and in fact;
    - If work for the client is performed in a jurisdiction that requires service provider to have a business license or business tax registration, service provider has required business license or business tax registration;
    - If work for the client requires service provider to hold a state contractor's license, service provider has required contractor's license;
    - Service provider delivers services to client under service provider's name, rather than under name of referral agency;
    - Service provider provides own tools and supplies to perform the services;
    - Service provider is customarily engaged in independently established business of same nature as that involved in work performed for client;
    - Service provider maintains clientele without any restrictions from referral agency and service provider is free to seek work elsewhere, including through a competing agency;
    - Service provider sets own hours and terms of work and is free to accept or reject clients and contracts;
    - Service provider sets own rates for services performed, without deduction by referral agency;
    - Service provider is not penalized in any form for rejecting clients or contracts (does not apply if service provider accepts client or contract and fails to fulfill any contractual obligations).
- 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.

➤ **Construction Industry Exemption**

- *Dynamex* does not apply to relationship between a contractor and individual performing work pursuant to a subcontract in the construction industry, which is instead governed by *Borello*, if the contractor demonstrates that all the following criteria are satisfied:
  - Subcontract is in writing;
  - Subcontractor is licensed by Contractors State License Board and work is within the scope of that license;
  - If subcontractor is domiciled in jurisdiction that requires subcontractor to have business license or business tax registration, subcontractor has required business license or business tax registration;
  - Subcontractor maintains a business location separate from business or work location of contractor;
  - Subcontractor has authority to hire and to fire other persons to provide or to assist in providing services;
  - 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;
  - Subcontractor is customarily engaged in independently established business of same nature as that involved in work performed.
- License requirement above shall not apply to a subcontractor providing construction trucking services, provided all of the following criteria are satisfied:
  - Subcontractor is business entity formed as sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation;
  - For work performed after January 1, 2020, the subcontractor is registered with Department of Industrial Relations as a public works contractor, regardless of whether subcontract involves public work;
  - Subcontractor utilizes own employees to perform construction trucking services, unless subcontractor is sole proprietor who operates own truck to perform entire subcontract and holds valid motor carrier permit issued by DMV;
  - Subcontractor negotiates and contracts with, and is compensated directly by, licensed contractor;
    - For work performed after January 1, 2020, any business entity that provides construction trucking services to a licensed contractor utilizing more than one truck shall be deemed employer for all drivers.
      - “Construction trucking services” mean hauling and trucking services provided in construction industry pursuant to a contract with a licensed contractor utilizing vehicles that require a commercial driver’s license to operate or have a gross vehicle weight rating of 26,001 or more pounds.
        - This paragraph shall only apply to work performed before January 1, 2022.

- AB 5 applies to claims brought under the Labor Code, Unemployment Insurance Code, IWC wage orders, and workers compensation (effective 7/1/20)

**Nicole Kamm, Esq.**  
nkamm@fisherphillips.com  
(213) 330-4497 (o)/(818) 262-6093 (c)

**Hannah Sweiss, Esq.**  
hsweiss@fisherphillips.com  
(213) 330-4496 (o) / (818) 939-8078 (c)