

# UC LEGAL

## Legal Advisory

December 20, 2019

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### SUMMARY

**California adopts new restrictive test to determine whether workers can be classified as independent contractors.**

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UC Legal provides updates regarding important legal and regulatory developments that affect the University. For additional information or assistance with a specific legal matter, please contact UC Legal.

## GOVERNOR NEWSOM SIGNS AB 5 LIMITING WHO CAN BE CLASSIFIED AS AN INDEPENDENT CONTRACTOR

On September 18, 2019, Governor Newsom signed [Assembly Bill 5](#) (“AB 5”), establishing a strict test for determining whether a person can be treated as an independent contractor rather than an employee under certain laws. AB 5 codifies and expands the California Supreme Court’s decision in [Dynamex Operations West, Inc. v. Superior Court \(2018\) 4 Cal.5th 903](#), which adopted the “ABC” test for assessing whether a worker is an independent contractor or an employee under the California Wage Orders. AB 5 expands the use of the ABC test beyond the Wage Orders to include the Labor Code (including wage and hour and workers’ compensation requirements) and the Unemployment Insurance Code (addressing unemployment insurance benefits).

A worker’s status as an independent contractor or an employee dictates whether a variety of labor, employment, and tax laws applies to that worker. These laws generally entitle employees – but not independent contractors – to certain protections and benefits. Currently, no uniform test exists to determine employee versus independent contractor status for all purposes. Employers must use different tests under different laws. AB 5 introduces some level of clarity by requiring the ABC test for workers’ compensation, unemployment benefits, and state wage and hour requirements.

### ***Dynamex v. Superior Court and AB 5***

Last year, the California Supreme Court held in *Dynamex* that disputes under California’s Wage Orders about whether a worker was misclassified as an independent contractor must be evaluated using the “ABC” test. California’s Wage Orders cover different industries and occupations and impose minimum wage, overtime, and meal and rest period requirements on private sector employers. AB 5 codifies and expands the *Dynamex* holding, making the ABC test the default employee/independent contractor test for all Labor Code provisions, including those governing workers’ compensation, as well as all Unemployment Insurance Code provisions.

Under the ABC test, the hiring entity must establish all of the following to properly classify a worker as an independent contractor:

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

The hiring entity has the burden of proof and must satisfy all three elements of the ABC test to classify a worker as an independent contractor. If the hiring entity cannot demonstrate just one element, then the worker must be classified as an employee.

### ***Exemptions:***

AB 5 contains many exemptions from the ABC test for various industries, occupations, and business relationships. Here are some of those exemptions:

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- Business-to-Business. The “business-to-business” exemption from the ABC test applies to “business service providers” that contract to provide services to another business, but only if an extensive list of detailed criteria are met, including that the contracting business does not control or direct the business service provider regarding how it performs the work. This is similar to the first prong of the ABC test. Among other things, the business-to-business exemption also requires that the business service provider actually contract with other businesses to provide the same or similar services and that the business service provider provides its own tools, vehicles, and equipment.
- Medical Professionals. Physicians, dentists, podiatrists, psychologists, and veterinarians are exempt from the ABC test. This exemption does not apply to these medical professionals if they are currently or potentially governed by collective bargaining agreements.
- Licensed Professionals. Professionals that may be exempted from the ABC test under AB 5 include, but are not limited to, attorneys, architects, engineers, private investigators, accountants, and construction subcontractors.
- Professional Services. If certain conditions are met, the ABC test does not apply to contracts for the following professional services: marketing, human resources administration, travel agent services, graphic design, grant writers, fine artists, agents licensed to practice before the IRS, payment processing agents, photographers, and journalists.

But beware! These exemptions only apply if specific criteria are met. And, even if a worker qualifies for an exemption from the ABC test, the hiring entity must then confirm that the worker satisfies other independent contractor/employee tests, such as [the Borello test for state law claims](#), [the IRS test for federal tax purposes](#), and [the Department of Labor economic realities test for federal wage and hour matters](#). These multifactor tests are more flexible than the ABC test, but there is significant overlap – particularly in analyzing the hiring entity’s “right to control” the worker.

### ***Effective Date, Legal Challenges, Amendments***

AB 5 takes effect on January 1, 2020, and the University’s compliance effort is under way. The law applies retroactively to disputes arising under the California Wage Orders, but this does not affect University operations or expose the University to additional liability, because the Wage Orders do not apply to public entity employers like the University.

There are many areas of AB 5 where the practical application of the plain language will lead to confusion. The law is likely to change over time, whether through litigation, legislation, and/or ballot initiative. The University is monitoring these developments.

### ***Next Steps***

1. Consider where and how the University uses independent contractors.
2. Partner with Human Resources, Academic Personnel and Programs, Procurement, and/or UC Legal to review independent contractor relationships.
3. For short-term employment relationships, consider utilizing University options such as contract appointments or limited appointments for policy-covered staff positions.

If you have any questions about AB 5 or independent contractor relationships, please contact your campus counsel, Senior Counsel [Shondella Reed](#), or Senior Counsel [Trina Mastro](#).