

FLOOR ALERT

May 28, 2019

TO: Members, California State Assembly

**SUBJECT: AB 5 (GONZALEZ) WORKER STATUS: INDEPENDENT CONTRACTORS
SUPPORT IF AMENDED – AS AMENDED MAY 24, 2019**

The California Chamber of Commerce and the organizations listed below **SUPPORT IF AMENDED AB 5 (Gonzalez)**. As recently amended on May 24, 2019, **AB 5** exempts doctors, insurance agents, securities brokers, direct sellers, realtors, barbers, hair stylists, and listed professionals with degrees/licensing, including lawyers, accountants, engineers, architects, marketing, and human resources from the application of the *Dynamex Operations West v. Superior Court* (“*Dynamex*”). While we appreciate the recognition in **AB 5** that the *Dynamex* decision is not one size fits all and agree the professions identified should be exempted under **AB 5**, the Legislature should not stop with selecting just a few professions and not others similarly situated. Accordingly, we are seeking additional amendments that provide a more progressive and holistic approach to the application of *Dynamex* that reflects today’s modern workforce, as set forth below.

The *Dynamex* Decision:

Prior to *Dynamex*, California courts and state agencies had long applied what is known as the *Borello* test for determining whether a worker was an independent contractor for labor and employment purposes. The *Borello* test was established by the California Supreme Court’s decision *S.G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341.¹ This flexible, multi-factor approach looked primarily at whether the hiring entity had a “right to control” the manner in which the worker performed the contracted service, along with eight other “secondary” factors, such as whether the worker was engaged in a distinct occupation or business, the skill required in the particular occupation, and whether the worker or the hiring entity supplied the tools used to perform the work and the place where the work was performed.

Despite the *Borello* test being used for nearly three decades in the employment context, the California Supreme Court made a surprising and unprecedented departure from the *Borello* test and announced a significant change in the law, adopting the “ABC” test for determining whether an individual is an employee under the Wage Orders. Notably, this test has never existed in any form of California law, either in statute or by a regulatory action. This is also the first time that the right to control is no longer determinative.

Under this new “ABC” test, a person will be considered an independent contractor only if the hiring entity can prove all three of the following:

- (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;
- (B) that the worker performs work that is outside the usual course of the hiring entity’s business;

¹Under *Borello*, each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case [¶] ... Besides the [traditional common law] “right to control the work,” the factors include (1) the alleged employee’s opportunity for profit or loss depending on his managerial skill; (2) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (2) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’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.

This new test places in doubt the sustainability of a significant portion of independent contractor relationships in California and has the potential to cause substantial economic harm to millions of California citizens. Because of the rigidity of the test, specifically factors “B” and “C”, most individuals who control their own schedule, control the projects or tasks that they take on, and control the way in which they perform the tasks or projects, will likely lose existing contracts and work opportunities because they perform work that is similar to that of the business entity retaining their services and/or are not in an independent business or trade of the same work being performed.

With one judicial opinion, nearly 30 years of established law has been overturned virtually overnight (and possibly retroactively as well). The Industrial Welfare Commission, which was empowered to promulgate and amend the Wage Orders, including the Wage Order at issue in *Dynamex*, was defunded over 15 years ago. This means that, when the Wage Orders were finalized, the use of technology, platforms, and the flexible work arrangements that now exist in California’s economy were never considered. This decision from the Supreme Court takes California backwards into ideas about employment that have no relation to the modern workforce and that have never been contemplated by elected officials or agencies.

Additional Amendments Are Needed to Protect the Opportunity for Millions of Californians to Maintain Their Careers:

(1) A Broader Exemption for Professionals:

We agree with the professionals currently exempted in the bill. But, we believe that others who are similarly situated should also be exempted, such as therapists, speech interpreters and translators, court reporters, scientists, and so many other individuals who have advanced degrees or are licensed by the State, perform work as independent contractors and want to maintain that status. These individuals choose their own hours, projects, and rate of pay. At the informational hearing in the Assembly Labor Committee, even proponents acknowledged that these individuals had greater bargaining power and were not as vulnerable to misclassification as others.

However, without a broader exemption in **AB 5**, such professionals will lose their opportunity to maintain their status as independent contractors. The “B” factor prohibits any independent contractor performing work within the usual course of business of the hiring entity, which could include the services provided by many of these individuals for multiple companies. Accordingly, we request a broader exemption for professionals than just those currently identified in **AB 5**.

(2) A Broader Exemption for Individuals Who, Like Direct Sellers, Prefer to Control Their Own Schedule:

AB 5 exempts direct sellers from the application of *Dynamex*, with which we agree. Direct sellers control their own schedules with regard to the days and hours they work and make their own decisions regarding to whom they sell products. There are numerous other independent contractors who enjoy this same control and flexibility and should be able to maintain their status as independent contractors, just like direct sellers. Newspaper distributors, drivers in the gig economy, taxi cab drivers, truck drivers, consultants, travel agents, repair persons, videographers, caterers, freelance writers, photographers, musicians, graphic designers, and so many others who all control when they work and for whom they work and they should be able to maintain their status as independent contractors.

(3) Business to Business Exemption:

AB 5 should also exempt business to business contracts from the application of *Dynamex*. Any sole proprietor, partnership, LLC, LLP, or corporation should be able to contract with another lawful business to provide services, despite whether the services provided are within the “usual course of business.” For example, a restaurant that contracts with a delivery company to deliver its food each week, should be able

to maintain that contract. An online retailer that receives all of its sales through its website should be able to hire a website design company to update its website, even though this service could arguably be within the usual course of the retailer's business.

(4) Ability to Subcontract for Short-Term Projects:

One of the main reasons companies utilize independent contractors is to fulfill a demand for a short-term project. Even though the company may have a full workforce, an unexpected order or contract may require immediate, extra workers to satisfy the deadline for the project. "Hiring up" in such a scenario does not make sense for either the company or the individual, as the demand for the work is only temporary. An example of this unexpected, immediate demand for help, is when the devastating wildfires spread throughout Northern California. There was an immediate need for additional independent owner/operators of trucks that could assist in hauling debris as well as transporting tools and supplies. Companies need the flexibility to manage these unexpected increases in demand through the use of independent contractors. **AB 5** should be amended to include this exemption.

Retroactive Application of the Dynamex Decision Is Further Increasing Litigation:

Dynamex has already increased litigation costs for individual claims, class actions, and representative actions against California businesses of all sizes. The threat of litigation is exacerbated because some California courts are applying the *Dynamex* decision retroactively - up to 4 years back. See *Oriana Johnson, et al. v. VCG-IS LLC, et al.*, (Cal. Sup. Ct. 2018) No. 30-2015-00802813. Retroactive application means that companies that were playing by the rules and classifying workers under the *Borello* test are now facing even more litigation due to the potential retroactive application of *Dynamex*. See *Lawson v. Grubhub.*, (N.D. Cal. 2018) No. 3:15-cv-05128. We appreciate the acknowledgment in **AB 5** that the bill is declaratory of existing law for those industries/professions exempted from the decision. However, for those who are not exempted, the retroactive application is significant.

California is estimated to have nearly 2 million residents who choose to work as independent contractors. That figure is a conservative one as the 2018 U.S. Bureau of Labor Statistics Economic Release did not include the number of individuals who supplement their income with online platforms. 79 percent of independent contractors prefer their status over traditional employment according to the Bureau of Labor Statistics Economic Release (June 7, 2018). Furthermore, in a California August 2018 survey, 93% of independent contractors said they would opt to remain independent contractors rather than become employees. *EMC Research August 2018*.

Failing to further amend **AB 5** with the additional exemptions listed above, has the potential to eliminate the vast majority of independent contractors in California. This not only hurts the business model of a broad swath of industries and billions of venture capital dollars that are increasingly invested in businesses, but also it hinders California as a national leader in the innovation economy.

For all of these reasons, we respectfully **SUPPORT** if **AB 5** is further **AMENDED** to provide a more progressive and holistic approach that fit today's modern workforce.

Sincerely,



Ben Ebbink
California Chamber of Commerce

Associated General Contractors
Association of Language Companies
Brea Chamber of Commerce
CalAsian Chamber of Commerce
California Ambulance Association

California Association for Licensed Professional Clinical Counselors
California Association of Licensed Investigators
California Association of Marriage and Family Therapists
California Attractions and Parks Association
California Building Industry Association
California Business Properties Association
California Coalition of Travel Organizations
California Construction and Industrial Materials Association
California Defense Counsel
California Employment Law Council
California Forestry Association
California Hospital Association
California League of Food Producers
California News Publishers Association
California Psychological Association
California Retailers Association
California Society of Enrolled Agents
Citizens Against Lawsuit Abuse
Civil Justice Association of California
Electronic Transactions Association
Glamsquad
Hayward Chamber of Commerce
IPSE – The Association of Independent Workers
IU Group
Long Beach Area Chamber of Commerce
Murrieta Wildomar Chamber of Commerce
North Orange County Chamber
North Sacramento Chamber of Commerce
Pleasanton Chamber of Commerce
Plumbing-Heating-Cooling Contractors Association of California
Pro Small Biz CA
Professional Independent Consultants of America, Inc.
Regional Chamber of Commerce-San Gabriel Valley
Rover.com
Sacramento Regional Builders Exchange
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce
Silicon Valley Leadership Group
Simi Valley Chamber of Commerce
Southern CA Rental Housing Association
Taxicab Paratransit Association of CA
The Joint National Committee for Languages
The National Council for Languages and International Studies
U.S. Chamber of Commerce
West Hollywood Chamber of Commerce
Western States Trucking Association
Yorba Linda Chamber of Commerce

cc: Che Salinas, Office of the Governor
Lorie Alvarez, Assembly Committee on Labor and Employment
Lauren Prichard, Assembly Republican Caucus

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