



California Lawmakers Approve Strict Independent-Contractor Test

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Employers would have a difficult time classifying workers as independent contractors under a bill that the California Senate passed on Sept. 10. Gig-economy businesses, such as Uber and Lyft, oppose the bill because their drivers would be deemed employees under the proposed legislation.

The distinction between employees and independent contractors is significant, because employees are entitled to minimum wage, overtime pay and other protections that are not afforded to independent contractors, who may work for themselves or for several employers.

The California Assembly passed AB 5 (http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5) in May, and it will be sent to Gov. Gavin Newsom for signature or veto after the Assembly approves the final version of the bill.

We've rounded up the latest news on this topic from *SHRM Online* and other trusted media outlets.

Bill Would Codify Dynamex and the ABC Test

The California Supreme Court's *Dynamex* decision last year unnerved many employers that rely on independent contractors. The court created a three-pronged "ABC" test to determine whether workers should be classified as employees or independent contractors, and AB 5 seeks to codify the test. According to the ABC test, the state considers a worker an employee unless the hiring entity establishes all of the following factors:

- The hiring entity does not control or direct the work, both in fact and according to the contract for the work's performance.
- The worker performs tasks that are outside of the usual course of the hiring entity's business.
- 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 *Dynamex* decision not only expanded the definition of "employee" under the California Wage Orders, but it also places the burden on companies to prove that independent contractors are properly classified.

(*SHRM Online* (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/pages/california-supreme-court-adopts-broad-new-misclassification-test.aspx))

Certain Occupations Excluded

The *Dynamex* decision only applies to wage orders (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/pages/california-abc-test-applies-only-to-wage-order-claims.aspx). However, if passed, AB 5 would extend the ABC test to all provisions of the California Labor Code and Unemployment Insurance Code unless another definition of "employee" is provided. So, for example, the ABC test would apply to a labor-code claim for wrongful termination in violation of public policy. Although the bill would exempt certain occupations—such as doctors, investment advisors and some direct sellers—gig-economy workers aren't included in the exemptions. The business community wanted to change that, but the bill's sponsor, Assemblywoman Lorena Gonzalez, D-San Diego, said she didn't want to exclude such workers from the bill's coverage.

(*SHRM Online* (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-bill-would-exempt-certain-occupations-from-dynamex-ruling.aspx))

Bill Expected to Impact the Gig Economy

Newsom has said he supports the measure, which is expected to have wide-reaching implications, particularly for businesses that rely on independent, on-demand labor. Ride-hailing giants Uber and Lyft have vocally opposed the bill and would have to revise their business models to comply. Republican members of the California Senate recently introduced 12 new amendments to add more exemptions to the bill's coverage or streamline the bill's application, but none of those proposals were included in the final legislation.

(*USA Today* (<https://www.usatoday.com/story/news/politics/2019/09/10/what-californias-ab-5-means-apps-like-uber-lyft/2278936001/>))

Legislative Session Ending Soon

California legislators have until Sept. 13 to pass any measures they are considering this session, and Newsom has until Oct. 13 to sign or veto bills. As usual, lawmakers are considering a number of workplace-related bills that would create compliance obligations for employers in the state. Here's an update on some of the key measures employers should be watching.

(*SHRM Online* (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/California-Legislative-Update-2019.aspx))

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