



ALERTS

‘ABC Test’ For Independent Contractors Set To Take Effect In California Jan. 1

December 2, 2019 | [Atlanta](#) | [Chicago](#) | [Columbus](#) | [Dallas](#) | [Delaware](#) | [Elkhart](#) | [Fort Wayne](#) | [Grand Rapids](#) | [Indianapolis](#) | [Los Angeles](#) | [Minneapolis](#) | [San Diego](#) | [South Bend](#) | [Washington, D.C.](#)

As 2019 draws to a close, every business with a California presence should consider evaluating its workforce in the Golden State to ensure compliance with [AB 5](#), which will be effective Jan. 1, 2020.

Through AB 5, the California legislature codified and expanded the reach of the so-called “ABC Test” for determining whether a worker should be classified as an independent contractor. This new law expands the reach of the [California Supreme Court’s Dynamex decision](#) which applied to coverage under the California Industrial Welfare Commission’s Wage Orders. AB 5 applies this new test to businesses under the California Labor Code and the California Unemployment Insurance Code.

Currently, California businesses are subject to a variety of tests of employee status, depending upon the law in question. Under most federal and California laws, the common law agency test applies. For workers’ compensation laws, the California Supreme Court adopted an “economic realities” test 30 years ago in *S.G. Borello & Sons v. Department of Industrial Relations*.

However, as of Jan. 1, 2020, the default standard for independent contractor treatment will be the ABC Test.

The ABC Test significantly narrows the scope of work for which businesses may classify workers as independent contractors, rather than employees, and expands the application of this new standard to nearly all employers doing business in California.

Businesses that do not adapt to the ABC Test may face an increased risk

RELATED PEOPLE



Scott J. Witlin

Partner
Los Angeles

P 310-284-3777
F 310-284-3894
scott.witlin@btlaw.com



John F. Kuenstler

Partner
Chicago, Los Angeles

P 312-338-5924
F 312-759-5646
john.kuenstler@btlaw.com



Mark Wallin

Partner
Chicago, Minneapolis, Los Angeles

P 312-214-4591
F 312-759-5646
mark.wallin@btlaw.com



Kenneth J. Yerkes

Partner
Indianapolis

P 317-231-7513
F 317-231-7433
ken.yerkes@btlaw.com

of claims from workers asserting that they were misclassified as independent contractors, on an individual and class or collective basis.

ABC Test Explained

Under the ABC Test, a worker is assumed to be an employee unless the business demonstrates:

A. That the worker is free from the control and direction of the hiring entity in performing the work, both in the contract for performance and in fact

B. That the worker performs work that is outside of the usual course of the hiring entity's business

C. That 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

It is Prong B of the test that will likely cause the most difficulty for companies that regularly engage independent contractors.

Prong B excludes from the assumption of employee status workers who perform duties outside the "usual course of the hiring entity's business." While AB 5 does not specifically define the phrase, many businesses use contractors to help them perform their regular business. California courts are expected to be tasked with interpreting the scope of this requirement.

Many industries lobbied hard to obtain exemptions from the ABC Test. The new statute excludes seven different categories of occupations or business, each with its own separate test for qualifying for the exclusion. These exclusions cover diverse occupations ranging from professionals such as architects and lawyers to non-professionals such as grant writers, tutors, truck drivers, and manicurists. Each category has a slightly different requirement to qualify for the exclusion from the ABC Test. However, qualifying for the exclusion from the ABC Test merely defaults the workers to a determination under the *Borello* test. Complicating matters further is that for all these occupations, a determination of employee status under federal law, such as under the National Labor Relations Act, likely remains under the common law agency test.

Application and Enforcement

While the California Labor Commissioner is officially tasked with enforcing many of the provisions of AB 5, claims of worker misclassification will more commonly be asserted in private civil actions either individually or on a class basis. In other words, companies will increasingly see independent contractors bring claims for wage and hour law lawsuits or class actions (i.e. overtime claims, meal and rest break claims, wage statement claims, etc.).

Employer Takeaways

Although [several industry groups are expected to challenge the new law](#), businesses operating in California should review and update their practices relative to independent contractors before Jan. 1, 2020 – whether through potentially reclassifying independent contractors as employees or revising independent contractor agreements.



Janilyn Brouwer Daub

Partner

South Bend, Elkhart

P 574-237-1139

F 574-237-1125

janilyn.daub@btlaw.com



John T.L. Koenig

Partner

Atlanta

P 404-264-4018

F 404-264-4033

john.koenig@btlaw.com



David B. Ritter

Partner

Chicago

P 312-214-4862

F 312-759-5646

david.ritter@btlaw.com



Mark S. Kittaka

Partner

Fort Wayne, Columbus

P 260-425-4616

F 260-424-8316

mark.kittaka@btlaw.com

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, Scott J. Witlin at 310-284-3777 or scott.witlin@btlaw.com; John Kuentler at 312-338-5924 or john.kuentler@btlaw.com; Mark W. Wallin at 312-214-4591 or mark.wallin@btlaw.com; or Peter J. Wozniak at 312-214-2113 or peter.wozniak@btlaw.com.

You can also contact another member of the Labor and Employment Department:

Kenneth J. Yerkes, Chair
317-231-7513

John T.L. Koenig, Atlanta
404-264-4018

David B. Ritter, Chicago
312-214-4862

William A. Nolan, Columbus
614-628-1401

Mark S. Kittaka, Fort Wayne
260-425-4616

Robert W. Sikkel, Grand Rapids
616-742-3978

Peter A. Morse, Indianapolis
317-231-7794

Scott J. Witlin, Los Angeles
310-284-3777

Janilyn Brouwer Daub, South Bend and Elkhart
574-237-1139

© 2019 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg LLP.

This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.



Robert W. Sikkel
Of Counsel (Retired)

P 616-742-3978
robert.sikkel@btlaw.com



Peter A. Morse, Jr.
Partner
Indianapolis, Washington, D.C.

P 317-231-7794
F 317-231-7433
pete.morse@btlaw.com



William A. Nolan
Partner
Columbus

P 614-628-1401
F 614-628-1433
bill.nolan@btlaw.com

RELATED PRACTICE AREAS

Labor and Employment