

NIESAR & VESTAL LLP

Law Alert

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**AB5 exempts certain California workers from the *ABC* test  
(but makes them subject to the *Borello* test)**

**As of January 1, 2020, the vast majority of California workers will be classified as employees. However, AB5 provides for certain exemptions, and certain workers will be thus exempt from the *ABC* test. But, the common law “*Borello*” test will still apply to a majority of those workers.**

In our law alert dated November 5, we discussed the main provisions of AB5, which classifies the vast majority of California workers as employees. As of January 1, 2020, it will be very unlikely that any worker in California currently treated as an independent contractor will be allowed to continue to be so classified. However, AB5 exempts certain occupations and business relationships from *ABC*'s application. Here, we will address those exemptions. The analysis of the exemptions is two-fold. In Part I, we will identify the several categories of workers exempt from the *ABC* test. At the same time, the majority of the workers in all the exempt categories are still subject to the “common law” independent contractor test in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989 48 Cal.3d 341) (“*Borello*”). We will address the *Borello* test and its implications in Part II.

**I. The categories of workers exempt from the *ABC* test**

The three big categories below can be identified among these exemptions, although the list below is non-exhaustive and there are other exemptions that are provided for by AB5.

A) Specific Occupations

The specific occupations exemption mainly, although not exclusively, applies to the following licensed professionals in the State of California:

- physicians, surgeons, dentists, psychologists and veterinarians;
- lawyers, architects, engineers, private investigators, and accountants; and
- securities broker-dealers and investment advisers.

B) “Professional Services” Exemption

This exemption includes the following “professional services”, the majority of which must meet specific conditions in order to be AB5 exempt:

- human resources administrators;
- marketers, graphic designers, grant writers, fine artists, certain photographers or photojournalists;
- estheticians, electrologists, manicurists, barbers, and cosmetologists are exempt, but only if they set their own rates, are paid directly by clients, schedule their own appointments, and follow several other requirements more akin to independent workers than employees;
- services provided by a freelance writer, editor, or newspaper cartoonist who does not provide content submissions to the putative employer more than 35 times per year;
- services provided by an enrolled agent who is licensed by the United States Department of the Treasury; and
- salespersons are exempt, but their pay must be based on actual sales as opposed to wholesale purchases or referrals.

Additional factors, like maintaining a business location that is separate from hiring entity, must be also met for the exemption to apply to the “professional services”.

### C) Bona Fide Business-To-Business Contracting Relationship Exemption

AB5 also excludes any “bona fide business-to-business contracting relationship,” that is, a relationship under which a sole proprietor, partnership, or other form of business provides services to another business. However, the contracting business must satisfy twelve requirements defined in the statute. Some of these requirements include 1) proof that the vendor provides similar or the same services to other clients, 2) the vendor provides its services directly to the contracting business and not its customers, and 3) the vendor advertises to the public.

## **II. The *Borello* test will still apply to a majority of the exempt workers**

The next question is whether workers falling under any of the exempt categories, and that meet the required conditions, are automatically independent contractors. The answer is negative. These categories are not “home free”. Except for real estate salespeople and repossessioners (see discussion below), workers in all the exempt categories are subject to the *Borello* test. The *Borello* test evaluates multiple factors and does not require all factors to be met to establish independent contractor status. These factors include:

- whether the person to whom service is rendered has the right to control the manner and means of accomplishing the desired results;
- whether the principal or worker supplies instrumentalities, tools, and the place of work for the person doing the work;
- whether the one performing services is engaged in a distinct occupation or business;
- the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- the skill required in the particular occupation;
- the length of time for which the services are to be performed;
- the method of payment, whether by the time or by the job;

- whether the work is a part of the regular business of the principal; and
- whether the parties believe they are creating the relationship of employer-employee.

In determining one's status as employee or independent contractor, the principal factor is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the desired results. However, this factor is not dispositive and can be outweighed by the other factors.

Therefore, the test of qualifying as an independent contract is much easier to meet in the *Borello* scenario; at the same time, it will be very difficult for the non-exempt workers to meet the *ABC* test, as explained in our previous law alert.

Concerning real estate salespeople licensed pursuant to Division 4 of the Business and Professions Code, they can generally be treated as either employees or independent contractors, as agreed with the real estate broker. Repossession agencies licensed in the State of California, who generally transact business with another person or entity, are independent contractors, if the following condition is met: the repossession agency must be free from the control and direction of the hiring person or entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

This is undoubtedly a confusing area of law. Even though the law has not yet become effective, it is already challenged in court. For example, the California Trucking Association filed a federal lawsuit on November 12, seeking to block the law from applying to truck drivers.

If you have questions concerning the qualification of your workers, a particular exemption, or the choice of the best compliance option for your business, please feel free to contact Gerald Niesar (gniesar@nvlawllp.com), Oscar Escobar (oescobar@nvlawllp.com), Peter Vestal (pvestal@nvlawllp.com) or Carolina Aricu (caricu@nvlawllp.com).

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