

AB5 Legislation & COVID-19



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Full recordings will be available after the presentation

About the Trainer



Samantha Pungprakearti is a litigation attorney at Carle, Mackie, Power & Ross LLP focusing on employment law and business disputes.

Ms. Pungprakearti has deep experience in representing clients in employment matters, including cases involving discrimination, retaliation, CFRA/FMLA leave issues as well as a panoply of wage and hour claims.

AB-5: The New Law and Exceptions

Default rules:

- Every person working for you is an employee
- Every person working for you is entitled to minimum wage, overtime, meal and rest periods, workers' comp insurance coverage, withholdings, etc.
- Since 1989, the test for deciding if someone was properly classified as a contractor was the *Borello* test (named after the *S.G. Borello & Sons, Inc.* case).
 - Included 11-14 factors relating to how much control the company had over the person but included issues like whether they provided their own equipment or set their own hours.

Dynamex / AB-5 “ABC TEST”

- (A) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- (B) that the worker performs work that is outside the usual course of the hiring entity'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 for the hiring entity.”

Dynamex / AB-5 “ABC TEST”

- ✓ The ABC test has been the law since 2018.
- ✓ The ABC test applies to all businesses, agencies, and anyone else considered an “employer”.
- ✓ AB5 applies to claims covered by the **Labor Code** the **Unemployment** Insurance Code, and as of July 1, 2020, the **Workers’ Compensation Code**. It does not apply to claims under the Fair Employment and Housing Act.

AB-5 Exceptions

AB-5 creates 5 types of exceptions to the ABC test

- (1) specific occupations,
- (2) professional services,
- (3) business-to-business contracts for services,
- (4) the construction industry, and
- (5) referral agencies.

For these exceptions, the statute specifies that the test established by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, rather than the ABC Test, will apply to determine whether a worker is an employee or independent contractor.

(1) Specific Occupations

“...the following occupations as defined in the paragraphs below...”

1. Insurance brokers
2. Physicians, dentist, podiatrist, veterinarian, etc.
3. Lawyers, architects, engineer, private investigator, accountant
4. Investment brokers
5. A direct sales salesperson
6. Commercial fisherman



(2) Professional Services

“...a contract for professional services as defined below...”

2 Questions must be satisfied:

- i. Is the service identified as a type of professional service in the law; and**
- ii. Does the contract and the person satisfy the other requirements of the law**

(2) Professional Services

(i) Is the service identified as a type of professional service in the law:

- **Marketing** – if original and creative, based on invention, imagination or talent of the worker
- **Human Resources** – predominantly intellectual and varied in character
- Travel agent
- **Graphic design**
- **Grant writer** (nothing specific described)
- Fine artist
- Photographer, journalists
- Others

(2) Professional Services

(ii) Does the contract and the person satisfy all of the other requirements of the law:

1. Maintains a business location (could be a residence) that is separate from the hiring entity
2. Has a business license
3. Has the ability to set or negotiate their own rates
4. Sets their own work hours
5. Customarily engaged in the same type of work for another customer or hold themselves out for such work; and
6. Customarily and regularly exercise discretion and independent judgment

(3) Business-to-Business Exception

2 Questions must be satisfied:

- i. Is the service provided compliant; and**
- ii. Does the contract and the business satisfy the other requirements of the law**



(3) Business-to-Business Exception

(i) Is the service provided compliant:

1. Provides services directly to the contracting business rather than to customers of the contracting business
2. Provides its own tools, vehicles, and equipment to perform the services
3. Can negotiate its own rates
4. Consistent with the nature of the work, can set its own hours and location of work, and
5. Is not performing the type of work for which a license from the Contractor's State License Board is required

(3) Business-to-Business Exception

(ii) Does the contract and the business satisfy the other requirements of the law:

1. Is free from the hiring firm's control and direction while performing the work (this must be set forth in the contract and be true in fact)
2. Has a written contract
3. Has all required business licenses or business tax registration
4. Maintains a business location separate from hiring firm
4. Is customarily engaged in an independently established business of the same nature as that involved in the work performed
5. Actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring firm
6. Advertises and holds itself out to the public as available to provide the same or similar services

**If you fall under an
exception, you are not
out of the woods yet!**

Anyone who falls into the exception
will be subject to evaluation under the
old, and more lenient, *Borello* test
which considers many other factors.



Borello v. ABC Test

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
 2. Whether or not the work is a part of the regular business of the principal or alleged employer;
 3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
 4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;
 5. Whether the service rendered requires a special skill;
 6. 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;
 7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;
 8. The length of time for which the services are to be performed;
 9. The degree of permanence of the working relationship;
 10. The method of payment, whether by time or by the job; and
 11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests
- A. The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
 - B. The worker performs work that is 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.


Families First Coronavirus Response Act ("FFCRA") Highlights

- **Employers of under 500 employees**
 - **Expanded Sick Leave +**
 - **Expanded FMLA Leave**



FFCRA Highlights

Reasons for the Leave: Unable to work because the employee ...

- (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - (3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
 - (4) is caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2);
 - (5) is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 related reasons; or
 - (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
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FFCRA Highlights

Sick Leave:

Reason for leave: Any of the reasons listed previously

Length of leave: 2 weeks based on the number of hours they normally worked up to a maximum of 80 hours

Paid: Yes.

- ☐ If taking leave under reason 1-3: paid at the employee's regular rate of pay up to \$511 per day and \$5,110 in the aggregate
- ☐ If taking leave under reason 4-6: paid at the 2/3rds employee's regular rate of pay up to \$200 per day and \$2,000 in the aggregate



FFCRA Highlights

FMLA Leave:

Reason for leave: ONLY if the employee cannot work (or telework) because he/she is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 related reasons

Length of leave: up to 10 additional weeks

Paid: Yes, paid at the 2/3rds employee's regular rate of pay up to \$200 per day and \$10,000 in the aggregate



FFCRA Exception

- Exception for employers of less than 50 for providing sick leave or FMLA leave for employees **whose children are out of school**, if they determine that providing the leave will threaten the business as a going concern.

FFCRA Exception

Small Business Exception

A small business may claim this exemption if an authorized officer of the business has determined that:


1. Would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; **or**
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Some Common Topics During Shelter-in-Place

Remote Workers:

- Reimburse for business expenses
- No OSHA requirements...yet
- Tracking hours and productivity
- Confidentiality concerns

Reduction in Hours:

- Can reduce hours to save on payroll
 - Employees can claim Unemployment Insurance benefits to make up the difference
 - Be careful with salaried exempt employees. You have to keep them at twice the minimum wage or temporarily convert them to be on hourly status
 - Also be careful that exempt employees' duties remain exempt level
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Some Common Topics

Temporary Layoff:

- Use a neutral checklist/evaluation chart to ensure your decisions are neutral and can be documented
- Check with your insurance as to how long they can be kept on insurance without working
- Unemployment Insurance is available, without the normal waiting period, so apply immediately
- Vacation payouts are not counted as wages for purposes of getting benefits
- WARN Notice requirements
- Be very careful with employees who start volunteering when you can't pay them any longer.



Q&A Session

If you haven't already, please send in your follow-up questions via the webinar's dashboard.

Time permitting we hope to respond to everyone's inquiries



Thanks for Joining Us!



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Survey & full presentation recording coming via email