



NAPABA

Virtual Experience

Friday, November 6, 2020

2:00 PM – 3:00 PM

Session 603 | It's A Gig... It's a Job... No, It's...Employment?: Independent Contractor Status and the Gig Economy

California's Assembly Bill 5 ("AB5") and copycat legislation from other states is causing fundamental shifts in the way many businesses are operating. Employers continue to struggle with understanding and complying with the vagaries of the law in order to answer what should be a simple question – employee or independent contractors?

In this session, our distinguished panelists will discuss the specific impact of AB5 on the gig economy and similar industries that have been heavily affected. Attendees will help guide the panel's discussion by providing their own examples of arrangements that might implicate AB5. The panelists will recommend ways to improve current independent contractor models to be more defensible under AB5 and will invite attendees to ask questions about changes they can make to their existing business models. We will also discuss other options (e.g., reclassification strategies) and issues to consider when deciding whether to reclassify independent contractors as employees.

Moderator:

Brandon R. Mita, *Associate, Littler Mendelson, P.C.*

Speakers:

Frances S.P. Barbieri, *Chief Counsel, Litigation and Employment, World Wide Technology*

Jaime Chu, *Senior Counsel, Litigation and Employment, Federal Express Corporation*

John Hong, *Chief People Officer, Avellino Lab USA, Inc.*

It's A Gig...It's a Job...No, It's...Employment? – Independent Contractor and the Gig Economy

NAPABA 2020 Virtual Experience Convention – CLE Materials

There is no question that our world has been flipped on its head with the COVID-19 pandemic. As a society, we have become even more reliant on various gig economy services to perform tasks that we would have typically done on our own. These services include, among other things, meal deliveries to our residences and doing our grocery shopping. However, many of these businesses that provide these services rely heavily on the use of independent contractors. With unemployment at rates not seen since the Great Depression,¹ workers are turning to alternative solutions to earn a living. Indeed, a report from Upwork shows a 24% increase in the number of workers deciding to enter the gig economy when compared to other years.²

Despite this reliance on the gig economy, there has been a fundamental shift in the way many jurisdictions are looking at independent contractor relationships within the gig economy and this change has been ongoing even before the pandemic. The most notable shift started with a ruling by the California Supreme Court in *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903 (2018). In that case, the court put aside the “*Borello*” test to determine a worker is a contractor.³ The *Borello* test, which had long been applied by California courts and agencies alike to determine employee/contractor status, primarily looked at whether the putative employer maintained the “right to control” how services were to be performed. The *Borello* test also involved other “secondary” factors, including whether the worker was engaged in a distinct occupation or business, the skill required in the particular occupation, and whether the worker or the putative employer supplied the tools used to perform the work and the place where the work was performed.

In *Dynamex*, the court was grappling with the meaning of the term “employ” for purposes of interpreting California’s wage orders, and in particular, the specific wage order at issue pertained to wage and hour obligations for non-exempt employees. In order to define this term, the court adopted Massachusetts’ independent contractor test in which workers are *presumed* to be employees unless all three of the following conditions are met:

- (A) The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
- (B) The service is performed outside the usual course of the business of the employer; and,

¹ See Nara Schoenberg, *Comparing COVID-19 with previous national crises such as Vietnam War, Spanish flu: Historians weigh in on the similarities and differences*, CHICAGO TRIBUNE (Sept. 10, 2020, 4:04 PM), <https://www.chicagotribune.com/lifestyles/ct-life-covid-compare-national-crises-09092020-20200910-ovkxyg36fje6bkfr45k3fr4jta-story.html>.

² See Allana Akhtar, *The pandemic could be turning the gig economy white-collar, if this summer's new freelancers are any indication*, BUSINESS INSIDER (Sept. 23, 2020, 12:00 PM), <https://www.businessinsider.com/upwork-pandemic-gig-economy-white-collar-high-skilled-summer-freelancers2020-9>.

³ *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989)

(C) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.⁴

Known as the ABC test, the court's decision in *Dynamex* was limited to California wage orders. As a result, the California legislature sought to expand the application of the ABC test through the introduction and subsequent passage of Assembly Bill No. 5 ("AB 5").⁵ AB 5 not only applies to California's wage orders, but also broadly applies to the California Labor Code, unemployment insurance claims, and workers' compensation claims. Despite its broad applicability, AB 5 also contains a wide range of exceptions where *Borello* would still be used to determine employee/independent contractor status.

Almost as soon as AB 5 became effective, efforts were taken across multiple fronts in an attempt to limit AB 5's reach. The most promising effort for employers is the California legislature's adoption of Assembly Bill No. 2257 ("AB 2257").⁶ AB 2257 clarifies various exceptions that were left in doubt under AB 5. For example, AB 5 left a number of open questions regarding referral agencies and whether a person who is referred to a client to perform a particular service is an employee of the referral agency or a contractor. AB 5 included a list of the types of services that fell within the referral agency exception, and these services included graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup. AB 2257 has now also added consulting, youth sports coaching, caddying, wedding planning, services provided by wedding and event vendors, and interpreting services by a service provider certified by one of several specified agencies.⁷ AB 2257 also modified AB 5's language to make it clear that the service provider need only be free to maintain her or his own clientele. Before this change, the exception could only be met if the provider actually maintained a separate list of clients.

Moreover, AB 2257 added several new exceptions to AB 5 in which the *Borello* test would be applied. These new exceptions include:

- Recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineers, musicians engaged in creating sound recordings, vocalists, photographers working on album covers, and other press and publicity photos relating to recordings, and independent radio promoters;
- Musicians or musical groups for the purpose of a single-engagement live performance event;
- An individual performance artist;
- Licensed landscape architects;
- Freelance translators;
- Registered professional foresters;

⁴ See Mass. Gen. Laws c. 149, § 148B.

⁵ Assemb. B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621).

⁶ Assemb. B. 2257, 2019-2020 Leg., Reg. Sess. (Cal. 2020) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621).

⁷ *Id.*

- Home inspectors;
- Persons who provide underwriting inspections, premium audits, risk management or loss-control work for the insurance industry;
- Manufactured housing salespersons;
- Persons engaged in conducting international and cultural exchange visitor programs;
- Competition judges with specialized skill sets;
- Digital content aggregators who serve as licensing intermediaries for digital content;
- Specialized performer hired to teach a master class for no more than one week; and
- Feedback aggregators.⁸

However, one glaring hole in AB 2257 is that the legislation is devoid of any mention of the gig economy. As a result, many companies within the gig economy continue to be subject to the ABC test. With that said, California voters will be deciding this November whether transportation and delivery network drivers should be exempt from the ABC test in AB 5. Proposition 22, if adopted by California voters, would find that app-based drivers are indeed contractors so long as the network company for which the contractors perform services does not unilaterally prescribe their schedule or a minimum number of hours; does not require drivers to accept any specific ride or delivery request to maintain access to the network; and allows drivers to work for other network-based companies or hold other jobs.⁹

Outside of California, there are 16 states and two territories that have embraced the ABC test in some form.¹⁰ Copycat legislation employing a broad use of the ABC test has already made its way

⁸ *Id.*

⁹ See Bruce Sarchet, Jim Paretti, and Michael Lotito, Independent Contractor Issues in California: Summer 2020 Update, LITTLER MENDELSON, P.C. (Sept. 1, 2020), <https://www.littler.com/publication-press/publication/independent-contractor-issues-california-summer-2020-update>; see also Mercury News & East Bay Times Editorial Boards, Editorial: Prop. 22 would stop the assault on gig firms and workers, THE MERCURY NEWS (Sept. 12, 2020, 5:10 AM), <https://www.mercurynews.com/2020/09/12/editorial-prop-22-would-stop-the-assault-on-gig-firms-and-workers/>.

¹⁰ See ALASKA STAT. ANN. § 23.20.525(a)(8) (West 2009); Calif. Assembly Bill 5, § 2 (adding LAB. CODE § 2750.3; effective Jan. 1, 2020); CONN. GEN. STAT. ANN. § 31-222(a)(B)(ii) (West 2017); DEL. CODE ANN. tit. 19, § 3302(10)(k) (West 2019); HAW. REV. STAT. ANN. § 383-6 (West 1984); 820 ILL. COMP. STAT. ANN. 185/10(b) (West 2015); IND. CODE ANN. § 22-4-8-1(b) (West 2006); LA. STAT. ANN. § 23:1472(12)(E) (2014); MASS. GEN. LAWS ANN. ch. 149, § 148B(a) (2004) (applicable also to minimum wage and overtime actions); NEB. REV. STAT. ANN. § 48-604(5) (West 2018); NEV. REV. STAT. ANN. § 612.085 (West 1993); N.H. REV. STAT. ANN. § 282-A:9(III) (West 2011); N.J. STAT. ANN. § 43:21-19(i)(6) (West 2017); N.M. STAT. ANN. § 51-1-42(F)(5) (West 2015); P.R. LAWS ANN. tit. 11, § 202(j)(5) (1995); VT. STAT. ANN. tit. 21, § 1301(6)(B) (West 2014); V.I. CODE ANN. tit. 24, § 302(k)(5) (2009); WASH. REV. CODE ANN. § 50.04.140(1) (West 1991); W. VA. CODE ANN. § 21A-1A-16(7) (West 1997). The aforementioned statutes predominantly apply to workers' compensation claims. Illinois, Nevada, the District of Columbia, Maryland, and New York have also adopted the ABC test but its applicability is limited to the construction industry. See D.C. CODE ANN. § 32-1331.02, 32-1331.04(c)(2) (West 2013); 820 ILL. COMP. STAT. ANN. 185/5, 185/10(b) (West 2008); MD. CODE ANN., LAB. & EMPL. §§ 3-902, 3-903(c) (West 2012); NEV. REV. STAT. ANN. § 608.0155(2) (2019); N.Y. LAB. LAW § 861-c(1) (McKinney 2010). Colorado, Georgia, Idaho, and Montana have only adopted parts A and C of the ABC test. See COLO. REV. STAT. ANN. § 8-70-115(1)(b) (West 2016); IDAHO CODE ANN. § 72-1316(4) (West 2008); S.D. CODIFIED LAWS § 61-1-11 (2011); UTAH CODE ANN. § 35A-4-204(3) (West 2006) (applicable to unemployment insurance claims); see also GA. CODE ANN. § 34-8-35(f) (West 2012) (adopting parts A and C, but adding an alternative element to satisfy part C: the worker is subject to an IRS determination against employee status); MONT. CODE ANN. § 39-71-417(4)(a) (West 2011) (using only parts A and C but applicable only for obtaining an independent contractor certification); 43 PA. STAT. AND CONS. STAT. ANN. § 933.3(a) (West 2011) (adding an

to several state legislatures. Jurisdictions such as New Jersey, Rhode Island, Pennsylvania, Washington, and Minnesota, and New York have introduced such bills.¹¹

With no indication that the COVID-19 pandemic will recede any time soon and with no viable vaccine likely to be released in 2020, it has been predicted that the economy and employment numbers will not return to pre-pandemic figures until 2023.¹² Accordingly, there will be a continued reliance by many on the gig economy and business that use the independent contractor model as a source of income and for needed services. But how long such businesses will be able to remain viable given that their model is under assault remains an open question.

additional requirement to parts A and C: a written contract to perform the services in question; applicable only to the construction industry); WYO. STAT. ANN. § 27-3-104(b) (West 2014) (for unemployment insurance purposes, “An individual who performs service for wages is an employee for purposes of this act unless it is shown that the individual: (i) Is free from control or direction over the details of the performance of services by contract and by fact; (v) Represents his services to the public as a self-employed individual or an independent contractor; and (vi) May substitute another individual to perform his services”; subsections (ii)-(iv) repealed); WYO. STAT. ANN. § 27-14-102(a)(xxiii) (West 2018) (same definition applicable to workers' compensation claims).

¹¹ See Ryan T. Warden, *New Jersey Resumes Efforts to Amend ABC Test for Independent Contractor Status, Passes Slate of Laws Targeting Misclassification*, OGLETREE DEAKINS (Jan. 23, 2020), <https://ogletree.com/insights/new-jersey-resumes-efforts-to-amend-abc-test-for-independent-contractor-status-passes-slate-of-laws-targeting-misclassification/>; Michael J. Lotito, Bruce J. Sarchet, and Jim Paretti, *AB 5: The Aftermath of California's Experiment to Eliminate Independent Contractors Offers a Cautionary Tale for Other States*, LITTLER MENDELSON, P.C. (Mar. 10, 2020), <https://www.littler.com/publication-press/publication/ab-5-aftermath-californias-experiment-eliminate-independent>; Lawrence K. Cagney, Jyotin Hamid, Meir D. Katz, Jonathan F. Lewis, Franklin L. Mitchell, Elizabeth P. Serebransky, Justin C. Ferrone, and Tricia B. Sherno, *States Increase Scrutiny of Independent Contractor Usage*, DEBEVOISE & PLIMPTON (Nov. 26, 2019), <https://www.debevoise.com/insights/publications/2019/11/states-increase-scrutiny-of-independent-contractor>.

¹² See Berekeley Lovelace Jr., *Fauci tells Congress the U.S. could have enough coronavirus vaccine doses for every American by April*, CNBC (Sept. 23, 2020 10:29 AM), <https://www.cnbc.com/2020/09/23/coronavirus-vaccine-fauci-tells-congress-it-may-take-time.html>; Annalyn Kurtz, *Six months into the pandemic, the US economic outlook is getting gloomier*, CNN BUSINESS (Sept. 21, 2020 9:53 AM), <https://www.cnn.com/2020/09/21/economy/us-economy-back-to-normal-index/index.html>.