



# CALIFORNIA SENATE REPUBLICANS

## What Happens Next With AB 5

As a disclaimer from the start, whether or not a hiring entity is an employer under Dynamex and the “ABC test” as codified in AB 5 can be nuanced, so in many cases, it may be difficult to know for sure. It is also important to note that the bill itself lacks clarity, which means that litigation will be highly likely to sort it all out, or follow up legislation will be needed to bring clarity. In fact, a recent article on AB 5 by an employment law firm describes AB 5 as “a hopelessly confusing mixture of rules and exceptions to rules which layers test upon test in a manner sure to ensnare even the most well-intended employers in litigation for years to come.”

I have provided elsewhere lists of the occupations/professions and industries that are carved out of AB 5 as well as those that are not. Accordingly, I will not repeat that here.

You have asked to get a better picture of AB 5’s application to various types of business arrangements within the agricultural/trucking industry. As mentioned above, that is not an easy task because so much depends upon the specific facts in the various arrangements and the filtering of these facts through the layers of tests for independent contracting in AB 5. Accordingly, what follows will be an explanation of the general framework in AB 5 for determining the employment status of an individual.

First, it is important to consider the type of business that of the hiring entity is in and then to consider the type of work product or service that the contracting entity is providing. Once this has been taken into account, consideration must be given to the type of employment relationship (i.e. employee v. independent contractor) that exists between the hiring entity and the contracting entity that is providing the work product or service.

Under Dynamex, as codified by AB 5, this relationship is evaluated through the lens of the three factor “ABC test” for determining employment status, i.e. whether the worker/service provider is an employee or independent contractor. The three factors include:

A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the 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. Factors "B" and "C" are the most problematic because while independent contractors may control their own schedule, control the projects or tasks that they take on, and control the way in which they perform the tasks or projects, they will still likely lose under AB 5 existing contracts and work opportunities because they perform work that is similar to that of the business entity retaining their services and/or are not in an independent business or trade of the same work being performed.

As applied to the trucking industry, the "ABC test" will eviscerate the independent contracting owner/operator model because under this model, owner/operators work as independent contractors for trucking companies known as truck brokers. This type of arrangement is disallowed under the "B" factor because owner/operators provide trucking services for a trucking company and both are in the same business, i.e. trucking is not outside the hiring entity's usual course of business (trucking).

This will have a direct impact on the agricultural industry as many farmers depend upon trucking companies who utilize owner/operators to take their products to market. For these trucking companies and for farmers, it does not make sense to hire trucking and/or other employees who are only needed for few specific weeks or months of the year. It makes much more sense to hire independent owner/operators. Since many trucking companies rely on the owner/operator model, AB 5 will likely put them out of business, which means farmers will have to find and enter into contracts with each and every individual truck driver needed to get their product to market. This would seem to be an impossible feat.

In considering some of the other arrangements we discussed (i.e. hauling soil and seeds and the planting of seeds), as indicated above, consideration needs to be given to both the relationship with the contracting entity and the relationship with the individuals being paid to produce, haul, process, deliver and plant.

In the case of hauling soil, as long as the hiring entity is not in the trucking industry, nor in the soil hauling industry ("B Test") and as long as the individuals being paid to haul the soil are employees, there would not seem to be a violation of AB 5's "ABC test."

In the case of producing, hauling, delivering and planting seeds, as long as the contracting entity (farm) is not in the seed production, hauling and delivery business, and as long as the individuals being paid to produce, haul, deliver and plant the seeds are employees, there would not seem to be a violation of AB 5. What may be a little confusing here is that seed planting may in fact be in the usual course of business of the hiring entity (farmer) which would seem to run afoul of the "B test." However, AB 5 also has a weak business to business exemption that would seem to apply in this scenario. This exemption is a 12 factor test, which, includes among other things, the requirement that the

independent contractor have a business license and be a business entity (i.e. sole proprietorships, partnerships, limited liability companies, limited liability partnerships, or corporations).