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LEGAL UPDATE

September 29, 2020

To: Superintendents, Member School Districts (K-12)
From: Jennifer Henry, Associate General Counsel *J.H.*
Subject: AB 2257 Revises AB 5 Regarding Independent Contractors
Memo No. 58-2020

AB 2257, which went into immediate effect on September 4, 2020, clarified and amended AB 5, a problematic law which went into effect January 2020 regarding independent contractors.

AB 5, which implemented the California Supreme Court’s 2018 decision in *Dynamex*,¹ provided that all workers are now employees, unless the employer can demonstrate that:

- A) The person 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) The person **performs work that is outside the usual course of the hiring entity’s business**; and
- C) The person is **customarily engaged in an independently established trade**, occupation, or business of the same nature as that involved in the work performed.

These three factors are also known as the “**ABC Test**.”

AB 2257 has added exemptions and changed some of AB 5’s exemptions. It is important to note that if an exemption applies, this does not mean that the worker is an independent contractor. It just means that the worker now has to meet the more flexible “**Borello test**”² in order to be considered an independent contractor: A) separate business location (which can be a residence); B) business license; C) can negotiate own pay rate; D) can set own hours (within reasonable business hours and deadlines); E) customarily engaged, or available, in the same type of work with other hiring entities; and F) customarily exercises discretion and independent judgment.

AB 5 established a “Business to Business” exemption, which applies where an

¹ *Dynamex Operations West, Inc. v. Lee* (2018) 4 Cal.5th 903.

² The *Borello* six-factor test was set forth in a prior California Supreme Court decision *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations* (1989) 48 Cal. 3d 341 (1989).



independent contractor is acting as a sole proprietor. With the “Business to Business” exemption, a hiring entity has to meet the A-F Borello test **and also** meet 12 additional criteria (some of which overlaps with the Borello criteria), including a worker having a written contract, advertising, and providing his or her own tools. Under AB 5, one of the 12 criteria was that the worker could not provide services directly to the hiring entity’s customers, only to the hiring entity. AB 2257 changed this to apply only if the worker does not regularly contract with other businesses (and where the worker has employees, the workers must perform services only in the name of the worker’s business). AB 2257 also clarified that the worker’s separate business location can be his/her residence; the written contract has to specify the rate of pay and payment due date; the worker can contract with other businesses but is not required to; and the hiring entity can provide proprietary tools, materials, etc. Lastly, AB 2257 clarified that a contracting business under this exemption includes public agencies and quasi-public corporations. For example, a district could contract with a part-time psychologist who has his/her own LLC under this exemption.

AB 2257 also expanded the “Professional Services” exemption, which applied to freelance writers and other consultants, to include (1) digital content aggregators; (2) content contributor, advisor, producer, narrator, or cartographer for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work; and (3) a specialized performer hired by a performing arts company or organization to teach a master class for no more than one week. Workers under this exemption must meet the A-F Borello test and additional criteria including not directly replacing an employee.

AB 2257 expanded the “Referral Agency” exemption to include graphic and web design, photography, tutoring, consulting youth sports coaching, minor home repair, interpreting services, and animal services like dog walking. It also added some music industry and artist exemptions, and added an exemption for individuals engaged by international exchange visitor programs.

Although the initial intent behind AB 2257 was to give more flexibility to performing artists and others, it also creates new questions and still leaves several issues unresolved. On the ballot this November is Proposition 22, which would exempt app-based rideshare and delivery drivers from AB 5.

The full text of AB 2257 can be found here:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257 .

We understand many of our clients may seek the services of independent special education service providers. We encourage you to contact legal counsel to discuss specific facts of your situation and the legality of such arrangements in light of AB 5 and AB 2257.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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