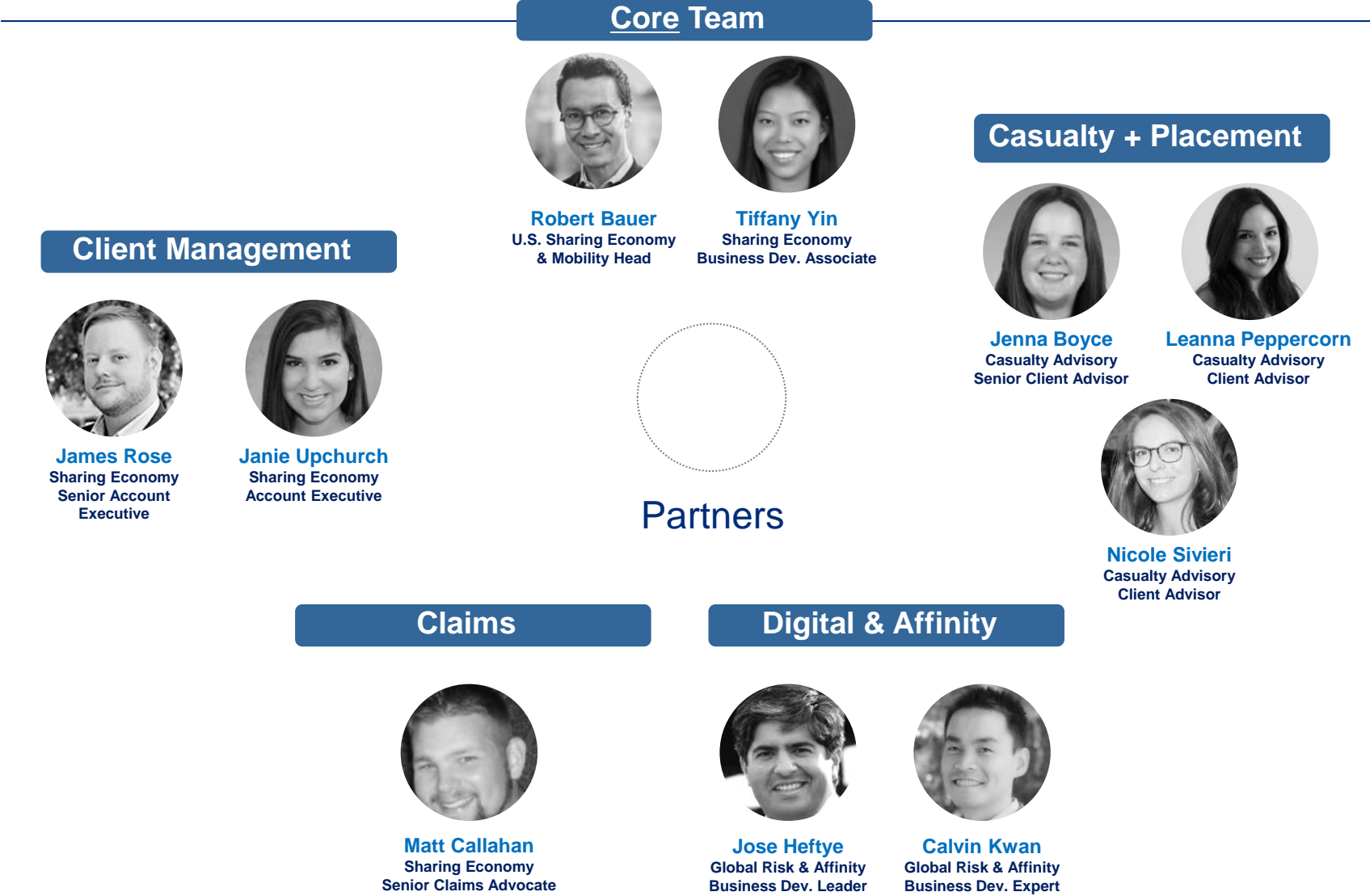


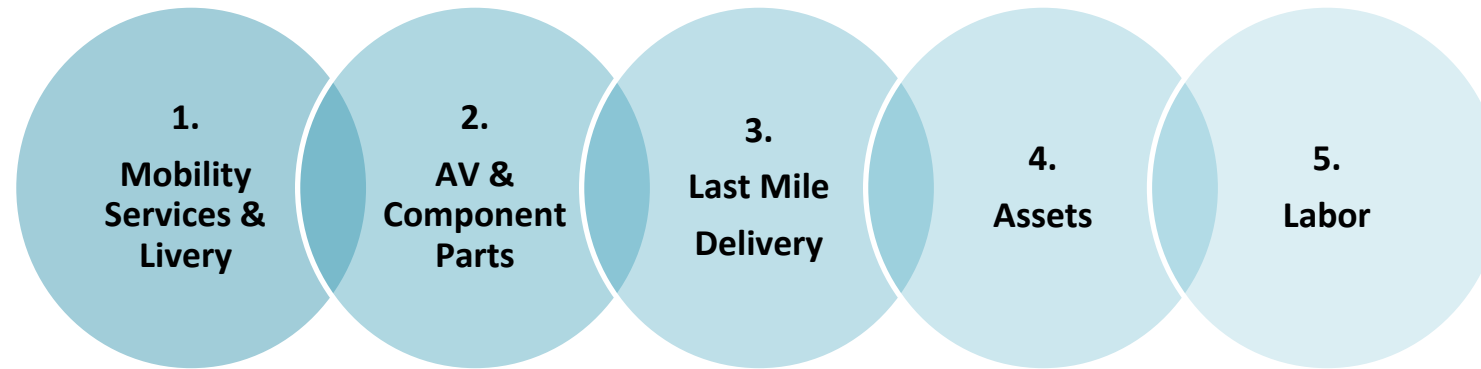
AB5 and its Impact on Gig Workers and Beyond

September 26, 2019

Introductions



The Future in 5 Parts



- Micro-Mobility
- Subscription
- Car Share
- Ride Share



- Lidar/Radar
- Telematics
- Mapping
- Routing



- Food Delivery
- Last Mile Package Delivery



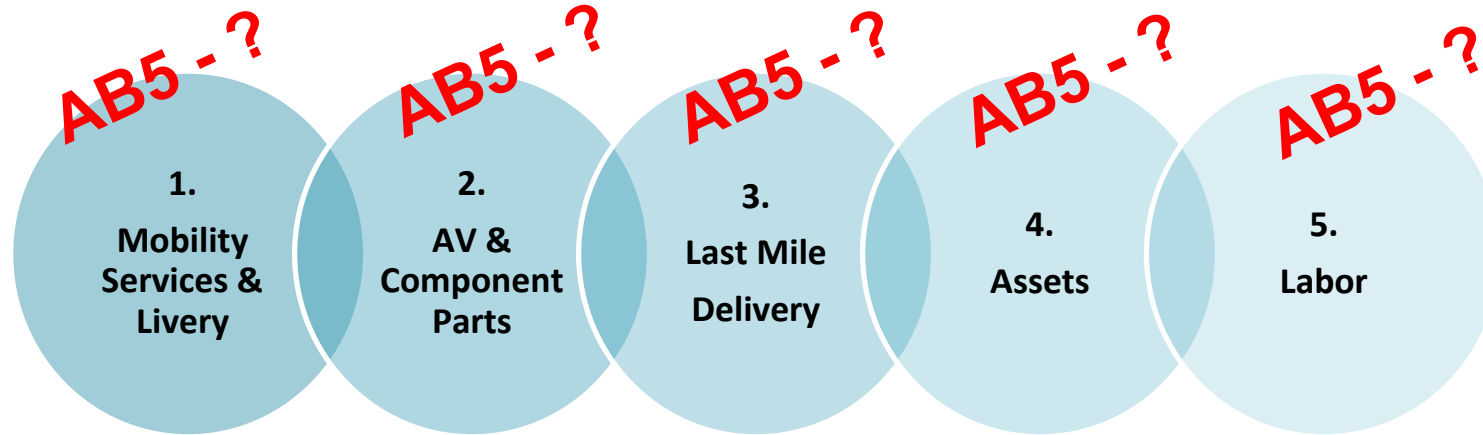
- Real Estate
- Hospitality
- Storage
- Airlines



- “Professional” Services



The Future in 5 Parts



- Micro-Mobility
- Subscription
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- Ride Share



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- Food Delivery
- Last Mile Package Delivery



- Real Estate
- Hospitality
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- Airlines



- "Professional" Services





AB5 and its Impact on Gig Workers and Beyond

Michael J. Lotito

September 26, 2019



Littler[®]

Hello!



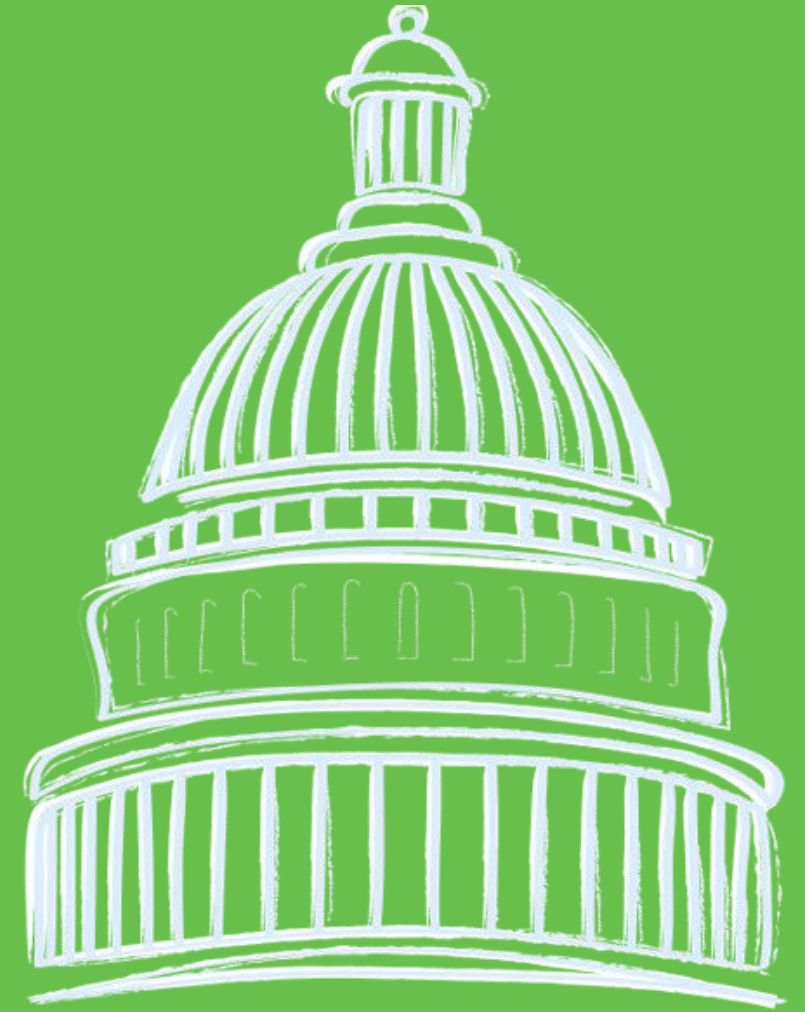
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Shareholder

Co-chair, Workplace Policy
Institute

Mlotito@Littler.com

AB 5: The Basics



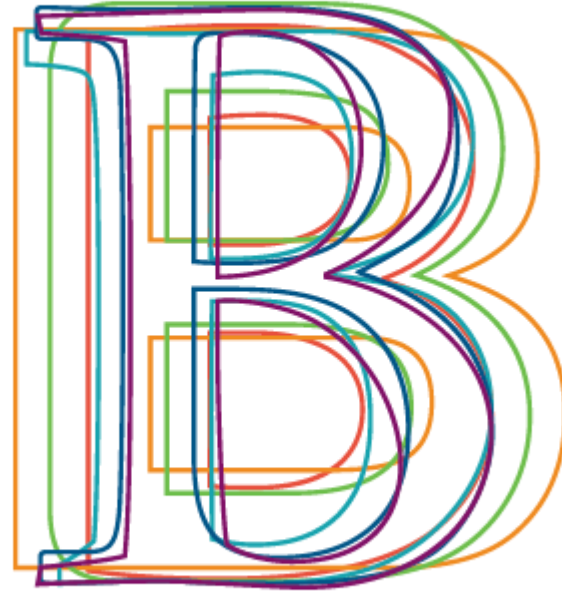
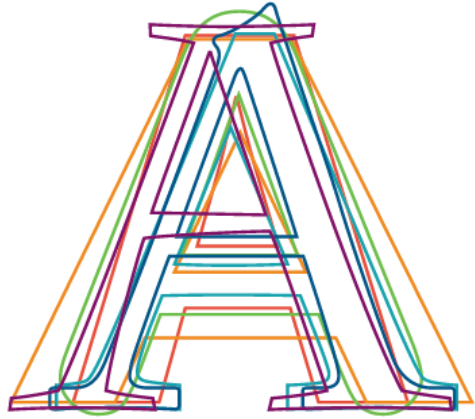
Impact of AB 5

- If enacted, on January 1, 2020, approximately 2 million independent contractors in California could be considered employees under state law.
- If “employees,” then the state’s (and city) workplace laws and regulations will apply to these workers.

Agenda



1. The ABC Test in California **today:**
Dynamex
2. The ABC Test in California **tomorrow:**
AB 5
3. Predictions: Impacts of the ABC Test
4. A Political Action Plan
5. January 2020: Practical Suggestions
6. A Different Path Forward?



THE ABC TEST IN CALIFORNIA ***TODAY***



The Common Law Control Test

- The original test for worker status was the common law control test (Master – Servant doctrine)
 - Multi-factor test but looked primarily at whether there was control over the manner and means by which services were performed rather than merely the results
 - IRS summarized them into 20 “factors” in 1987 and then in 1996 into three groups: behavior control, financial control and relationship of the parties

The *Borello* or Economic Realities Test

- Secondary factors also must be considered
 - The extent to which the work performed is an integral part of the employer's business
 - Whether the worker's managerial skills affect his or her opportunity for profit and loss
 - Investments in facilities and equipment
 - The worker's skill and initiative
 - The permanency of the worker's relationship with the employer
 - The nature and degree of control by the employer
- The "employer" has the burden of proof
- Can also consider the remedial purpose of the Labor Code to reach an expansive view
 - *S.G. Borello & Sons v. DIR*, 48 Cal. 3d 341 (1989)

Dynamex adopts the “ABC” test

- On April 30, 2018, the California Supreme Court issued a landmark decision in *Dynamex Operations West v. S.C. (Lee et al.)*
- Rejected the *Borello* economic realities test in favor of adopting a modified “ABC” test, similar to that used in Massachusetts and Indiana
 - “A” – Absence of control in contract and reality
 - “B” – Business is outside the usual course of the hiring entity’s business
 - “C” – Customarily an independent contractor
- Burden is still on the organization to prove that an individual meets the qualifications of an independent contractor

What *Dynamex* did and did not hold

Dynamex Holds:

- That the ABC test is the broadest test possible to capture employment relationships subject to the wage order.
- That this test differs from the FLSA standard and *Borello* standard used.

Dynamex Does Not Hold:

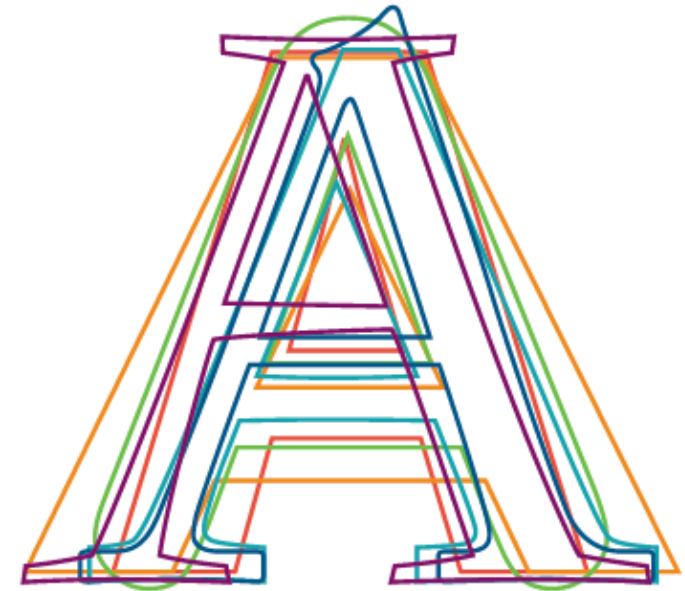
- That the ABC test applies to worker's compensation, unemployment taxes, benefits, or much of the Labor Code.
- That an employee under the wage order is an employee for other non-wage order purposes.

What this means. Under *Dynamex*...

- A worker can be an **employee** for purposes of the wage orders:
 - Minimum wage
 - Overtime
 - Meal and rest breaks
 - Uniforms and tools, etc.
- But, they may be a **contractor** for purposes of:
 - The Labor Code
 - Unemployment
 - Workers' Compensation
 - Employment Discrimination

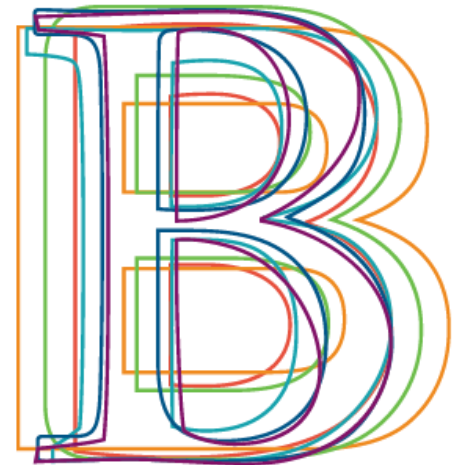
“A” Prong

- Right of control, not just the exercise of control.
- Essentially the same as the “control” factor under *Borello*.



“B” Prong

- Some ABC tests have two parts to the B prong:
 - (1) Outside the usual course of the business of the hiring entity
 - OR
 - (2) Outside all the *places of business* of the hiring entity
- California adopted (1) only



Analysis – “B” Prong

What if a chain of retail stores has in-house maintenance staff who travel from store to store performing plumbing and electrical repairs. But then, the store calls “Joe’s Plumbing Service” which sends out a truck to do some work at one of the stores?



“C” Prong

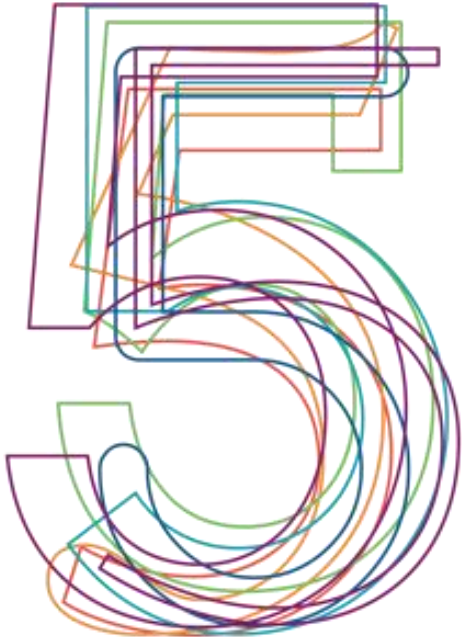
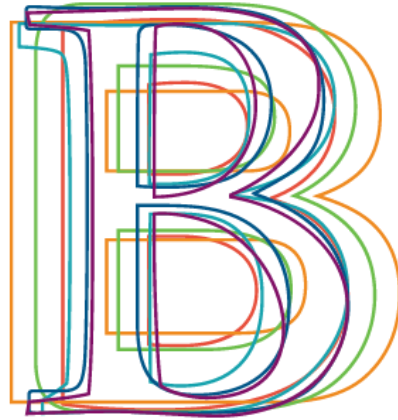
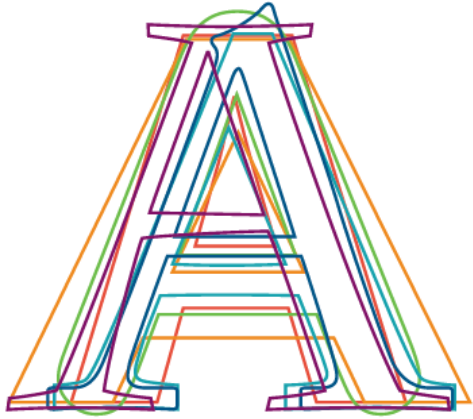
- Was the individual self-employed before performing services?
 - Business license
 - Advertisements
 - Offering services to a number of customers



When Is ABC In Effect?

- **April 30, 2018:** Cal. Supreme Ct.: The ABC test is adopted in CA
- **May 2, 2019:** 9th Circuit: *Dynamex* is retroactive!
 - *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 2019 U.S. App. LEXIS 13237, 2019 WL 1945001 (9th Cir. May 2, 2019)
- **July 24, 2019:** 9th Circuit changes its mind and withdraws retroactivity – sends to California Supreme Court to decide





THE ABC TEST IN CALIFORNIA ***TOMORROW:*** ***AB 5***



AB 5

- A proposed three-part legislative “fix” to *Dynamex*:

1.

Express adoption of the ABC test.

2.

Seven “exceptions” to # 1.

3.

Private and Public Actions to Enforce the law.

More Than Just The Wage Orders

- Under AB 5, the ABC test applies to determine whether a worker is an employee or a contractor for purposes of:
 - Labor Code
 - Unemployment Insurance Code
 - California Wage Orders
 - California FEHA
 - For Workers' Compensation on July 1, 2020



EXCEPT...

AB 5 – Seven “Exceptions”

AB 5's Exceptions: Category 1: Specific professions and businesses

Specific professions and businesses to which the *Borello* test will apply:

- Insurance brokers;
- Physicians, surgeons, dentists, podiatrists, psychologists and veterinarians;
- Lawyers, architects, engineers, private investigators and accountants;
- Securities broker-dealers, investment advisors, and their agents;
- Direct sales salespersons;
- Commercial fisherman working on an American vessel (sunsets 1-1-23).
- Newspaper carriers (sunsets 1-2-21)



AB 5's Exceptions: Category 2: Professional Services

Is engaged in one of the following:

- Marketing (must be original and creative);
- Human Resources (must be predominately intellectual and varied in character);
- Travel Agent
- Graphic Design
- Grant Writer
- Fine Artist
- Enrolled agent licensed to practice before the IRS
- Payment processing agent
- Still photographer or photojournalist who submits <35 submissions per year to a single entity
- Freelance writer who submits <35 submissions per year to a single entity



AB 5's Exceptions: Category 2: Professional Services

Is engaged in one of the following:

- Esthetician, electrologist, manicurist (sunsets 1-1-22), barber or cosmetologist who:
 - Has a state license
 - Sets their own rates, and is paid directly by clients
 - Sets their own hours of work
 - Has their own book of business and sets their own appointments
 - Maintains their own business license



AB 5's Exceptions: Category 2: Professional Services

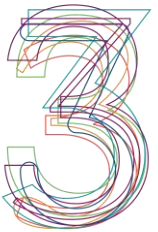
***Borello* test also applies where the professional:**

- Maintains a business location, separate from the hiring entity;
- Has a business license;
- Sets or negotiates their own rates for services provided;
- Sets their own work hours;
- Does the same type of work for others;
- Exercises discretion and independent judgment.



AB 5's Exceptions: Category 3: Real Estate/Repossession

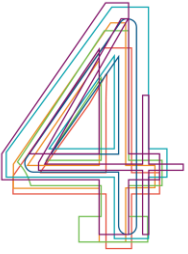
- Licensed real estate agents (status determined by Business and Professions Code section 10032);
- Repossession agencies (status determined by Business and Professions Code section 7500.2).



AB 5's Exceptions: Category 4: Business to Business

***Borello* test applies where a “business service provider”:**

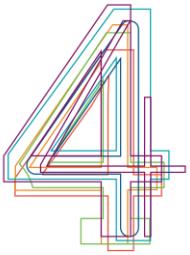
- Is free from control and direction of the contracting entity
- Provides service directly to another business, rather than to its customers
- Provides services pursuant to a written contract
- Has a license, where required
- Maintains a separate business location



AB 5's Exceptions: Category 4: Business to Business

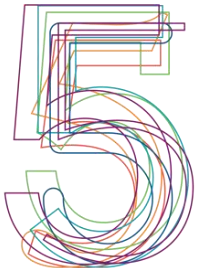
***Borello* test applies where a “business service provider”:**

- Is customarily engaged in business of the same nature of the work performed
- Contracts with other entities to provide the same or similar services
- Advertises and holds itself out to the public as available to provide the same or similar services
- Provides its own tools, vehicles and equipment to provide the services
- Negotiates its own rates
- Sets its own hours and location of work



AB 5's Exceptions: Category 5: Construction Industry

- Construction Industry:
- An individual or entity (the “contractor”) receiving services from an individual performing work (the “individual”) pursuant to a contract in the construction industry.
- The “contractor” bears the burden of demonstrating eight specific criteria are satisfied.
- If all criteria are satisfied, the relationship will be governed by the *Borello* test.
- Also, some limited exceptions for construction – related truck driving



AB 5's Exceptions: Category 6: Referral Agency

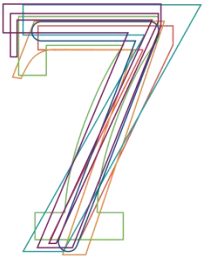
***Borello* applies to the relationship between a referral agency and a provider of the following services:**

- Graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, pet care, dog walking, dog grooming, web design, picture hanging, pool cleaning or yard cleanup.
- The referral agency bears the burden of demonstrating ten specific criteria are satisfied.



AB 5's Exceptions: Category 7: Motor Club

- Relationship between tow truck drivers and a Motor Club (AAA) is to be governed by *Borello*





The Problem With Exceptions:

“In all of these carve-outs you are picking winners and losers, so, can you walk me through the process of why you are doing it that way and how you process, who wins, and who loses. Who gets favoritism and who loses out?”

Senate Labor Committee Vice Chair, Senator Mike Morrell

Not Excepted:

- Independent Owner-Operators of trucks
- Franchisors
- TNCs
- Anyone else unions cared about



Criticism of the *Borello* test:

“[B]y retaining the Borello test, these occupations remain in the messy muddle of a failed employment test that met the needs of neither employers nor workers. Should Assembly Bill 5 become law, the Legislature will need to revisit the remnants of Borello in the future.”

Senate Labor Committee Analysis of AB 5

Another problem with exceptions

- The text used to describe how to qualify for an exception is, to put it kindly: dense.
- Bold prediction: There will be litigation to determine whether or not particular business models/workers qualify for an exception.

Retroactivity

- The seven exceptions to the ABC test apply retroactively.
- The obligations regarding classification apply as of January 1, 2020.

Public Enforcement

An injunction to prevent the continued misclassification of employees as independent contractors may be prosecuted against the putative employer by:

- The State Attorney General
- A City Attorney or City Prosecutor
- Upon their own complaint, in the name of the people, or upon the complaint of a board, officer, person, corporation, or association

The apparent goal of this section is to get around arbitration agreements which require that contractors arbitrate disputes, which can avoid class action litigation.

- Two lawsuits already filed

What's Next?



- **Adopted by legislature:** September 10, 2019.
- Governor has signed into law with an effective date of January 1, 2020.



What Will He Do?

Labor Day 2019 – special editorial in the *Sacramento Bee*:

“Reversing the trend of misclassification is a necessary and important step to improve the lives of working people. That’s why, this Labor Day, I am proud to be supporting Assembly Bill 5, which extends critical labor protections to more workers by curbing misclassification.”



AB 5: Author's Closing Statement to Senate Labor Committee:

“We probably won’t fix it for everybody this time. ... we will run out of time and I never worked harder on a bill, spent more hours on a bill. And, yet, we are not gonna get to every situation we dreamed of. And, I anticipate we’ll be working on this for a few years to get to those situations.”

Assemblymember Lorena Gonzalez, Author of AB 5, Statement at July 10, 2019, hearing before the California Senate Labor, Public Employment, and Retirement Committee



PREDICTIONS: IMPACTS OF THE ABC TEST

PREDICTION # 1!

The Law Of Unintended Consequences!

Impact On Tax Revenue

- State tax revenue might go up!
 - More “employees” paying taxes for unemployment, state income tax, etc.
- State tax revenue might go down!
 - If employers respond by moving jobs out of state, or move out of state entirely, tax revenue could actually decline.



Impact On Investment

- Private Equity firms are used to uncertainty and risk.
- But reclassifying hundreds of thousands of workers – there are just too many unknown unknowns. Private equity firms could look elsewhere.



Impact On Innovation

- If investment moves elsewhere, innovation will follow.
- California could lose its edge as a leader in innovation.



Franchisor-Franchisee

Littler | Insight

IN-DEPTH DISCUSSION

Franchising and California at a Crossroads: the Dynamics of Dynamex and the ABC Test

By James A. Paretti, Jr. and Michael J. Lotito on July 18, 2019

In 2018, the Supreme Court of California turned much of the established law regarding worker classification on its head with its decision in *Dynamex Operations West Inc. v. Superior Court*.¹ *Dynamex* addressed a single, narrow question: whether certain workers were appropriately classified as independent contractors or were instead properly classified as employees for purposes of the state's wage and hour laws. In the wake of *Dynamex*, however, some have urged courts to expand the scope of the case beyond the narrow confines of independent contractor/employee classification to instead broadly redefine the law of joint employment and vicarious liability generally. If courts take up this invitation, it may sound the death knell for the franchise model of business operation in California, imposing joint liability on franchisors with little to no control over the day-to-day activities of their franchisees or of those franchisees' employees.

For legal, practical, and policy reasons, it is hoped that courts will decline to expand *Dynamex*, keep the case cabined to its facts and the narrow question presented in it, and instead rely on the well-developed body of state law setting forth standards for establishing joint employment status and vicarious liability in the franchise context. Moreover, as the state legislature entertains proposals to purportedly codify the *Dynamex* decision, it should expressly clarify that the bill is intended to address the standard for determining only whether a worker is an employee or an independent contractor, and not intended to address joint employment status broadly or change the status of franchise relationships.

Background

In *Dynamex*, the court adopted the so-called "ABC test" for determining whether an individual worker was properly classified as an employee or an independent contractor for purposes of the California's Industrial Welfare Commission's wage orders. By any measure, the ABC test is a far

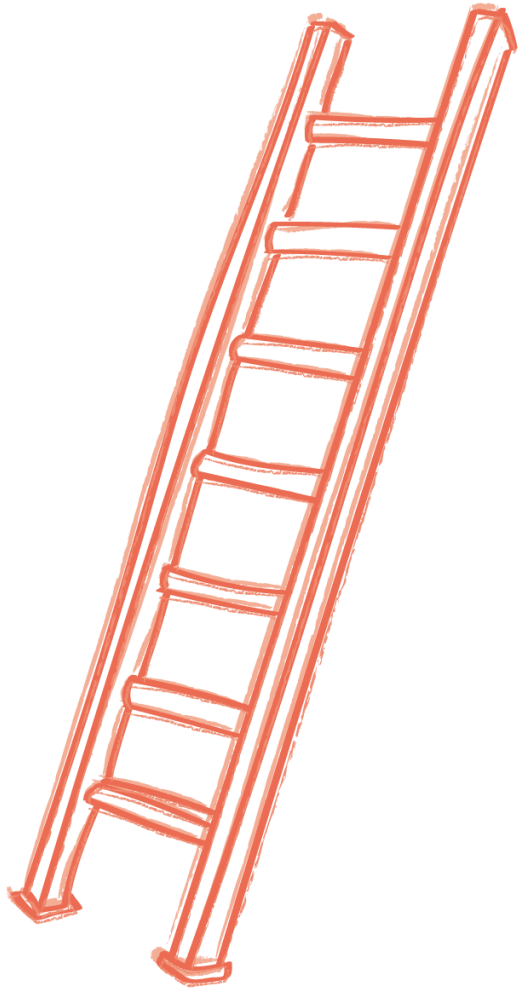
- Will ABC test be used broadly as the standard for joint employment, potentially holding franchisors liable to their franchisees' workers?
- If so, could signal the end of this industry in California.
- WPI white paper addresses the legal and practical issues presented.
- September 13 – Letter from Assemblywoman Gonzalez to Chief Clerk of the Assembly says:
 - “AB 5 is not intended to replace, alter, or change joint employer liability between two businesses. AB 5 is focused upon the determination whether an individual is an employee or an independent contractor.”



Impact On Other States

“California ... frequently creates political winds that sweep across the country.”

The Economist, June 20, 2019



A TEN STEP POLITICAL ACTION PLAN FOR AB 5

Action Plan

1.

Continue to monitor and follow the law – stay informed.

2.

Call the Governor. Or his staff. He also has the WPI Task Force Report.

Action Plan

3.

Find legislative champions for the business community and support them.

4.

Perform an economic analysis of the impact of the ABC test on your business.

Action Plan

5.

Ask your trade association to participate as an *amicus* before the California Supreme Court on the issue of *Dynamex* retroactivity.

6.

Establish coalitions of like-minded companies and experts such as economists and site selection personnel to assist in analysis and communication.

Action Plan

7.

A referendum is possible. In addition, other legal challenges may be possible.

8.

For multi-state employers, realize that the ABC test will spread beyond California. Develop an offensive strategy to enact favorable legislation in selected states.

Action Plan

9.

Engage in serious discussions about reforming our employment laws to permit more flexibility in the workplace.

10.

Consider a longer term strategy. If the country is in a recession and ABC has contributed to high unemployment, reform may be more appealing. Ultimately, look to the voters? (Remember Prop. 11?)



JANUARY 2020: OPTIONS

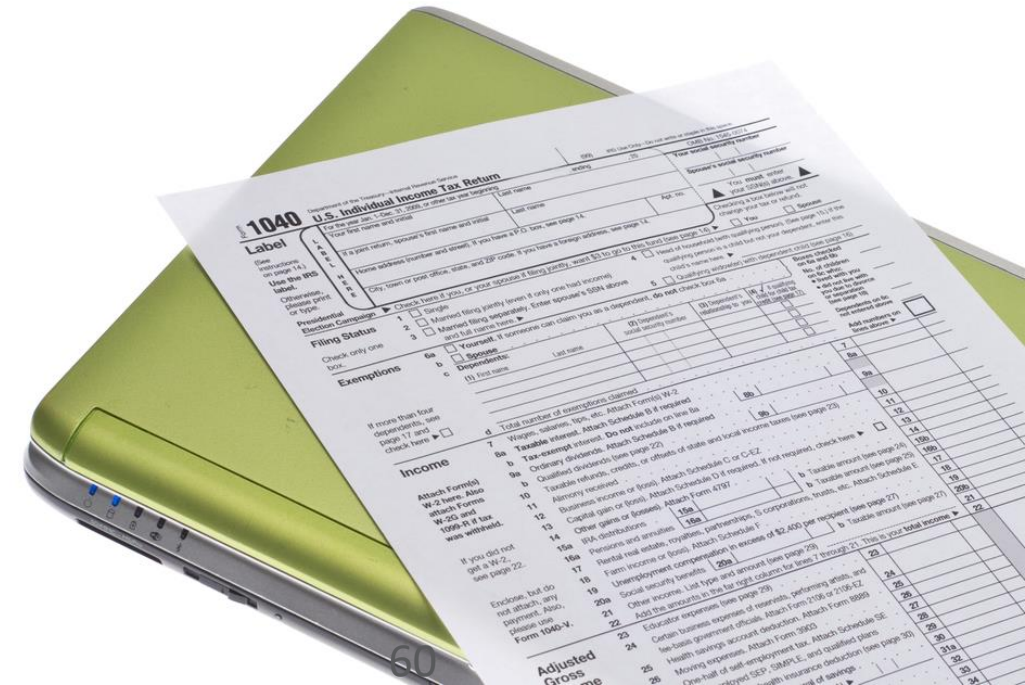
Should AB 5 Become Law - Option # 1



1. Make everyone an employee.
 - Obvious immediate cost implications.
 - Other long-term implications include wage and hour compliance challenges, and PAGA.

Option # 2

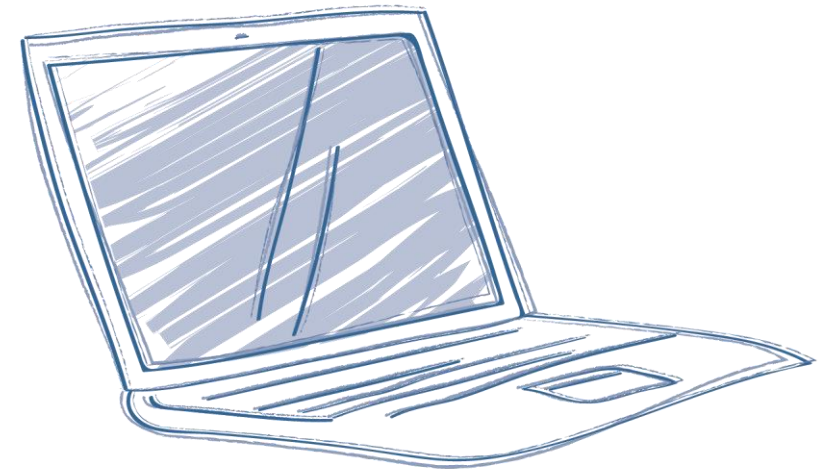
2. Outsource employment to a staffing agency.
 - AB 5 and *Dynamex* want to make sure that somebody is issuing a W-2.
 - BUT... be aware of potential joint employment liability.



Option # 3

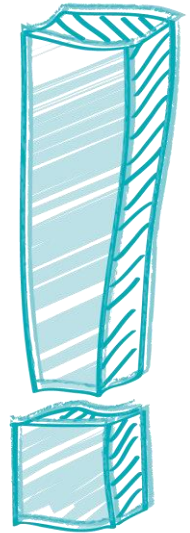
3. Subscription-based platforms.

- Recent DOL opinion letter: workers who use a virtual marketplace to connect with consumers are independent contractors.
- May hinge on the right of the contractor to set their own price.
- Something new to be invented here?



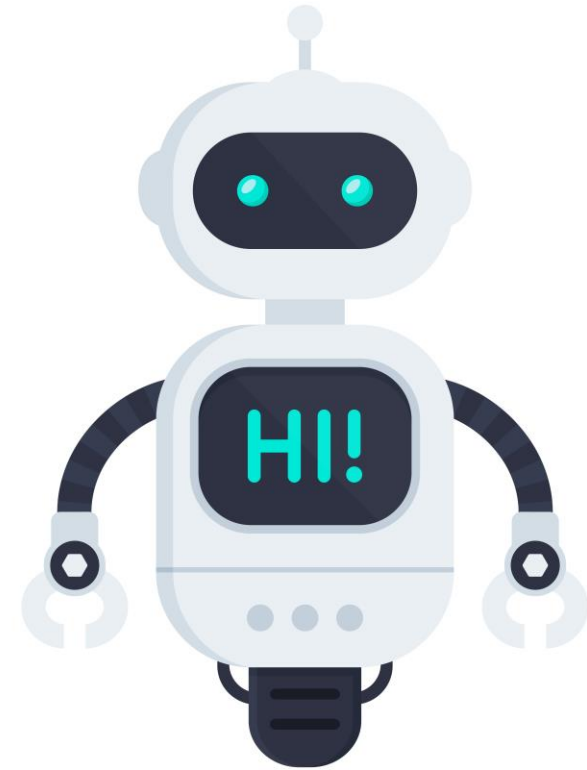
Option # 4

4. Continue to use contractors and hope for relief elsewhere.
- “Everything is great! Nobody would sue me!”
 - Not for those who are risk adverse.



Option # 5

5. Minimize the number of workers in California.
 - Move across state lines?
 - More virtual workers.
 - Invest in alternate forms of workplace production: A.I. and robotics.





A DIFFERENT
PATH FORWARD?



Barriers To Real Reform In California

“California’s politicians are not blind to their state’s problems, but they seem unpragmatic. They are also encumbered by structural issues, such as the entrenched interests of unions, bureaucracy and laws allowing voters to approve major decisions in ballot measures. All this means it is much harder for the state to make the big changes required. They may also be less receptive to moderation and pressure to change because they have no fear of losing power to the Republicans in the near future.”

The Economist, June 20, 2019

WPI Task Force Ideas

Create and fund a new system Universal Protections for all workers, regardless of status:



WPI Task Force Ideas

- Create a “portable safety net” for contractors. Any business that hires that worker would contribute an amount prorated to the number of hours worked; funds then would be used by that worker to pay for her or his unemployment, leave of absence, etc.
- The Cooperative Platform Economy Act



WPI Task Force Ideas

The Emma Coalition:

Securing the Future of Global Employment

Littler's Workplace Policy Institute | The National Restaurant Association | Prime Policy Group



Littler | Workplace Policy Institute

NATIONAL
RESTAURANT
ASSOCIATION

PRIME
POLICY GROUP

- Consider the future of work. TIDE (Technology-Induced Displacement of Employment) is a part of the modern economy -- the ABC test must be evaluated against that backdrop. Learn about and support efforts to address the workplace of the future, such as The Emma Coalition.

<https://www.littler.com/service-solutions/wpi/emma-coalition>

Questions?

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