

What You Need to Know About California Assembly Bill 5 Addressing Independent Contractors

Assembly Bill 5 was passed by the Legislature on September 9, its last week of session for 2019. The Governor has until October 13 to act and all indications are Governor Newsom will sign the bill into law. AB 5 confirms and expands upon the April 2018 decision by the [California Supreme Court in Dynamex Operations West, Inc. v. Superior Court](#). This decision and AB 5 will apply the "ABC" test to the question of employee vs. independent contractor. Workers will be classified as employees, unless the Company can demonstrate:

(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; and

(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.

This will continue to have a substantial impact for pool and spa installers/dealers and the service industry. In a vast majority of cases, the workers who build, renovate or service pools will be considered employees, not only with regard to State wage and hour orders, but also with regard to worker's compensation and unemployment insurance. AB 5 also states that it should be applied retroactively where permitted.

AB 5 does create a number of limited exceptions that may impact industry professionals.

First, the law excludes architects and engineers.

Second the law excludes subcontractors, provided that ALL of the following criteria are met:

1. The subcontract is in writing.
2. The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.
3. If the subcontractor is domiciled in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor has the required business license or business tax registration.
4. The subcontractor maintains a business location that is separate from the business or work location of the contractor.
5. The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.
6. The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, legally authorized indemnity obligations, performance bonds, or warranties relating to the labor or services being provided.
7. The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.

A similarly narrow exception exists for a company that is acting solely as a referral agency, such as Task Rabbit, referring work to separate and independent service providers. This exception only applies if ALL of the following are met:

- (A) The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in
- (B) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration, the service provider has the required business license or business tax registration.
- (C) If the work for the client requires the service provider to hold a state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor's license.
- (D) The service provider delivers services to the client under the service provider's name, rather than under the name of the referral agency.
- (E) The service provider provides its own tools and supplies to perform the services.
- (F) The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client.
- (G) The service provider maintains a clientele without any restrictions from the referral agency and is free to seek work elsewhere, including through a competing agency.
- (H) The service provider sets its own hours and terms of work and is free to accept or reject clients and contracts.
- (I) The service provider sets its own rates for services performed, without deduction by the referral agency.
- (J) The service provider is not penalized in any form for rejecting clients or contracts. This subparagraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

Where the exception exists the prior Borello test will be applied and the workers on site will likely be treated as employees of the subcontractor or service provider.

Companies should use caution, and consider consulting legal counsel before asserting either of these exceptions.

PHTA will alert its members once the Governor takes action. Questions or more information can be directed to PHTA Director of Government Affairs, Jennifer Hatfield, at jhatfield@phta.org.