

AB5: Trucking Industry Impact and Opportunities

Welcome!



BBSI

**Fisher
Phillips**



Some Background

Regulations



Some Background

Last 100 years: various tests based on “control”



The *Borello* Control Test

- Main focus on “control.” Until 2018, independent contractor analysis focused on whether the hiring entity had control over the manner and means of accomplishing the result desired, or just the results.
 - This was the *Borello* Control Test.



The *Borello* Control Test

After control, there were 13 other factors, including:

- Whether the work was integral to the hiring entity;
- Who supplied the equipment;
- Whether the worker holds themselves out as being in a distinct occupation or business;
- Whether the work required special skill;
- Length of time services performed.



Historically:

This test was really just a messy assessment of “factors.”

no direct oversight

some special skill

supplies own equipment

no prohibition on working for competitors

+ good vendor agreement

Independent Contractor!



Some Background

Last 100 years: various tests based on “control”



Some Background

Last 100 years: various tests based on “control”

2018 to present: **the “ABC” test**



Dynamex and the ABC Test

The ABC test started in 2018 when the Supreme Court issued its *Dynamex* decision.

The California Legislature then codified *Dynamex* with its own decision. The law was effective January 1, 2020 ***but is retroactive.***



The “ABC Test”

A. Control. 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 and in actuality.

B. Usual course of business. The person performs work that is outside the usual course of the hiring entity’s business.

C. Established trade or business. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.



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The Impact On Trucking

Regulations



The Impact of AB 5 on Trucking

November 2019: Shortly after the original version of AB 5 passes, California Trucking Association and two contractors sue to block enforcement of AB 5 as to motor carriers based on federal law preemption.

January 2020: The trial court agrees! The court issues a preliminary injunction that blocks the law from applying to motor carriers.

The State of California appeals this decision.



The Impact of AB 5 on Trucking

April 2021: The Ninth Circuit Court of Appeals reverses the injunction.

August 2021: CTA asks the U.S. Supreme Court to weigh in.

June 30, 2022: The Supreme Court declines to review, which means the Ninth Circuit's order (which permits AB 5 in the trucking industry) stands.

We are now stuck with AB 5.



The “ABC Test”

“What if our contractors have an LLC?”



The “ABC Test”

An LLC is helpful and a good first step, but there are two reasons it will not - by itself - save you.



The “ABC Test”

First, the Labor Code defines “Person” to include an LLC:

Section 18: “**Person**” means any person, association, organization, partnership, business trust, **limited liability company**, or corporation.



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The “ABC Test”

Second, while having an LLC is helpful, there are several additional requirements to meet an “exemption” from AB 5 that will apply in most cases.

We’ll discuss those next.



Statutory Exemptions

Regulations



Statutory Exemptions

Reminder: There are dozens of exemptions. But an exemption only means that the *Borello* Control test applies instead of the ABC test.

Even if one of these exemptions is satisfied, misclassification can *still* be a risk.



Statutory Exemptions

Most common:

- Business-to-business exemption
- Referral Agency
- Professional Services
- Certain single engagement events
- Recording artists
- Construction subcontractors



Business-to-Business Exemption (Truncated)

- (1) The business service provider is free from the control and direction of the contracting business entity.
- (2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business unless doing so under the name of the business service provider, not the contracting entity.
- (3) The contract is in writing and specifies payment terms.
- (4) The business service provider has any required licenses and registrations.
- (5) The business service provider maintains a business location (can include residence).
- (6) The business service provider is customarily engaged in an independently established business.



Business-to-Business Exemption (Truncated)

(7) The business service provider can contract with other businesses to provide the same or similar services.

(8) The business service provider advertises and holds itself out to the public.

(9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment.

(10) The business service provider can negotiate its own rates.

(11) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

(12) The business service provider is not performing work requiring a contractor's license.



Vendors

Regulations

Relying on Vendors



Labor Code section 2810.3 also governs your vendors.

Relying on Vendors



Labor Code section 2810.3 also governs your vendors.

- A “Client Employer” with 25+ employees,
- Who hires a vendor that perform work in the Client Employer’s “usual course of business,”
- Is equally liable for unpaid wages and workers’ compensation coverage for the vendor’s employees.
- There is an exemption for motor carriers of property engaging with other motor carriers of property using their own employees and vehicles.

Relying on Vendors

- Know your “usual course of business”
- Know your universe: run a 1099 report.
- Categorize into three buckets:
 - Individuals
 - One-person LLCs/Companies
 - Small/captive vendors



Relying on Vendors

For each individual 1099, we need to consider requiring the 1099 to form an entity (LLC/Inc).

You may also wish to re-engage the entity with an indemnity clause as to the employees.

Why?

Include arbitration agreement.



Relying on Vendors

- Consider using a staffing firm or a PEO.
- Do NOT enter contracts with employees of vendors, but there are options → vendor can use arbitration.
- If in doubt, secure proof of insurance coverage.
- **Above all else, understand the risks and limitations.**

How We Can Help

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Our comprehensive services include:

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- *Payroll Processing & Administration*
- *Human Resources Support*
- *Risk & Safety Mitigation*
- *Strategic Management Consulting*
- *Retirement Benefits 401-K*



Questions?

Thank you for joining us today!

*Please let us know how we can be of further assistance
with your continued business success.*

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