

## CLIENT ALERT

### California's So-Called Gig-Worker Law Codifies "ABC Test" for Independent Contractors

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California's legislature has now made it even more difficult for companies to engage workers as independent contractors in the state of California. A.B. 5, which was signed by Governor Gavin Newsom and enacted on September 18, 2019, adopts and expands the reach of the stringent three-part "ABC test" for establishing that a worker is an independent contractor (first created by the California Supreme Court in 2018 in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*). A.B. 5 will take effect on January 1, 2020, but the *Dynamex* opinion continues in force and has been held by the 9th Circuit to apply retroactively.

The new law mandates that a worker is an employee for purposes of the California Labor Code, Unemployment Insurance Code and IWC Wage orders, **unless** the purported employer can prove that the worker is:

- A. Contractually, and in fact, "free from the control and direction of the hiring entity;"
- B. Performing work that "is outside the usual course of the hiring entity's business;" **AND**
- C. "[C]ustomarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."

This is an extremely challenging test for companies to meet, particularly prong B, as many companies engage independent contractors who perform work that relates to the company's "usual course of business." It will create an overwhelming presumption in California that workers are employees, and it will significantly limit the number of workers who can qualify as independent contractors.

A.B. 5 expands the application of the ABC test to not just wage-hour issues under the California Wage Orders (which was already mandated in *Dynamex*), but also to the California Labor Code and Unemployment Insurance Code. This expansion creates greater liability for companies that are found to have misclassified workers as independent contractors. The California legislature did provide some relief to certain employers by exempting certain occupations from the law, including lawyers, private investigators, securities broker-dealers, cosmetologists, and physicians.

This new California law is expected to impact many California businesses but places at particular risk the business models of companies that operate in the "gig-economy" space. These at-risk companies include many that brand themselves as technology companies using software applications to pair customers with workers to perform specific tasks, often on a temporary or freelance basis (such as rideshare or delivery drivers). Several large companies, including rideshare companies that use the independent contractor model for drivers who provide services through their rideshare apps, have pledged to back a California ballot initiative for the November 2020 election to revoke A.B. 5. In addition to that challenge, we expect that there will be continued litigation over the interpretation of the ABC independent contractor test announced in *Dynamex* and codified in A.B. 5. In the interim, California companies should presume that in most instances they will be unable to classify workers as independent contractors. Any companies that are considering engaging independent contractors should carefully assess and

document the circumstances justifying the independent contractor classification and understand that misclassification may impose significant liability on the company.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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