

California Independent Contractor Legislation Would Reform AB 5's Treatment of Freelance Writers, Musicians, Artists, and Other Professions; Bill Awaits Governor's Signature

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On August 31, 2020, the California Legislature passed Assembly Bill 2257. If signed by Governor Newsom, AB 2257 would exempt several categories of workers from the stringent requirements of the ABC Test under Assembly Bill 5 (AB 5), including but not limited to the following:

1. Certain workers in the music industry;
2. Musicians performing for single live performances;
3. Individual performance artists presenting original, creative work;
4. Insurance industry workers who provide underwriting, inspections and other services; and
5. Consulting service providers.

If AB 2257 is signed into law, these workers' classifiability as independent contractors would be determined by the *Borello* test, which considers multiple factors around the principal question of whether the entity receiving a service has the right to "control the manner and means" of completing that service, as first set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989).

Additionally, the bill would also remove a provision in AB 5 that automatically turns freelance writers and photographers into employees if they contract for more than 35 submissions in a year to a single employer, provided: 1. The writer or photographer provide services under a contract that specifies the intellectual property rights, the rate of pay for which the services would be provided, and that the contractor does not replace an employee; 2. The services would not be primarily performed at the employer's location; and 3. The worker is not restricted from working for other employers.

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Workers in other categories would continue to be subject to the more stringent ABC test, under Assembly Bill 5 (AB 5), which took effect on January 1, 2020, and presumes workers are employees, rather than independent contractors, unless an employer can establish each of the three following factors: (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; (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 (click [here](#) for a full discussion of AB 5).

Under the ABC test, former independent contractors were much more likely to be classified as employees, thereby gaining entitlement to benefits such as unemployment insurance, minimum wage, overtime premiums, meal and rest periods, reimbursements for work-related expenses, paid family and sick leave and disability insurance coverage, but being subject to greater control by employers and losing certain other freedoms.

If and when this bill is signed into law by the governor, workers in the above classifications, as well as the pre-existing exemptions under AB 5 (found [here](#)) are more likely to be able to satisfy the tests for being classified as independent contractors instead of employees. However, any employers who utilize independent contractors in California are strongly encouraged to review the classification of any independent contractors, as the law is rapidly changing in this field.

FordHarrison attorneys are available to assist you in implementing these changes in the law and ensuring compliance with AB 5. If you have any questions or need assistance, please contact the authors of this Alert [Jack Schaedel](#), jschaedel@fordharrison.com, and [Jamin Xu](#), jxu@fordharrison.com. Of course, you may also contact the FordHarrison attorney with whom you usually work.

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