



# CALIFORNIA FARM BUREAU FEDERATION

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## AB 5 Frequently Asked Questions for Farmers & Ranchers

**What is AB 5?** Assembly Bill 5 codifies and expands the reach of a test—first imposed by the California Supreme Court in its 2018 *Dynamex* decision—to determine the legal relationship of a worker and an entity hiring that worker. AB 5 takes effect on Jan. 1, 2020.

**What was the *Dynamex* decision?** *Dynamex* established a new test for determining whether a worker is an employee of an entity hiring the worker, and thus covered by provisions of the applicable wage order of the California Industrial Welfare Commission (IWC). If not an employee, the worker is an independent contractor and not covered by a wage order.

**What is the new test?** Under the *Dynamex* “ABC” test, a worker is presumed to be an employee unless the hiring entity establishes *all three* of these conditions:

- A- Under the contract for the performance of the work and in performing the work, the worker is free from the entity’s control and direction.
- B- The work performed by the worker for the entity is outside its usual course of business.
- C- The worker is customarily engaged in an established trade, occupation, or business of the same nature as that involved in the work performed.

**What test did the ABC test replace?** For purposes of the IWC wage orders, the ABC test replaced the *Borello* test, named for a 1989 California Supreme Court decision. Under the *Borello* “economic realities” test, which remains in place for exemptions under AB 5, the most significant factor to be considered is whether the worker’s hirer controls or has the right to control the worker, not only as to the results to be obtained but also *how* the work is done. Depending on the issue involved, up to 11 additional factors may be considered; see Appendix A.

**How does AB 5 expand the reach of the ABC test?** AB 5 applies the ABC test to employment (versus independent contractor) classifications under the Labor Code and the Unemployment Insurance Code, in addition to the IWC wage orders.

**Does AB 5 apply the ABC test retroactively?** Under AB 5, the ABC test applies retroactively as to the IWC wage orders and to violations of the Labor Code relating to wage orders. Further, to the extent they would relieve an employer from liability for existing claims and actions, all exemptions apply retroactively to the maximum extent permitted by law.

**What exemptions does AB 5 provide?** Certain professions (e.g., doctors, lawyers, insurance agents) and other professional, business-to-business, and construction service providers are exempted from the ABC test. Instead, the previous *Borello* test will continue to apply.

**How does AB 5 impact farmers and ranchers?** As do other business operators, farmers and ranchers contract with various service providers. Examples include farm labor contractors, irrigation contractors, agronomists, pest control advisors, workplace safety advisors, human/labor relations consultants, and truckers.

AB 5 muddies the status of many service providers long considered independent contractors—and that is due not just to the rigidity of the ABC test but also to structural problems with provisions in the legislation.

On first thought, it would seem a service provider that is not an individual but an entity—such as a corporation or limited liability company—could not be subject to the ABC test, the *Borello* test, or any other test that determines employee or independent contractor status. That’s because only an individual human being can be an employee.

AB 5, however, put into the Labor Code a “business-to-business” exemption that ignores that legal principle. Specifically, that exemption states the employee or independent contractor status of a “business service provider” that is an entity is determined by the *Borello* test, if the service recipient can show that 12 criteria are satisfied; see Appendix B. Otherwise, the ABC test applies. As it is not at all clear how a court would interpret this provision, it is difficult to give clear guidance on situations involving it.

Perhaps “clean-up” legislation will address this untenable provision by declaring that determination of employee or independent contractor status does not apply to a service provider that is a business entity, and that it applies to individual human workers only. *Employees* of a service provider that is a business entity could, however, still be legally determined to be jointly employed by the service recipient under yet another test established by the California Supreme Court.

If not an entity, a service provider could be an individual. Here again, unfortunately, the AB 5 “business-to-business” exemption makes a legal conclusion that is contrary to established law. Along with the entity examples noted above, the “business-to-business” exemption applies to “a business entity formed as a sole proprietorship.” A sole proprietorship, however, is not a business entity; it is merely a business owned and operated by an individual, often under a fictitious business name. There is no legal distinction between the individual and the business. Yet the “business-to-business” exemption “does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.”

Thus, as with the provision indicating that an entity can be an employee, the inconsistency between this “business entity formed as a sole proprietorship” provision and a longstanding legal principle makes it difficult to provide clear guidance on situations involving an individual who is or claims to be a sole proprietor.

**Given these structural problems in its “business-to-business” exemption, how does AB 5 likely affect employee or independent contractor status of service providers used by farmers and ranchers?**

Applied literally, the “business-to-business” exemption means the ABC test for determining employee or independent contractor status applies to a “business entity” (including a sole proprietorship) that provides services to another business, unless the service-recipient business shows that the 12 “business-to-business” criteria apply; in that case, the *Borello* test applies.

This means a “business entity” is initially presumed under the ABC test to be an employee of the service recipient business, unless the service-recipient business can show the 12 “business-to-business” exemption criteria apply; in that case, the *Borello* test applies.

*As a practical matter, a farmer or rancher receiving services under a properly written contract from a law-abiding, separately established business that has and advertises for other customers/clients, that exclusively controls how its services are provided, and that performs its services using its own tools, vehicles, and equipment should be able to show the 12 “business-to-business” exemption criteria apply and that the service-providing business is an independent contractor under the Borello test. This is especially true for a service business organized as an entity such as a corporation or limited liability company, as opposed to a sole proprietorship.*

## **APPENDIX A – The 11 additional factors considered by the *Borello* test**

- Whether the worker is engaged in an occupation or business distinct from that of the service recipient.
- Whether the work is a part of the service recipient's regular business.
- Whether the service recipient or the worker supplies the instrumentalities, tools, and place of work.
- The worker's investment in the equipment or materials required by the worker's task or by the worker's employment of helpers.
- Whether the service rendered requires a special skill.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision.
- The worker's opportunity for profit or loss depending on the worker's managerial skill.
- The length of time for which the services are to be performed.
- The degree of permanence of the working relationship.
- The method of payment, whether by time or by the job.
- Whether the worker and service recipient believe they are creating an employer-employee relationship.

## **APPENDIX B – “Business-to-business” exemption criteria under AB 5**

The business service provider must:

- Be free from the control and direction of the service-recipient business in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- Provide services directly to the service-recipient business rather than to its customers.
- Have a written contract with the service-recipient business.
- Have any required business license or business tax registration.
- Maintain a business location that is separate from the business or work location of the service recipient business.
- Be customarily engaged in an independently established business of the same nature as that involved in the work performed.
- Actually contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.
- Advertise and hold itself out to the public as available to provide the same or similar services.
- Provide its own tools, vehicles, and equipment to perform the services.
- Be able to negotiate its own rates.
- Be able to, consistent with the nature of the work, set its own hours and location of work.
- Not be performing the type of work for which a license from the Contractor's State License Board is required.

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