
THIRD READING

Bill No: AB 2257
Author: Gonzalez (D), et al.
Amended: 8/25/20 in Senate
Vote: 27 - Urgency

SENATE LABOR, PUB. EMP. & RET. COMMITTEE: 5-0, 8/5/20
AYES: Hill, Morrell, Jackson, Mitchell, Pan

SENATE APPROPRIATIONS COMMITTEE: 7-0, 8/20/20
AYES: Portantino, Bates, Bradford, Hill, Jones, Leyva, Wieckowski

ASSEMBLY FLOOR: 77-0, 6/11/20 - See last page for vote

SUBJECT: Worker classification: employees and independent contractors:
occupations: professional services

SOURCE: Author

DIGEST: This bill clarifies existing exemptions under the existing ‘ABC’ employment test as add youth sports coaches, specialized performers teaching master classes, appraisers, and insurance field services, as specified, and strikes the existing limitations on the referral agency language, as specified.

Senate Floor Amendments of 8/25/20 revise and recast the provisions of AB 2257 and existing law to set the provisions of the ABC test and exemptions into a series of connected statutory sections, rather than a single statutory section.

ANALYSIS:

Existing law:

- 1) Establishes a comprehensive set of protections for employees, including a time-sure minimum wage, meal and rest periods, workers’ compensation coverage in the event of an industrial injury, sick leave, disability insurance (DI) in the event of a non-industrial disability, paid family leave, and

unemployment insurance (UI). (Labor Code §§201, 226.7, 246, 512, 1182.12, & 3600 and UI Code §§1251 & 2601)

- 2) Provides that, except as otherwise stated, a person providing labor or services for remuneration must be considered an employee unless the hiring entity demonstrates that all of the following conditions are satisfied:
 - a) 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 for the performance of the work and in fact.
 - b) The person performs work that is outside the usual course of the hiring entity's business.
 - c) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. (Labor Code §2750.3)

This bill:

- 1) Revises and recasts the provisions described above as a separate article within the Labor Code.
- 2) Clarifies that, when two bona fide businesses are contracting with one another under the business-to-business exemption, the determination of whether an individual working for a business service provider is an employee or independent contractor of the business service provider is governed by the existing 'ABC' test.
- 3) Waives that the requirement that the business service provider provides services directly to the contracting business if employees are doing the contracted work.
- 4) Clarifies that a service provider for a referral agency must set or negotiate their rates, in consultation with the client, and without deduction by the referral agency.
- 5) Provides that a referral agency's contract with a client may include a fee to be paid by the client, but prohibits this fee from being deducted from the service provider's total compensation.

- 6) Strikes the existing limitations on the referral agency language, opening the exemption all industries, with the exception of agriculture, retail, janitorial, construction, delivery, courier, transportation services, and high hazard industries, as defined under existing law.
- 7) Adds, under the professional services exemption, a specialized performer and individual performing artist, as defined.
- 8) Adds, under the professional services exemption, appraisers, translators, and registered foresters.
- 9) Adds, under a general 'ABC' test exemption, a worker who provides underwriting inspections, premium audits, risk management, or loss control work for the insurance industry; international exchange visitor program administrative staff, as defined; competition judges, including umpires and referees; and business arrangements involving entertainment venues, and solo artists.
- 10) Provides that the ABC test and Dynamex do not apply, and instead the Borello test applies, to the following occupations:
 - a) Recording artists, subject to the below.
 - b) Songwriters, lyricists, and composers.
 - c) Managers of recording artists.
 - d) Record producers.
 - e) Musical engineers and mixers engaged in the creation of sound recordings.
 - f) Musicians engaged in the creation of sound recordings, with exceptions discussed below.
 - g) Vocalists, with exceptions discussed below.
 - h) Photographers working on recording photo shoots, album covers, and other press and publicity purposes.
 - i) Independent radio promoters.
 - j) Any other individual engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions, unless otherwise stated in the terms and conditions of any current or future collective bargaining agreement or agreement between the applicable and respective parties, in which case those terms and conditions shall govern.

- 11) Provides that the above exemption does not apply to any of the following:
 - a) Film and television unit production crews working on live or recorded performances for audiovisual works, including still photographers and cinematographers.
 - b) Publicists who are not independent music publicists.
 - c) People subject to collective bargaining agreements and those hired by employers signed to collective bargaining agreements.
 - d) Solely for the purposes of determining a right to organize, those who are deemed to be eligible in an appropriate collective bargaining unit.
- 12) Provides that the terms and conditions of any current or future collective bargaining agreements or agreements between the applicable unions and recording industry employers govern in all events.
- 13) Strikes the submission cap of 35 times per year for still photographers, photojournalists, freelance writers, editors, illustrators, and newspaper cartoonists.
- 14) Provides that a still photographer, photojournalist, videographer, photo editor, freelance writer, editor, illustrator, or newspaper cartoonist fall under the “professional services” exemption described above if the following is applicable:
 - a) The worker works under a contract that specifies in advance the rate of pay, intellectual property rights, and obligation to pay by a defined time.
 - b) The worker is not replacing an employee performing the same work at the same volume, the individual does not primarily perform the work at the hiring entity’s business location, and the individual is not restricted from working for more than one hiring entity.
- 15) Provides that a still photographer, photojournalist, videographer, or photo editor fall under the professional services exemption if they work for a “digital content aggregator”, which is defined as a licensing intermediary that obtains a license or assignment of copyright from a still photographer, photojournalist, videographer, or photo editor for the purposes of distributing that copyright by way of sublicense or assignment, to the intermediary’s third party end users.
- 16) Makes minor and technical changes for clarity.

- 17) Contains an urgency clause, bringing the bill into immediate effect, due to the need ensure businesses and workers have immediate clarity on the specific standards used to determine an individual's employment classification working in the professions impacted by this legislation.

Comments

The Business-to-Business Provisions and Medical Groups. As discussed above, the structure of how existing law applies the 'ABC Test' exemptions consists of two overarching structures: industry or occupation-specific exemptions and general exemptions (business-to-business relationships and referral agencies). For most businesses, this is a straightforward analysis: they either have an explicit exemption or they must come into full compliance with the business-to-business or referral agency provisions. For *medical groups*, however, this is not necessarily the case.

Specifically, medical groups can include both practicing physicians and surgeons, who have an explicit exemption, and non-physicians (such as physical therapists or mental health professionals) who do not have an explicit exemption. For these medical groups to come into compliance with the 'ABC Test', the medical group will need to reorganize partnerships and other business structures to make the non-exempt medical professionals employees. The onset of the COVID-19 pandemic adversely (and in some cases permanently) affected these reorganization efforts, particularly for smaller medical groups.

Therefore, in order to give small medical groups an opportunity to recover from the COVID-19 pandemic and restructure their business arrangements, the author may wish to extend a temporary exemption of 1-2 years for medical groups from the 'ABC test'.

Referral Agencies and Interpreters: On area of particular strength for AB 2257 is how the bill navigates the unique tensions and challenges of foreign language interpretation. For languages of wide dispersion, such as Spanish (second most common language in California), there is a significant population of appropriately trained and certified interpreters for a whole host of settings: judicial, administrative, medical, and many others.

For other languages, however, this is not the case. For example, California is home to largest population of Persians outside of Iran. However, outside of the California courts, there is no specific certification for Farsi, as the population of Farsi

speakers (less than 1% of California) does not need and cannot sustain other types of certification. With Farsi and similar languages, the market strength and independence of the interpreter is in the knowledge of the language itself, as the language is rare and price competition is limited.

AB 2257 addresses this by making a certification necessary “where applicable” – ensuring that, where a certification is appropriate and necessary, referral agencies cannot connect uncertified interpreters to clients and undercut appropriately certified interpreters. On the other hand, where a certification is either not available or not appropriate, the referral agency is able to connect professional language interpreters and clients.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee:

- The enacted 2020-21 state budget provides resources to implement AB 5 (see below), including \$17.5 million for the Department of Industrial Relations (DIR), and \$3.4 million for the Employment Development Department (EDD). Both agencies indicate that they can implement this bill’s requirements with the above provided resources.
- The Franchise Tax Board (FTB) indicates that the bill would have an unknown impact on revenues. FTB’s implementation costs would be minor and absorbable.

SUPPORT: (Verified 8/21/20)

California IATSE Council
California Labor Federation, AFL-CIO
Entertainment Union Coalition
Getty Images (US), INC.
Greater Los Angeles for the Deaf
Recording Industry Association of America
Shutterstock, INC.

OPPOSITION: (Verified 8/21/20)

Greater Los Angeles Agency on Deafness, INC.
Independent Physical Therapists of California
Independent Shakespeare Co.
National Press Photographers Association

Orange County Deaf Equal Access Foundation
Playwrights' Arena
The Fountain Theatre
The Pkg Project, INC.
Theatrical Producers League of Los Angeles
Tri-County Glad

ARGUMENTS IN SUPPORT: The Recording Industry Association of America, along with the California Labor Federation, AFL-CIO and other coalition partners, argue the following in support:

AB 2257 represents a serious effort by all involved to create a follow-up to AB 5 of last year and the Dynamex ruling by the California Supreme Court in 2018 that recognizes the need to protect against misclassification of those working in the industry while also taking into account the many permutations of relationships that exist throughout this sector. There truly is no “one size fits all” categorization, either in terms of scope or activity. This compromise was accomplished due to the efforts of organized labor, unrepresented parties, and the business side of the industry under the watchful leadership of Assembly Majority Leader Calderon and Assembly Member Gonzalez. Starting in earnest with conversations dating to last year, we could not have accomplished this mission without their patience and urging....

The demand for music has never been greater, and it is an especially poignant time for inspiration for many during the crisis we are all facing. Beauty and creativity have always arisen across our industry during some of the world’s and country’s toughest times, reflecting our struggles and victories. This legislation provides an important platform for such expressions of art, while also continuing California’s seminal position as the bellwether for the industry worldwide.

ARGUMENTS IN OPPOSITION: The National Press Photographers Association, writing in an “oppose unless amended” position, argues the following:

We greatly appreciate the language revisions of AB 1850 and AB 2257 removing the 35-submission (per client, per year) limit along with the revision to the “not replacing an employee” clause; we appreciate the promised removal of the requirement that a contract specifies “intellectual property rights” in order to retain independent contractor status; and appreciate the promised removal of the requirement that

certain other terms be set “in advance” which is a concern for journalists operating on tight deadlines...

Without such revisions the language and restrictions noted above will continue to be to the detriment of freelance still photographers, photojournalists, videographers, and photo editors. Providing video reporting is a critical component of many journalism projects, even for journalists whose primary medium is not normally video and who often use the same device to shoot both stills (now permitted) and video (Still banned). We oppose legislation (unless so amended) that applies materially different rules to freelance journalism than to other forms of communication, as an ongoing unconstitutional abridgment of our members' First and Fourteenth Amendment rights.

ASSEMBLY FLOOR: 77-0, 6/11/20

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Berman, Bigelow, Bloom, Boerner Horvath, Bonta, Brough, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Chu, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Diep, Eggman, Flora, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kamlager, Kiley, Lackey, Levine, Limón, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Obernolte, O'Donnell, Patterson, Petrie-Norris, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Smith, Mark Stone, Ting, Voepel, Waldron, Weber, Wicks, Wood, Rendon

NO VOTE RECORDED: Choi, Quirk

Prepared by: Gideon L. Baum / L., P.E. & R. / (916) 651-1556
8/26/20 18:42:59

**** END ****