

AB5: A New Standard for Worker Classification – Part 2

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By Joseph D. Delfino on February 9, 2021

In our last article, we discussed the [status and potential impact of AB5](#), a law recently passed in California which went into effect on January 1, 2020, addressing the classification of certain workers. By way of review, prior to AB5's passage, the decision on whether a worker should be classified as an employee or an independent contractor in California was determined by a standard set forth in *S.G. Borello & Sons vs. Department of Industrial Relations*. The Borello test, similar to the common law independent contractor standard, has 11 factors, primarily focusing on whether a company has control over the means and manner of performing contracted work, and additional secondary factors, such as who provides work tools and the individual's opportunity for profit or loss, to determine contractor status.

Under the new AB5 law, all workers are presumed to be employees. However, a worker can still be classified as an independent contractor if they can satisfy the "ABC Test." In response to the passing of AB5, the California Trucking Association filed a lawsuit contending that AB5 was preempted by the supremacy and commerce clauses of the U.S. Constitution and is in direct conflict with the Federal Motor Carrier Safety Act and the Federal Aviation Administration Authorization Act of 1994. The California Truck Association was most concerned with prong "B" of the ABC Test, which states that for a worker to be an independent contractor, the worker must perform work that is outside the usual course of the hiring entity's business.

On January 16, 2020, Judge Roger Benitez of the US District Court issued a preliminary injunction prohibiting California from applying AB5 to motor carriers. On September 1, 2020, a panel of the ninth Circuit Court of Appeals heard the issue of whether the preliminary injunction issued by Judge Benitez was appropriate. To date, the Ninth Circuit Panel has not yet issued a decision on the preliminary injunction.

While observers await a decision from the Ninth Circuit Federal Court on the issue of the preliminary injunction, there has been action by State Courts in California with regard to AB5.

In *People v. Cal Cartage Transportation Express*, the State of California brought a lawsuit against Cal Cartage for misclassifying workers. In January, 2020, just after Judge Benitez issued his preliminary injunction in the Federal case, State Superior Court Judge William Highberger issued a ruling indicating that federal law preempted California from imposing AB5 on the trucking industry.

That State decision was appealed. In November, 2020, a three-Judge panel from the California Court of Appeals reversed the ruling of Judge Highberger and concluded that federal law did not preclude an employee classification law like AB5 from being implemented in California.

However, the federal preliminary injunction issued by Judge Benitez is still controlling. So even though a California State Court of Appeals Panel has ruled that AB5 is not preempted by federal law, the issue of whether AB5 is valid and controlling is still to be determined. All eyes now turn to

the forthcoming decision from the Ninth Circuit, which should be issued in the near future.

This publication is not intended to be all-encompassing and does not cover all situations and exceptions to general rules. To discuss the applicability or interpretation of any provision of the law to a specific situation, please contact an attorney at Hedrick Gardner Kincheloe & Garofalo, LLP.