

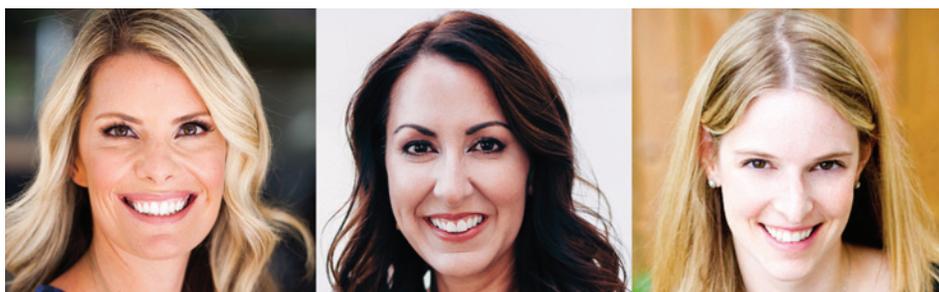
# New Bill Clears Path for Freelance Attorney Independent Contractor Status

By Erin F. Giglia, Laurie G. Rowen, and Shannon Forchheimer

Worker classification is not a new issue for the California courts, but a landmark decision 18 months ago left a thriving legal industry—the freelance attorney marketplace—questioning its survival. Now, with the California Legislature’s passage of Assembly Bill 5, law firms and freelance attorneys can breathe a sigh of relief.

The freelance attorney marketplace is distinct from the traditional notion of contract attorneys who are brought in to law firms for basic litigation support or due diligence. Rather, freelance attorneys represent a previously untapped crop of talent: lawyers who have fled Big Law due to intense work demands and need for a more balanced family life. The freelance attorney model where freelance attorneys work remotely for other law firms has given these attorneys a place to land.

Freelance attorneys have generally been treated as independent contractors. However, the decision set forth in *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903 (2018), radically altered 30 years of California worker classification law by using the “ABC Test” instead of the multifactor test set forth under *S.G. Borello & Sons v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), and essentially eliminated the independent contractor status for California workers.



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Under the ABC test, a worker is presumed to be an employee unless the hiring entity proves that (a) the worker is free from the hiring entity’s control; (b) the worker performs work that is outside the usual course of the hiring entity’s business; and (c) the worker is customarily engaged in an independent business of the same nature as the work performed for the hiring entity.

The *Dynamex* decision is intended to shield California workers from misclassification as independent contractors, which provides fewer legal protections for workers than employee status. Worker protection is an important goal, especially for workers earning close to minimum wage, and who value security and protection over flexibility. But blanket application to all workers goes far beyond protection and creates unintended negative consequences for some workers, businesses, and consumers. Certain industries, including licensed professionals and independent

business owners, do not logically fall under blanket employee classification because these workers truly run their own businesses, and often cannot maintain those businesses with added employee classification requirements.

The *Dynamex* decision sent immediate waves of concern throughout the legal industry, though these concerns were tempered by subsequent case law that limited *Dynamex* to wage orders. See *Garcia v. Border Transportation Group*, 28 Cal. App. 5th 558 (2018). In an industry where most high-level freelancers work remotely earning well above minimum wage, issues related to working conditions are unlikely to arise. However, there was a general concern that further legislation would codify *Dynamex* and apply it to all areas of the Labor Code, putting the freelance legal industry in jeopardy, and eliminating the flexibility freelancing provides.

## Assembly Bill 5 to the Rescue

Thankfully, AB 5 came to the rescue. While AB5 expands *Dynamex*,

providing much-needed protection for many workers, it will provide specific exemptions for certain industries, including lawyers.

AB 5 has not been without drama. In late 2018, Assembly Member Lorena Gonzales introduced AB 5 to clarify and codify the *Dynamex* decision, and to expand the case beyond the wage order to include the Labor Code and other provisions. Not surprisingly, gig companies such as Uber, Lyft, and DoorDash pushed to be exempted, but were ultimately unsuccessful. A handful of high-level professional industries that were negatively impacted by *Dynamex* successfully sought exemptions. After passing in the Assembly, the Senate placed the bill in the suspense file when it lacked agreement on exempted professionals. The bill made it out of the suspense file, was further amended, and ultimately passed on the Assembly floor by a vote of 56-15 on Sept. 11. At the time of publication, the bill's fate sat with Gov. Gavin Newsom, who had [publicly expressed support for the bill](#).

The legislation specifically exempts certain professions, including lawyers, doctors, engineers, and accountants, from the ABC test's reach, and stipulates that "instead, the determination of employee or independent contractor status for individuals in those occupations shall be governed by *Borello*." See [AB-5 Worker status: employees and independent contractors \(2019-2020\)](#).

This legislation is a clear sign that the Legislature intends to leave freelance attorneys untouched by *Dynamex* and the ABC test. However, to be considered an independent contractor, freelance attorneys still must satisfy the *Borello* factors.

### Applying *Borello* to Freelance/Contract Attorneys

The *Borello* "multifactor," or "economic realities test," has remained unchanged since 1989, but law firms and freelance attorneys should be vigilant in light of increased scrutiny on worker classification.

Under *Borello*, the most important consideration in determining the employee/independent contractor distinction is the "right to control work details." However, the right to control cannot be viewed in isolation, and there are several additional factors to consider in worker classification. These include whether the alleged employee is engaged in an occupation distinct from that of the principal, who supplies the instrumentalities and tools for the work, whether the services rendered require a special skill, the amount of supervision required, the length of time the services are required, the degree of permanence of the working relationship, and whether the parties believe they are creating an employer-employee relationship.

In light of these factors, there are considerations that law firms and freelance attorneys should recognize to ensure that they remain just that:

- Does the freelance attorney work on-site at the law firm office, or remotely?
- Does the freelance attorney work exclusively for one law firm, or multiple firms?
- Does the freelance attorney set his or her own rate?
- Does the freelance attorney supply his or her own office equipment?

Law firms procuring freelance attorney assistance need to exercise caution, and keep the *Borello* factors in mind. [Freelance legal companies](#) that connect true business owner freelance lawyers with multiple sources of

work, where the freelance attorneys set their own rates, work remotely, and supply their own equipment, provide the safest bet. The very thing that attracts attorneys to freelance work—autonomy—is the key to ensuring the industry's survival.

The passage of AB 5 will undoubtedly change the landscape of the gig economy in California. Fortunately, the Legislature has tailored the legislation so that it impacts the people that need it most, and the freelance legal industry has been left free to flourish. As long as law firms and freelance attorneys abide by the *Borello* factors, legal freelancing remains a viable option for attorneys that want an alternative to the traditional practice model, as well as a significant resource to California law firms.

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