



921 11th Street, Suite 400
Sacramento, CA 95814

916-448-9904
NFIB.com/CA

July 3, 2019

The Honorable Lorena Gonzalez
Assemblymember, District 80
State Capitol, Room 2114
Sacramento, CA 95814

RE: AB 5 (Gonzalez) Worker status: independent contractors. – OPPOSE UNLESS AMENDED

Dear Assemblymember Gonzalez,

On behalf of the National Federation of Independent Business, representing thousands of small business owners across California, I write respectfully in opposition to your Assembly Bill 5 unless amended to reflect the broad, diversity of industries represented by small businesses in our state who not only rely on independent contractors as part of their business models, but also many of which who are themselves independent contractors and wish to remain so.

As you know, prior to *Dynamex* California courts and state agencies had long applied what is known as the *Borello* test for determining whether a worker was an independent contractor for labor and employment purposes. The *Borello* test was a multi-factor approach which looked primarily at whether the hiring entity had a “right to control” the manner in which the worker performed the contracted service, along with eight other “secondary” factors. In *Dynamex*, the California Supreme Court decided to abruptly replace the *Borello* test in April of 2018.

Dynamex established a new “ABC” test, which provides that a worker must be treated as an employee unless the hiring entity can prove that the worker is: (A) free from control; (B) providing services **unrelated** to the hiring entity’s business; and (C) holding him or herself out as an independent business. This rigid formula prevents entrepreneurs from working as an independent contractor if they are providing services integral to another company’s business, regardless of what steps they have taken to establish themselves as a separate, independent business.

Fortunately, many policy leaders including yourself have acknowledged this new “ABC” test under *Dynamex* is unworkable for every single business in a state and economy as diverse as California’s. Unfortunately, the amendment process that has followed the introduction of AB 5

has left too many small businesses behind by narrowly carving out specific industries, rather than seeking to craft an exemption based on the nature of the contractual relationship between two entities. In a recent direct balloting of our California small business membership, 78% told us clearly that they wish to see a different approach, one that exempts two established, independent businesses from the "ABC" test, rather than picking and choosing industries.

Broad exemption from "ABC" test between two verifiably independent businesses:

NFIB small business members feel strongly that if, for example, a service provider has gone through the process of incorporating as an LLC or S-Corp, that business operator should be presumed exempt from the "ABC" test so that he or she may freely provide their services to other companies. Fundamentally, if two contracting entities can verify they operate freely and independently of one another, they should be held to the longstanding multi-factor test under *Borello*. Also known as a "business-to-business" exemption, this broad amendment would address the fundamental encumbrance of the "ABC" test, without picking winners and losers by carving out specific industries.

Eliminate unfair retroactive application of "ABC" test prior to April of 2018:

The sweeping action taken by the California State Supreme Court with *Dynamex* undoubtedly rewrote decades of California law by supplanting what was known as the *Borello* test with an unprecedented "ABC" test, never seen before in statute or regulation. In May of 2019, the U.S. Court of Appeals for the Ninth Circuit ruled that this unprecedented test could be applied retroactively, even when employers had no possible way of knowing about the "ABC" test. While *Borello* was certainly imperfect, NFIB small business members feel strongly it is unfair to punish employers for following the law of the land at the time, which was *Borello* for nearly three decades.

Independent contractor relationships provide millions of small business owners and entrepreneurs the opportunity to pursue their dreams, yet the rigid "ABC" test established by *Dynamex* and the threat of litigation presented by retroactive application jeopardize these opportunities. NFIB small business members respectfully urge the adoption of the two amendments described above to AB 5 to significantly alleviate these concerns.

For these reasons, NFIB respectfully opposes AB 5 unless amended.



Shawn Lewis
Policy Director