

California Construction and Employment Law Alert

AB5, Dynamex and the ABC Standard Exception for Construction-Related Trucking

Last Updated: September 27, 2019



Overview

Our earlier alert outlines the *Dynamex* case, which brought the inflexible ABC Standard to California for determining whether a worker is an employee or an independent contractor for IWC wage orders, in addition to the existing *Borello* test, which applies a more employer friendly multi-factor test.

The Legislature passed, and Governor Newsom signed, AB5 that codifies the *Dynamex* case and the ABC Standard for wage orders, the Labor Code, unemployment insurance, and worker's compensation issues. Our earlier alert details the exceptions to the ABC Standard, as part of AB5 in Labor Code section 2750.3(f)(1-7), that allow a contractor and subcontractor to revert to the *Borello* test when they can meet all of multiple requirements in section 2750.3(f)(1-7).

The initial part of Labor Code section 2750.3(f) relates to contractors and subcontractors and states as follows:

Subdivision (a) and the holding in *Dynamex* do not apply to the relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry, and instead the determination of whether the individual is an employee of the contractor shall be governed by Section 2750.5 and by *Borello*, if the contractor demonstrates that all the following criteria are satisfied:

[Section 2750.3(f)(1-7) skipped for this analysis. See prior alert.]

AB5 also includes subparts in Labor Code section 2750.3(f)(8) that address the trucking industry within an exception for the construction industry, and state as follows:

(8) (A) Paragraph (2) shall not apply to a subcontractor providing construction trucking services for which a contractor's license is not required by Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, provided that all of the following criteria are satisfied:

- (i) The subcontractor is a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.
- (ii) For work performed after January 1, 2020, the subcontractor is registered with the Department of Industrial Relations as a public works contractor pursuant to Section 1725.5, regardless of whether the subcontract involves public work.
- (iii) The subcontractor utilizes its own employees to perform the construction trucking services, unless the subcontractor is a sole proprietor who operates their

California Construction and Employment Law Alert
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own truck to perform the entire subcontract and holds a valid motor carrier permit issued by the Department of Motor Vehicles.

(iv) The subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.

(B) For work performed after January 1, 2020, any business entity that provides construction trucking services to a licensed contractor utilizing more than one truck shall be deemed the employer for all drivers of those trucks.

(C) For purposes of this paragraph, “construction trucking services” mean hauling and trucking services provided in the construction industry pursuant to a contract with a licensed contractor utilizing vehicles that require a commercial driver’s license to operate or have a gross vehicle weight rating of 26,001 or more pounds.

(D) This paragraph shall only apply to work performed before January 1, 2022.

(E) Nothing in this paragraph prohibits an individual who owns their truck from working as an employee of a trucking company and utilizing that truck in the scope of that employment. An individual employee providing their own truck for use by an employer trucking company shall be reimbursed by the trucking company for the reasonable expense incurred for the use of the employee owned truck.

The trucking exception expires on January 1, 2022 and therefore, lasts only two years. This creates a problem for contractors and truckers who contract for longer than two years. Is the contract effective to make those truckers independent contractors? For the whole contract or the period before January 1, 2022, only? Or, is the contract completely ineffective to make the trucker an independent contractor?

When part of a contract conflicts with a statute it is illegal, and some, or all, of the contract may be rendered void and unenforceable. (Civil Code section 1608.) Accordingly, depending on the nature of the illegality, neither party would be entitled to relief if either party breaches the contract. This means that certain of the parties’ duties that might have been covered by an agreement are no longer defined by the agreement. In reference to AB5, the worker’s independent contractor status might be avoided due to violation of the ABC Standard after January 1, 2022, but the obligation to pay the worker would not be.

California Construction and Employment Law Alert AB5, Dynamex and the ABC Standard Exception for Construction- Related Trucking

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Parties with contracts affected by AB5 should review their agreements and determine whether they have been made unenforceable and therefore ineffective to sustain independent contractor status. If the contract duration extends beyond January 1, 2022, do the contracts have “savings clauses,” that allow enforceable parts of a contract to remain in place? A savings clause might look like: “If any part of this agreement is rendered and/or determined to be illegal, void, and/or unenforceable, those portions shall be excised from the agreement and the unaffected portions of this agreement shall remain in full force and effect.”

If existing agreements do not have “savings clauses,” then whole contracts may be unenforceable for failure to comply on the standards and/or exceptions addressed by AB5. For example, if the parties have an agreement that falls within the exception, but its duration extends past January 1, 2022, then the agreement might be rendered illegal and therefore, void and unenforceable.

Of course, there is uncertainty about which parts of the contract might be rendered illegal. Certainly the contract would be illegal and unenforceable to sustain independent contractor status after January 1, 2022. However, would the payment provisions, indemnity clauses, and insurance requirements be enforceable nonetheless? Also, how would the provisions of a contract entered before January 1, 2022 but extending after that date be treated? Would a court enforce the contract and uphold independent contractor status before January 1, 2022? Would a court allow a contract that falls into the AB5 exception stand for periods prior to January 1, 2022? Perhaps that would be a fair result, but there are no guarantees. Or, would a court deem the entire time period covered by the contract to be illegal, even if some of it occurs prior to January 1, 2022? It seems unlikely a court would cause the parties to forfeit the benefit of their bargain for the time it was legal, but again, the result would be uncertain.

If the contract is illegal, void and/or unenforceable, then the contractor may be deemed the trucker’s employer. If the trucker is an employee of the contractor, the contractor would be liable for: payroll, meals and breaks, overtime, payroll tax, leaves, benefits, unemployment insurance, and worker’s compensation coverage for that employee. Simply paying the trucker the contracted amount would not be sufficient to satisfy the laundry list of requirements that an employer must meet, and the employer could be liable if a trucker, a union, or the DIR brought a claim against the contractor. Unwary contractors could face liability and penalties if they fail to account for the trucker’s status as an employee.

Further, the trucking exception does not require the trucker/hauler to have a CSLB license. However, it does require the trucker/hauler company to be registered with the [Department of Industrial Relations \(“DIR”\) as a public works contractor](#). Since the relevant provisions of AB5 commence on January 1, 2020, any trucker/hauler who wishes to take advantage of this

California Construction and Employment Law Alert
AB5, Dynamex and the ABC Standard Exception for Construction-
Related Trucking

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exception must timely register with DIR, which means they must apply now to ensure timely registration.

Third, if the trucker/hauler utilizes more than one truck, then it is designated the employer of all the other drivers of those additional trucks. (AB5/new Labor Code section 2750.3(f)(8)(B).) This part of AB5 prevents “daisy-chaining” owner/operators on jobs, and requires contractors to have one-to-one contracts with eligible trucking entities.

Sample Trucker/Hauler Question from a Recent AGC Regional Meeting:

Question:

"I own trucks, have a business license, and employees, but as I bid work, sometimes I have to use owner-operators to meet the needs of the job. Can I do that going forward or am I a broker then? (I don't have a CSLB license). Also, some of the bids I'm doing are three years out. What happens to the owner operator contracts that start now when owner operators are legal but don't conclude until after 2022 when owner operators are not allowed?"

Response to sample question:

As set forth above, if you bring additional owner/operators to operate additional trucks, they are your employees for purposes of that particular job. (AB5/new Labor Code section 2750.3(f)(8)(B).) The statute precludes “daisy chains.”

Existing contracts that extend past January 1, 2022 that assumed owner/operator hiring is legal will need to be examined on their own terms to determine the effect of AB5. Perhaps pro-active parties will analyze and renegotiate portions of contracts to avoid having parts of, or entire, contracts rendered illegal and unenforceable.

Moving forward with new contracts, parties may want to write “sunset” clauses that address the lack of the exemption after January 1, 2022 or contingency language allowing the agreement to remain in place, if the current exception in Labor Code section 2750.3(f)(8) is extended. For example, “This agreement ends as of January 1, 2022, unless the provisions of Labor Code section 2750.3(f)(8), or other related legislation or statute, permit the parties to legally keep its terms in effect past January 1, 2022.”

Recommendations:

If contractors wish to hire truckers as independent contractors and ensure that the truckers fall within the exception to AB5 they should verify that the trucker: a) has a formal business entity; b) is registered as a public contracting entity with the DIR; and c) holds a valid motor carrier permit issued by the Department of Motor Vehicles.

California Construction and Employment Law Alert
**AB5, Dynamex and the ABC Standard Exception for Construction-
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If the contractor hires a trucker with more than one truck, then the trucker is the employer of the other truckers. The contractor should verify that the trucker has worker's compensation coverage for the other truckers and/or employees. The contract between the contractor and the trucker should also address liability for employment issues and the trucker should indemnify the contractor for potential liability arising from the trucker's status as the employer of the other truckers and/or employees.

AB5 injects uncertainty as to whether contracts attempting to use the trucking exception might be challenged as failing to comply with AB5, whether by a worker, a union, or the DIR. Therefore, contracting contractors and truckers should be aware that their contracts may come under scrutiny and they should insert savings clauses into their contracts to preserve non-challenged parts of contracts.

The trucking exception expires on January 1, 2022. Contractors and truckers entering new contracts may want to write their contracts to terminate on January 1, 2022 to coincide with the expiration of the trucking exception, and if so, they may want to write a specific contingency allowing the contract to continue in case the exception is extended.

The trucking and hauling industry lobbyists will want to address what happens to contracts that extend after January 1, 2022, and they would provide a great service to their constituents if they can offer clean-up legislation that would clarify and/or extend this exemption.