

AB5 Compliance Checklist

Hiring Entity Guidelines – Identifying the Proper Classification for an Independent Contractor vs. Employee

Last Updated: October 24, 2019



As the hiring entity, it is your responsibility to determine whether an individual worker working as a subcontractor may be treated as a bona fide independent contractor or is an employee under California law. The determination will be through the application of the factors set forth in Labor Code 1750.5 and the multi-factor *Borello* Test or the ABC Test set forth in the California Supreme Court opinion in *Dynamex* or the recently enacted Assembly Bill 5. As outlined in Assembly Bill 5, the construction industry did receive several exemptions to the application of the ABC test, but it is vital to ensure proper application to avoid penalties and liabilities. Please use the following checklists to determine which test is applicable to the services being rendered in order to properly classify the workers performing services for your entity.

Contractor to Subcontractor Checklist Within the Construction Industry

When subcontracting work in the construction industry, the subcontractor must meet ALL of the following. Does the subcontractor:

	YES	NO
Hold a license issued by CSLB		
Perform work within the scope of the license issued by CSLB		
Hold a valid business license or business tax certification (if located in a jurisdiction that is required to perform business)		
Have a subcontract in writing for the scope of work being performed		
Is free from control and direction of the contractor who is issuing the work		
Maintains a business location that is separate from the business or work location of the contractor		
Has the authority to hire and fire other individuals or companies that will be providing or assisting in provides services for work within their issued scope		
Assumes financial responsibility for errors or omissions in labor or services and can provide evidence of this through insurance, legally authorized indemnity obligations, performance bonds, or warranties		
Has other frequent and consistent engagements separate from the scope identified here with other businesses performing work in the same nature		

If you answered yes to each of the questions above, your subcontractor/individual will qualify to apply the *Borello* test to ensure they are classified as an Independent Contractor.

The principal factor of the *Borello* test was whether the “person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” Answer the following questions for final application of the *Borello* test:

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The test also included nine additional factors:

(1) right to discharge at will, without cause; (2) whether the one performing the services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is part of the regular business of the principal; and (9) whether or not the parties believe they are creating a relationship of employer-employee.

If ANY one of the questions above received a “no” then the employment status of the subcontractor will be determined under the ABC test.

Answer the following questions for final application of the ABC test:

		YES	NO
A	Is the worker free from the control and direction of the hiring entity in the performance of the work, both when referring to the contract and the actual work as is?		
B	Does the worker perform work that is outside the usual course of business of the hiring entity?		
C	Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?		

If ANY one of the questions above received a “no” than the subcontractor/individual **CANNOT** be classified as an Independent Contractor and will fall under the classification of an Employee of your entity.



Contractor to Service Provider Checklist Within the Construction Industry

When contracting work to a service provider that DOES NOT require an active license with the CSLB for the scope of work being performed, (e.g. testing or inspection services) and is not a construction trucking entity, the subcontractor must meet ALL of the following. Does the person(s)/company:

	YES	NO
Operate as an entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation with the intent to contract to provide services to another such business		
Operate free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact		
Provide services directly to the contracting business rather than to customers of the contracting business		
Have a written contract with the with the contracting entity		
Have the appropriate business license or business tax registration in the jurisdiction in which the work is performed		
Maintain a business location that is separate from the business or work location of the contracting business		
Have an independently established business of the same nature as that involved in the work performed		
Provide its own tools, vehicles, and equipment to perform the services		
Negotiate its own rates		
Have the freedom to set its own hours and location of work consistent with the nature of the work		

If you answered yes to each of the questions above, your subcontractor/individual will qualify to apply the *Borello* test to ensure they are classified as an Independent Contractor.

The principal factor of the *Borello* test was whether the “person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” Answer the following questions for final application of the *Borello* test:

The test also included nine additional factors:

- (1) right to discharge at will, without cause; (2) whether the one performing the services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the

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principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is part of the regular business of the principal; and (9) whether or not the parties believe they are creating a relationship of employer-employee.

If ANY one of the questions above received a “no” then the employment status of the subcontractor will be determined under the ABC test.

Answer the following questions for final application of the ABC test:

		YES	NO
A	Is the worker free from the control and direction of the hiring entity in the performance of the work, both when referring to the contract and the actual work as is?		
B	Does the worker perform work that is outside the usual course of business of the hiring entity?		
C	Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?		

If ANY one of the questions above received a “no” than the subcontractor/individual **CANNOT** be classified as an Independent Contractor and will fall under the classification of an Employee of your entity.



Construction Trucking Checklist Within the Industry

The following information will ONLY apply until January 1, 2022. When a subcontractor or trucking services provider is providing “construction trucking services” for which a contractor’s license is not required, ALL of the following must be met. Does the subcontractor or trucking services provider:

	YES	NO
Have the business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation		
Registered with the DIR (Department of industrial Relations) as a public works contractor (this applies after 1/1/2020 for both public and private work)		
Has a licensed driver who is licensed to operate a truck in excess of 26,000 pounds		
Has a subcontract for the scope of work being performed and negotiates directly with the licensed contractor		
Is compensated directly by the licensed contractor		
Utilizes its own employees to perform the construction trucking services Exemption- unless the subcontractor is a sole proprietor who operates their own truck to perform the entire subcontract and holds a valid motor carrier permit issued by the DMV		
Is the employer for all drivers of the trucks being utilized/contracted by the licensed contractor for construction trucking services if more than one truck is being used		

If you answered yes to each of the questions above, your subcontractor/individual will qualify to apply the *Borello* test to ensure they are classified as an Independent Contractor.

The principal factor of the *Borello* test was whether the “person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” Answer the following questions for final application of the *Borello* test:

The test also included nine additional factors:

- (1) right to discharge at will, without cause;
- (2) whether the one performing the services is engaged in a distinct occupation or business;
- (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- (4) the skill required in the particular occupation;
- (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (6) the length of time for which the services are to be performed;
- (7) the method of payment, whether by the time or by the job;
- (8) whether or not the work is part of the regular

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business of the principal; and (9) whether or not the parties believe they are creating a relationship of employer-employee.

If ANY one of the questions above received a “no” then the employment status of the subcontractor will be determined under the ABC test.

Answer the following questions for final application of the ABC test:

		YES	NO
A	Is the worker free from the control and direction of the hiring entity in the performance of the work, both when referring to the contract and the actual work as is?		
B	Does the worker perform work that is outside the usual course of business of the hiring entity?		
C	Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?		

If ANY one of the questions above received a “no” than the subcontractor/individual **CANNOT** be classified as an Independent Contractor and will fall under the classification of an Employee of your entity.