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R SHEET ON CALIFORNIA'S ANTI-CONTRACTOR LAW, ASSEMBLY BILL 5

April 2020

BACKGROUND

In 2018, the California Supreme Court issued an 82-page decision in a little-known case that has dramatically shaken up the state's labor code and given rise to a new law that **threatens** the livelihood of as many as 2 million contractor workers.

In *Dynamex Operations West, Inc. v. Superior Court*, the court tossed aside the existing standard for determining whether a company could hire independent contractors rather than permanent employees and replaced it with a stringent new “ABC” test that dramatically limits the use of contractors. The case centered on a same-day delivery service that had switched its drivers to freelancers to reduce costs.

In its decision, the court replaced the existing **test**, which made the contractor-or-employee determination based mainly on whether contractors had a right to control how they performed the job. California companies had successfully been operating under the old standard, which was established by a 1989 state high-court decision known as *Borello*. Indeed, the gig firms that created business models based on the use of contractors—notably **transportation network companies** such as Uber and Lyft and delivery services such as DoorDash—developed under the old standard.

In *Dynamex*, the state high court crafted a new standard out of whole cloth. Its new **test** only allows companies to use contractors if they meet all three of the following circumstances: The workers are a) not controlled by the company, b) performing a task that is outside of the company's usual scope of business and c) affirmatively decided to go into business for themselves. That's a high hurdle—one that, on its face, undermines how many new economy firms operate.

Enter **Assembly Bill 5**, authored by union-allied Democrat Lorena Gonzalez of San Diego. The Legislature could have crafted a measure that addressed the concerns of businesses that would be harmed by the court's decision

SUMMARY

- The California Supreme Court's 2018 *Dynamex* decision imposed a stringent new “ABC” test on companies that want to use contractors.
- Lawmakers passed Assembly Bill 5, which put that test into law after exempting various politically influential industries.
- The new law has caused dramatic economic dislocations.
- Lawmakers have introduced 34 separate measures to roll back at least a portion of the law.
- The Legislature should suspend AB 5 during the current economic crisis and revisit it once it returns to session.

or placed limits on its application. Instead, the Legislature passed—and Gov. Gavin Newsom signed—a far-reaching law that imposes the new standard widely and strictly, but only after it **exempted** many politically powerful professions including architects, attorneys, investment advisers, psychologists, physicians, real-estate agents, veterinarians and engineers. AB 5's clear targets were companies such as Uber and Lyft, but it also ensnares truck drivers, freelance writers, photographers, sign-language interpreters, musicians and various home-based workers.

CURRENT DEBATE

The law's January 2020 implementation led to widespread dislocations and intense pushback, as many ordinary Californians found their livelihoods in peril. Layoff notices were rampant. As the *Los Angeles Times* **reported**, AB 5 left performing artists in a “state of fear and confusion.”

AB 5 imposed an annual cap (35 submissions) on freelance writers and photographers who provide work to one outlet, prompting a First Amendment-based lawsuit that was recently rejected by a federal court. The California Trucking Association filed a federal lawsuit based

on interstate commerce issues, given that the new law would essentially require truck drivers (including owner-operators) hauling deliveries from other states to stop at the California border and switch to employee-drivers. A federal court has issued a temporary [injunction](#) banning application of the law to truck drivers.

Uber, Lyft and DoorDash are circulating a statewide [initiative](#) that would exempt their drivers from the conditions imposed by AB 5. That's a costly and time-consuming endeavor, however, and its outcome is far from certain. Instead of trying to address the legitimate concerns of the mostly moderate-income people employed by these companies, Gov. Newsom [approved](#) \$20 million to step up enforcement actions under the law. By the end of the legislative bill-filing deadline, lawmakers had introduced 34 measures designed to exempt other industries, roll back some of the law's provisions or repeal the measure. Most of these proposals come from Republicans, who have little power in the state Legislature.

Any change must go through the Assembly Appropriations Committee, which is chaired by Representative Gonzalez. She has defended the bill, and has been criticized for her stinging and dismissive [Twitter comments](#) aimed at Californians who are upset at their loss of work. "These were never good jobs," she wrote, after Vox Media announced layoffs of its California-based freelancers who worked for its sports website. Gonzalez has since agreed to "clarify" some aspects of the law.

ACTION ITEMS

The Legislature is temporarily suspended during the coronavirus crisis. However, many voices—not just from the conservative side of the aisle—have been calling for Newsom to suspend AB 5. The [rationale is clear](#). AB 5 restricts the ability of delivery drivers to get goods and services to people's homes. During this virtual lockdown, it's foolhardy to enforce a law that makes it more difficult to get food and household products to people, thereby encouraging Californians to go to stores where they risk spreading the virus.

Furthermore, AB 5 restricts the ability of Californians to earn a living at a time when everyone is struggling to make ends meet. It limits home-based and other freelance work at a time when public health demands that more people work from home. Yes, AB 5 should be suspended in this time of crisis, but it also needs to be [revisited](#) once things calm down. The Legislature should embrace ideas advocated by the R Street Institute: the creation of a third cat-

egory of worker that allows more flexibility or a model that provides portable benefits.

AB 5 is fundamentally flawed because it undermines contractual relationships that California businesses and workers have freely entered into. It neglects the degree to which many workers prefer to operate as contractors, given the flexible work hours and freedom such arrangements entail. The law impedes innovation and entrepreneurship—hallmarks of the [new economy](#) that had flourished in California.

CONTACT US

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