

**ASSEMBLY BILL**

**No. 1928**

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**Introduced by Assembly Members Kiley and Melendez**  
**(Coauthors: Assembly Members Fong and Gallagher)**  
(Coauthors: Senators Jones and Moorlach)

January 15, 2020

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An act to amend Section 2750.5 of, to add Section 2750.7 to, and to repeal Section 2750.3 of, the Labor Code, relating to employment, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 1928, as introduced, Kiley. Employment standards: independent contractors and employees.

Existing law, as established in the case of *Dynamex Operations W. Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission. Existing law requires a 3-part test, commonly known as the “ABC” test, to determine if workers are employees or independent contractors for purposes of specified wage orders.

Existing law establishes that, for purposes of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration is considered an employee rather than an independent contractor unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is

customarily engaged in an independently established trade, occupation, or business. This test is commonly known as the “ABC” test. Existing law charges the Labor Commissioner with the enforcement of labor laws, including worker classification.

Existing law exempts specified occupations and business relationships from the application of Dynamex and these provisions. Existing law instead provides that these exempt relationships are governed by the test adopted in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d (Borello).

This bill would repeal those existing provisions and instead require a determination of whether a person is an employee or an independent contractor to be based on the specific multifactor test set forth in Borello, including whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired, and other identified factors. The bill would make related, conforming changes.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote:  $\frac{2}{3}$ . Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 2750.3 of the Labor Code is repealed.  
2 ~~2750.3.—(a) (1) For purposes of the provisions of this code~~  
3 ~~and the Unemployment Insurance Code, and for the wage orders~~  
4 ~~of the Industrial Welfare Commission, a person providing labor~~  
5 ~~or services for remuneration shall be considered an employee rather~~  
6 ~~than an independent contractor unless the hiring entity demonstrates~~  
7 ~~that all of the following conditions are satisfied:~~  
8 (A) ~~The person is free from the control and direction of the~~  
9 ~~hiring entity in connection with the performance of the work, both~~  
10 ~~under the contract for the performance of the work and in fact.~~  
11 (B) ~~The person performs work that is outside the usual course~~  
12 ~~of the hiring entity’s business.~~  
13 (C) ~~The person is customarily engaged in an independently~~  
14 ~~established trade, occupation, or business of the same nature as~~  
15 ~~that involved in the work performed.~~  
16 (2) ~~Notwithstanding paragraph (1), any exceptions to the terms~~  
17 ~~“employee,” “employer,” “employ,” or “independent contractor,”~~

1 and any extensions of employer status or liability, that are expressly  
2 made by a provision of this code, the Unemployment Insurance  
3 Code, or in an applicable order of the Industrial Welfare  
4 Commission, including, but not limited to, the definition of  
5 “employee” in subdivision 2(E) of Wage Order No. 2, shall remain  
6 in effect for the purposes set forth therein.

7 (3) If a court of law rules that the three-part test in paragraph  
8 (1) cannot be applied to a particular context based on grounds other  
9 than an express exception to employment status as provided under  
10 paragraph (2), then the determination of employee or independent  
11 contractor status in that context shall instead be governed by the  
12 California Supreme Court’s decision in *S. G. Borello & Sons, Inc.*  
13 *v. Department of Industrial Relations* (1989) 48 Cal.3d 341  
14 (*Borello*).

15 (b) Subdivision (a) and the holding in *Dynamex Operations*  
16 *West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903  
17 (*Dynamex*), do not apply to the following occupations as defined  
18 in the paragraphs below, and instead, the determination of  
19 employee or independent contractor status for individuals in those  
20 occupations shall be governed by *Borello*.

21 (1) A person or organization who is licensed by the Department  
22 of Insurance pursuant to Chapter 5 (commencing with Section  
23 1621), Chapter 6 (commencing with Section 1760), or Chapter 8  
24 (commencing with Section 1831) of Part 2 of Division 1 of the  
25 Insurance Code.

26 (2) A physician and surgeon, dentist, podiatrist, psychologist,  
27 or veterinarian licensed by the State of California pursuant to  
28 Division 2 (commencing with Section 500) of the Business and  
29 Professions Code, performing professional or medical services  
30 provided to or by a health care entity, including an entity organized  
31 as a sole proprietorship, partnership, or professional corporation  
32 as defined in Section 13401 of the Corporations Code. Nothing in  
33 this subdivision shall apply to the employment settings currently  
34 or potentially governed by collective bargaining agreements for  
35 the licensees identified in this paragraph.

36 (3) An individual who holds an active license from the State of  
37 California and is practicing one of the following recognized  
38 professions: lawyer, architect, engineer, private investigator, or  
39 accountant.

1     ~~(4) A securities broker-dealer or investment adviser or their~~  
 2 ~~agents and representatives that are registered with the Securities~~  
 3 ~~and Exchange Commission or the Financial Industry Regulatory~~  
 4 ~~Authority or licensed by the State of California under Chapter 2~~  
 5 ~~(commencing with Section 25210) or Chapter 3 (commencing with~~  
 6 ~~Section 25230) of Division 1 of Part 3 of Title 4 of the~~  
 7 ~~Corporations Code.~~

8     ~~(5) A direct sales salesperson as described in Section 650 of the~~  
 9 ~~Unemployment Insurance Code, so long as the conditions for~~  
 10 ~~exclusion from employment under that section are met.~~

11     ~~(6) A commercial fisherman working on an American vessel~~  
 12 ~~as defined in subparagraph (A) below:~~

13     ~~(A) For the purposes of this paragraph:~~

14     ~~(i) “American vessel” has the same meaning as defined in~~  
 15 ~~Section 125.5 of the Unemployment Insurance Code.~~

16     ~~(ii) “Commercial fisherman” means a person who has a valid,~~  
 17 ~~unrevoked commercial fishing license issued pursuant to Article~~  
 18 ~~3 (commencing with Section 7850) of Chapter 1 of Part 3 of~~  
 19 ~~Division 6 of the Fish and Game Code.~~

20     ~~(iii) “Working on an American vessel” means the taking or the~~  
 21 ~~attempt to take fish, shellfish, or other fishery resources of the state~~  
 22 ~~by any means, and includes each individual aboard an American~~  
 23 ~~vessel operated for fishing purposes who participates directly or~~  
 24 ~~indirectly in the taking of these raw fishery products, including~~  
 25 ~~maintaining the vessel or equipment used aboard the vessel.~~  
 26 ~~However, “working on an American vessel” does not apply to~~  
 27 ~~anyone aboard a licensed commercial fishing vessel as a visitor~~  
 28 ~~or guest who does not directly or indirectly participate in the taking.~~

29     ~~(B) For the purposes of this paragraph, a commercial fisherman~~  
 30 ~~working on an American vessel is eligible for unemployment~~  
 31 ~~insurance benefits if they meet the definition of “employment” in~~  
 32 ~~Section 609 of the Unemployment Insurance Code and are~~  
 33 ~~otherwise eligible for those benefits pursuant to the provisions of~~  
 34 ~~the Unemployment Insurance Code.~~

35     ~~(C) On or before March 1, 2021, and each March 1 thereafter,~~  
 36 ~~the Employment Development Department shall issue an annual~~  
 37 ~~report to the Legislature on the use of unemployment insurance in~~  
 38 ~~the commercial fishing industry. This report shall include, but not~~  
 39 ~~be limited to, reporting the number of commercial fishermen who~~  
 40 ~~apply for unemployment insurance benefits, the number of~~

1 commercial fishermen who have their claims disputed, the number  
2 of commercial fishermen who have their claims denied, and the  
3 number of commercial fishermen who receive unemployment  
4 insurance benefits. The report required by this subparagraph shall  
5 be submitted in compliance with Section 9795 of the Government  
6 Code.

7 ~~(D) This paragraph shall become inoperative on January 1, 2023,~~  
8 ~~unless extended by the Legislature.~~

9 ~~(7) A newspaper distributor working under contract with a~~  
10 ~~newspaper publisher, as defined in subparagraph (A), and a~~  
11 ~~newspaper carrier working under contract either with a newspaper~~  
12 ~~publisher or newspaper distributor.~~

13 ~~(A) For purposes of this paragraph:~~

14 ~~(i) "Newspaper" means a newspaper of general circulation, as~~  
15 ~~defined in Section 6000 of the Government Code, and any other~~  
16 ~~publication circulated to the community in general as an extension~~  
17 ~~of or substitute for that newspaper's own publication, whether that~~  
18 ~~publication be designated a "shoppers' guide," as a zoned edition,~~  
19 ~~or otherwise.~~

20 ~~(ii) "Publisher" means the natural or corporate person that~~  
21 ~~manages the newspaper's business operations, including~~  
22 ~~circulation.~~

23 ~~(iii) "Newspaper distributor" means a person or entity that~~  
24 ~~contracts with a publisher to distribute newspapers to the~~  
25 ~~community.~~

26 ~~(iv) "Carrier" means a person who effects physical delivery of~~  
27 ~~the newspaper to the customer or reader.~~

28 ~~(B) This paragraph shall become inoperative on January 1, 2021,~~  
29 ~~unless extended by the Legislature.~~

30 ~~(e) (1) Subdivision (a) and the holding in Dynamex do not~~  
31 ~~apply to a contract for "professional services" as defined below;~~  
32 ~~and instead the determination of whether the individual is an~~  
33 ~~employee or independent contractor shall be governed by Borello~~  
34 ~~if the hiring entity demonstrates that all of the following factors~~  
35 ~~are satisfied:~~

36 ~~(A) The individual maintains a business location, which may~~  
37 ~~include the individual's residence, that is separate from the hiring~~  
38 ~~entity. Nothing in this subdivision prohibits an individual from~~  
39 ~~choosing to perform services at the location of the hiring entity.~~

1 ~~(B) If work is performed more than six months after the effective~~  
2 ~~date of this section, the individual has a business license, in~~  
3 ~~addition to any required professional licenses or permits for the~~  
4 ~~individual to practice in their profession.~~

5 ~~(C) The individual has the ability to set or negotiate their own~~  
6 ~~rates for the services performed.~~

7 ~~(D) Outside of project completion dates and reasonable business~~  
8 ~~hours, the individual has the ability to set the individual’s own~~  
9 ~~hours.~~

10 ~~(E) The individual is customarily engaged in the same type of~~  
11 ~~work performed under contract with another hiring entity or holds~~  
12 ~~themselves out to other potential customers as available to perform~~  
13 ~~the same type of work.~~

14 ~~(F) The individual customarily and regularly exercises discretion~~  
15 ~~and independent judgment in the performance of the services.~~

16 ~~(2) For purposes of this subdivision:~~

17 ~~(A) An “individual” includes an individual providing services~~  
18 ~~through a sole proprietorship or other business entity.~~

19 ~~(B) “Professional services” means services that meet any of the~~  
20 ~~following:~~

21 ~~(i) Marketing, provided that the contracted work is original and~~  
22 ~~creative in character and the result of which depends primarily on~~  
23 ~~the invention, imagination, or talent of the employee or work that~~  
24 ~~is an essential part of or necessarily incident to any of the~~  
25 ~~contracted work.~~

26 ~~(ii) Administrator of human resources, provided that the~~  
27 ~~contracted work is predominantly intellectual and varied in~~  
28 ~~character and is of such character that the output produced or the~~  
29 ~~result accomplished cannot be standardized in relation to a given~~  
30 ~~period of time.~~

31 ~~(iii) Travel agent services provided by either of the following:~~  
32 ~~(I) a person regulated by the Attorney General under Article 2.6~~  
33 ~~(commencing with Section 17550) of Chapter 1 of Part 3 of~~  
34 ~~Division 7 of the Business and Professions Code, or (II) an~~  
35 ~~individual who is a seller of travel within the meaning of~~  
36 ~~subdivision (a) of Section 17550.1 of the Business and Professions~~  
37 ~~Code and who is exempt from the registration under subdivision~~  
38 ~~(g) of Section 17550.20 of the Business and Professions Code.~~

39 ~~(iv) Graphic design.~~

40 ~~(v) Grant writer.~~

- 1     ~~(vi) Fine artist.~~
- 2     ~~(vii) Services provided by an enrolled agent who is licensed by~~  
3 ~~the United States Department of the Treasury to practice before~~  
4 ~~the Internal Revenue Service pursuant to Part 10 of Subtitle A of~~  
5 ~~Title 31 of the Code of Federal Regulations.~~
- 6     ~~(viii) Payment processing agent through an independent sales~~  
7 ~~organization.~~
- 8     ~~(ix) Services provided by a still photographer or photojournalist~~  
9 ~~who do not license content submissions to the putative employer~~  
10 ~~more than 35 times per year. This clause is not applicable to an~~  
11 ~~individual who works on motion pictures, which includes, but is~~  
12 ~~not limited to, projects produced for theatrical, television, internet~~  
13 ~~streaming for any device, commercial productions, broadcast news,~~  
14 ~~music videos, and live shows, whether distributed live or recorded~~  
15 ~~for later broadcast, regardless of the distribution platform. For~~  
16 ~~purposes of this clause a “submission” is one or more items or~~  
17 ~~forms of content produced by a still photographer or photojournalist~~  
18 ~~that: (I) pertains to a specific event or specific subject; (II) is~~  
19 ~~provided for in a contract that defines the scope of the work; and~~  
20 ~~(III) is accepted by and licensed to the publication or stock~~  
21 ~~photography company and published or posted. Nothing in this~~  
22 ~~section shall prevent a photographer or artist from displaying their~~  
23 ~~work product for sale.~~
- 24     ~~(x) Services provided by a freelance writer, editor, or newspaper~~  
25 ~~cartoonist who does not provide content submissions to the putative~~  
26 ~~employer more than 35 times per year. Items of content produced~~  
27 ~~on a recurring basis related to a general topic shall be considered~~  
28 ~~separate submissions for purposes of calculating the 35 times per~~  
29 ~~year. For purposes of this clause, a “submission” is one or more~~  
30 ~~items or forms of content by a freelance journalist that: (I) pertains~~  
31 ~~to a specific event or topic; (II) is provided for in a contract that~~  
32 ~~defines the scope of the work; (III) is accepted by the publication~~  
33 ~~or company and published or posted for sale.~~
- 34     ~~(xi) Services provided by a licensed esthetician, licensed~~  
35 ~~electrologist, licensed manicurist, licensed barber, or licensed~~  
36 ~~cosmetologist provided that the individual:~~  
37     ~~(I) Sets their own rates, processes their own payments, and is~~  
38 ~~paid directly by clients.~~

1     ~~(II) Sets their own hours of work and has sole discretion to~~  
2 ~~decide the number of clients and which clients for whom they will~~  
3 ~~provide services.~~

4     ~~(III) Has their own book of business and schedules their own~~  
5 ~~appointments.~~

6     ~~(IV) Maintains their own business license for the services~~  
7 ~~offered to clients.~~

8     ~~(V) If the individual is performing services at the location of~~  
9 ~~the hiring entity, then the individual issues a Form 1099 to the~~  
10 ~~salon or business owner from which they rent their business space.~~

11     ~~(VI) This subdivision shall become inoperative, with respect to~~  
12 ~~licensed manicurists, on January 1, 2022.~~

13     ~~(d) Subdivision (a) and the holding in Dynamex do not apply~~  
14 ~~to the following, which are subject to the Business and Professions~~  
15 ~~Code:~~

16     ~~(1) A real estate licensee licensed by the State of California~~  
17 ~~pursuant to Division 4 (commencing with Section 10000) of the~~  
18 ~~Business and Professions Code, for whom the determination of~~  
19 ~~employee or independent contractor status shall be governed by~~  
20 ~~subdivision (b) of Section 10032 of the Business and Professions~~  
21 ~~Code. If that section is not applicable, then this determination shall~~  
22 ~~be governed as follows: (A) for purposes of unemployment~~  
23 ~~insurance by Section 650 of the Unemployment Insurance Code;~~  
24 ~~(B) for purposes of workers compensation by Section 3200 et seq.;~~  
25 ~~and (C) for all other purposes in the Labor Code by Borello. The~~  
26 ~~statutorily imposed duties of a responsible broker under Section~~  
27 ~~10015.1 of the Business and Professions Code are not factors to~~  
28 ~~be considered under the Borello test.~~

29     ~~(2) A repossession agency licensed pursuant to Section 7500.2~~  
30 ~~of the Business and Professions Code, for whom the determination~~  
31 ~~of employee or independent contractor status shall be governed~~  
32 ~~by Section 7500.2 of the Business and Professions Code, if the~~  
33 ~~repossession agency is free from the control and direction of the~~  
34 ~~hiring person or entity in connection with the performance of the~~  
35 ~~work, both under the contract for the performance of the work and~~  
36 ~~in fact.~~

37     ~~(e) Subdivision (a) and the holding in Dynamex do not apply~~  
38 ~~to a bona fide business-to-business contracting relationship, as~~  
39 ~~defined below, under the following conditions:~~



1     ~~(1) If a business entity formed as a sole proprietorship,~~  
2 ~~partnership, limited liability company, limited liability partnership,~~  
3 ~~or corporation (“business service provider”) contracts to provide~~  
4 ~~services to another such business (“contracting business”), the~~  
5 ~~determination of employee or independent contractor status of the~~  
6 ~~business services provider shall be governed by Borello, if the~~  
7 ~~contracting business demonstrates that all of the following criteria~~  
8 ~~are satisfied:~~

9     ~~(A) The business service provider is free from the control and~~  
10 ~~direction of the contracting business entity in connection with the~~  
11 ~~performance of the work, both under the contract for the~~  
12 ~~performance of the work and in fact.~~

13     ~~(B) The business service provider is providing services directly~~  
14 ~~to the contracting business rather than to customers of the~~  
15 ~~contracting business.~~

16     ~~(C) The contract with the business service provider is in writing.~~

17     ~~(D) If the work is performed in a jurisdiction that requires the~~  
18 ~~business service provider to have a business license or business~~  
19 ~~tax registration, the business service provider has the required~~  
20 ~~business license or business tax registration.~~

21     ~~(E) The business service provider maintains a business location~~  
22 ~~that is separate from the business or work location of the~~  
23 ~~contracting business.~~

24     ~~(F) The business service provider is customarily engaged in an~~  
25 ~~independently established business of the same nature as that~~  
26 ~~involved in the work performed.~~

27     ~~(G) The business service provider actually contracts with other~~  
28 ~~businesses to provide the same or similar services and maintains~~  
29 ~~a clientele without restrictions from the hiring entity.~~

30     ~~(H) The business service provider advertises and holds itself~~  
31 ~~out to the public as available to provide the same or similar~~  
32 ~~services.~~

33     ~~(I) The business service provider provides its own tools,~~  
34 ~~vehicles, and equipment to perform the services.~~

35     ~~(J) The business service provider can negotiate its own rates.~~

36     ~~(K) Consistent with the nature of the work, the business service~~  
37 ~~provider can set its own hours and location of work.~~

38     ~~(L) The business service provider is not performing the type of~~  
39 ~~work for which a license from the Contractor’s State License Board~~

1 is required, pursuant to Chapter 9 (commencing with Section 7000)  
2 of Division 3 of the Business and Professions Code.  
3 ~~(2) This subdivision does not apply to an individual worker, as~~  
4 ~~opposed to a business entity, who performs labor or services for~~  
5 ~~a contracting business.~~  
6 ~~(3) The determination of whether an individual working for a~~  
7 ~~business service provider is an employee or independent contractor~~  
8 ~~of the business service provider is governed by paragraph (1) of~~  
9 ~~subdivision (a).~~  
10 ~~(4) This subdivision does not alter or supersede any existing~~  
11 ~~rights under Section 2810.3.~~  
12 ~~(f) Subdivision (a) and the holding in Dynamex do not apply to~~  
13 ~~the relationship between a contractor and an individual performing~~  
14 ~~work pursuant to a subcontract in the construction industry, and~~  
15 ~~instead the determination of whether the individual is an employee~~  
16 ~~of the contractor shall be governed by Section 2750.5 and by~~  
17 ~~Borello, if the contractor demonstrates that all the following criteria~~  
18 ~~are satisfied:~~  
19 ~~(1) The subcontract is in writing.~~  
20 ~~(2) The subcontractor is licensed by the Contractors State~~  
21 ~~License Board and the work is within the scope of that license.~~  
22 ~~(3) If the subcontractor is domiciled in a jurisdiction that requires~~  
23 ~~the subcontractor to have a business license or business tax~~  
24 ~~registration, the subcontractor has the required business license or~~  
25 ~~business tax registration.~~  
26 ~~(4) The subcontractor maintains a business location that is~~  
27 ~~separate from the business or work location of the contractor.~~  
28 ~~(5) The subcontractor has the authority to hire and to fire other~~  
29 ~~persons to provide or to assist in providing the services.~~  
30 ~~(6) The subcontractor assumes financial responsibility for errors~~  
31 ~~or omissions in labor or services as evidenced by insurance, legally~~  
32 ~~authorized indemnity obligations, performance bonds, or warranties~~  
33 ~~relating to the labor or services being provided.~~  
34 ~~(7) The subcontractor is customarily engaged in an~~  
35 ~~independently established business of the same nature as that~~  
36 ~~involved in the work performed.~~  
37 ~~(8) (A) Paragraph (2) shall not apply to a subcontractor~~  
38 ~~providing construction trucking services for which a contractor's~~  
39 ~~license is not required by Chapter 9 (commencing with Section~~

1 7000) of Division 3 of the Business and Professions Code, provided  
2 that all of the following criteria are satisfied:

3 (i) ~~The subcontractor is a business entity formed as a sole~~  
4 ~~proprietorship, partnership, limited liability company, limited~~  
5 ~~liability partnership, or corporation.~~

6 (ii) ~~For work performed after January 1, 2020, the subcontractor~~  
7 ~~is registered with the Department of Industrial Relations as a public~~  
8 ~~works contractor pursuant to Section 1725.5, regardless of whether~~  
9 ~~the subcontract involves public work.~~

10 (iii) ~~The subcontractor utilizes its own employees to perform~~  
11 ~~the construction trucking services, unless the subcontractor is a~~  
12 ~~sole proprietor who operates their own truck to perform the entire~~  
13 ~~subcontract and holds a valid motor carrier permit issued by the~~  
14 ~~Department of Motor Vehicles.~~

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

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

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

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

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

36 (g) ~~Subdivision (a) and the holding in Dynamex do not apply~~  
37 ~~to the relationship between a referral agency and a service provider,~~  
38 ~~as defined below, under the following conditions:~~

39 (1) ~~If a business entity formed as a sole proprietor, partnership,~~  
40 ~~limited liability company, limited liability partnership, or~~

1 corporation (“service provider”) provides services to clients through  
2 a referral agency, the determination whether the service provider  
3 is an employee of the referral agency shall be governed by Borello,  
4 if the referral agency demonstrates that all of the following criteria  
5 are satisfied:

6 (A) The service provider is free from the control and direction  
7 of the referral agency in connection with the performance of the  
8 work for the client, both as a matter of contract and in fact.

9 (B) If the work for the client is performed in a jurisdiction that  
10 requires the service provider to have a business license or business  
11 tax registration, the service provider has the required business  
12 license or business tax registration.

13 (C) If the work for the client requires the service provider to  
14 hold a state contractor’s license pursuant to Chapter 9 (commencing  
15 with Section 7000) of Division 3 of the Business and Professions  
16 Code, the service provider has the required contractor’s license.

17 (D) The service provider delivers services to the client under  
18 service provider’s name, rather than under the name of the referral  
19 agency.

20 (E) The service provider provides its own tools and supplies to  
21 perform the services.

22 (F) The service provider is customarily engaged in an  
23 independently established business of the same nature as that  
24 involved in the work performed for the client.

25 (G) The service provider maintains a clientele without any  
26 restrictions from the referral agency and the service provider is  
27 free to seek work elsewhere, including through a competing agency.

28 (H) The service provider sets its own hours and terms of work  
29 and is free to accept or reject clients and contracts.

30 (I) The service provider sets its own rates for services performed,  
31 without deduction by the referral agency.

32 (J) The service provider is not penalized in any form for  
33 rejecting clients or contracts. This subparagraph does not apply if  
34 the service provider accepts a client or contract and then fails to  
35 fulfill any of its contractual obligations.

36 (2) For purposes of this subdivision, the following definitions  
37 apply:

38 (A) “Animal services” means services related to daytime and  
39 nighttime pet care including pet boarding under Section 122380  
40 of the Health and Safety Code.

1 (B) “Client” means a person or business that engages a service  
2 contractor through a referral agency.

3 (C) “Referral agency” is a business that connects clients with  
4 service providers that provide graphic design, photography,  
5 tutoring, event planning, minor home repair, moving, home  
6 cleaning, errands, furniture assembly, animal services, dog walking,  
7 dog grooming, web design, picture hanging, pool cleaning, or yard  
8 cleanup.

9 (D) “Referral agency contract” is the agency’s contract with  
10 clients and service contractors governing the use of its intermediary  
11 services described in subparagraph (C).

12 (E) “Service provider” means a person or business who agrees  
13 to the referral agency’s contract and uses the referral agency to  
14 connect with clients.

15 (F) “Tutor” means a person who develops and teaches their own  
16 curriculum. A “tutor” does not include a person who teaches a  
17 curriculum created by a public school or who contracts with a  
18 public school through a referral company for purposes of teaching  
19 students of a public school.

20 (3) This subdivision does not apply to an individual worker, as  
21 opposed to a business entity, who performs services for a client  
22 through a referral agency. The determination whether such an  
23 individual is an employee of a referral agency is governed by  
24 subdivision (a).

25 (h) Subdivision (a) and the holding in *Dynamex* do not apply  
26 to the relationship between a motor club holding a certificate of  
27 authority issued pursuant to Chapter 2 (commencing with Section  
28 12160) of Part 5 of Division 2 of the Insurance Code and an  
29 individual performing services pursuant to a contract between the  
30 motor club and a third party to provide motor club services utilizing  
31 the employees and vehicles of the third party and, instead, the  
32 determination whether such an individual is an employee of the  
33 motor club shall be governed by *Borello*, if the motor club  
34 demonstrates that the third party is a separate and independent  
35 business from the motor club.

36 (i) (1) The addition of subdivision (a) to this section of the  
37 Labor Code by this act does not constitute a change in, but is  
38 declaratory of, existing law with regard to wage orders of the  
39 Industrial Welfare Commission and violations of the Labor Code  
40 relating to wage orders.

1     ~~(2) Insofar as the application of subdivisions (b), (c), (d), (e),~~  
2 ~~(f), (g), and (h) of this section would relieve an employer from~~  
3 ~~liability, those subdivisions shall apply retroactively to existing~~  
4 ~~claims and actions to the maximum extent permitted by law.~~

5     ~~(3) Except as provided in paragraphs (1) and (2) of this~~  
6 ~~subdivision, the provisions of this section of the Labor Code shall~~  
7 ~~apply to work performed on or after January 1, 2020.~~

8     ~~(j) In addition to any other remedies available, an action for~~  
9 ~~injunctive relief to prevent the continued misclassification of~~  
10 ~~employees as independent contractors may be prosecuted against~~  
11 ~~the putative employer in a court of competent jurisdiction by the~~  
12 ~~Attorney General or by a city attorney of a city having a population~~  
13 ~~in excess of 750,000, or by a city attorney in a city and county or,~~  
14 ~~with the consent of the district attorney, by a city prosecutor in a~~  
15 ~~city having a full-time city prosecutor in the name of the people~~  
16 ~~of the State of California upon their own complaint or upon the~~  
17 ~~complaint of a board, officer, person, corporation, or association.~~

18     SEC. 2. Section 2750.5 of the Labor Code is amended to read:

19     2750.5. (a) There is a rebuttable presumption affecting the  
20 burden of proof that a worker performing services for which a  
21 license is required pursuant to Chapter 9 (commencing with Section  
22 7000) of Division 3 of the Business and Professions Code, or who  
23 is performing ~~such~~ *those* services for a person who is required to  
24 obtain such a license is an employee rather than an independent  
25 contractor. ~~Proof of independent contractor status includes~~  
26 ~~satisfactory proof of these factors:~~

27     ~~(a) That the individual has the right to control and discretion as~~  
28 ~~to the manner of performance of the contract for services in that~~  
29 ~~the result of the work and not the means by which it is~~  
30 ~~accomplished is the primary factor bargained for.~~

31     ~~(b) That the individual is customarily engaged in an~~  
32 ~~independently established business.~~

33     ~~(c) That the individual's independent contractor status is bona~~  
34 ~~fide and not a subterfuge to avoid employee status. A bona fide~~  
35 ~~independent contractor status is further evidenced by the presence~~  
36 ~~of cumulative factors such as substantial investment other than~~  
37 ~~personal services in the business, holding out to be in business for~~  
38 ~~oneself, bargaining for a contract to complete a specific project~~  
39 ~~for compensation by project rather than by time, control over the~~  
40 ~~time and place the work is performed, supplying the tools or~~

1 ~~instrumentalities used in the work other than tools and~~  
2 ~~instrumentalities normally and customarily provided by employees,~~  
3 ~~hiring employees, performing work that is not ordinarily in the~~  
4 ~~course of the principal's work, performing work that requires a~~  
5 ~~particular skill, holding a license pursuant to the Business and~~  
6 ~~Professions Code, the intent by the parties that the work~~  
7 ~~relationship is of an independent contractor status, or that the~~  
8 ~~relationship is not severable or terminable at will by the principal~~  
9 ~~but gives rise to an action for breach of contract.~~

10 ~~In~~

11 ~~(B) In addition to the factors contained in subdivisions (a), (b),~~  
12 ~~and (c), Section 2750.7, any person performing any function or~~  
13 ~~activity for which a license is required pursuant to Chapter 9~~  
14 ~~(commencing with Section 7000) of Division 3 of the Business~~  
15 ~~and Professions Code shall hold a valid contractors' license as a~~  
16 ~~condition of having independent contractor status.~~

17 ~~For~~

18 ~~(c) For purposes of workers' compensation law, this~~  
19 ~~presumption is a supplement to the existing statutory definitions~~  
20 ~~of employee and independent contractor, and is not intended to~~  
21 ~~lessen the coverage of employees under Division 4 and Division~~  
22 ~~5.~~

23 SEC. 3. Section 2750.7 is added to the Labor Code, to read:

24 2750.7. (a) Notwithstanding any other law, a determination  
25 of whether a person is an employee or an independent contractor  
26 for the purposes of this division shall be based on the multifactor  
27 test set forth in *S.G. Borello & Sons, Inc. v. Department of*  
28 *Industrial Relations*.

29 (b) These factors include, but are not limited to, the following:

30 (1) Whether the person to whom service is rendered has the  
31 right to control the manner and means of accomplishing the result  
32 desired, which is the principal factor.

33 (2) Whether the one performing services is engaged in a distinct  
34 occupation or business.

35 (3) The kind of occupation, with reference to whether, in the  
36 locality, the work is usually done under the direction of the  
37 principal or by a specialist without supervision.

38 (4) The skill required in the particular occupation.

1 (5) Whether the principal or the worker supplies the  
2 instrumentalities, tools, and the place of work for the person doing  
3 the work.

4 (6) The length of time for which the services are to be  
5 performed.

6 (7) The method of payment, whether by the time or by the job.

7 (8) The right to discharge at will, without cause.

8 (9) Whether or not the work is part of the regular business of  
9 the principal.

10 (10) Whether or not the parties believe they are creating the  
11 relationship of employer-employee.

12 (c) The individual factors set forth in subdivision (b) above shall  
13 not be applied mechanically as separate tests, but shall be  
14 intertwined.

15 (d) The test set forth in this section shall apply to any  
16 determinations before an administrative agency or court.

17 SEC. 4. This act is an urgency statute necessary for the  
18 immediate preservation of the public peace, health, or safety within  
19 the meaning of Article IV of the California Constitution and shall  
20 go into immediate effect. The facts constituting the necessity are:

21 Because the expansive nature of Assembly Bill 5 (Chapter 296  
22 of the Statutes of 2019) has resulted in the significant and  
23 immediate impact of lost income and resulted in a disruption of  
24 the work relationship for thousands of Californians, thereby  
25 effecting many occupations essential to the preservation of the  
26 public peace, health, and safety, it is necessary for this measure to  
27 take immediate effect.