



**Digital Commons@**  
Loyola Marymount University  
LMU Loyola Law School

Loyola of Los Angeles Law Review

---

Volume 55 | Number 1

Article 1

---

Spring 2-17-2022

## Defining Employee: California Style

Harvey Gelb

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>

---

### Recommended Citation

Harvey Gelb, *Defining Employee: California Style*, 55 Loy. L.A. L. Rev. 1 (2022).  
Available at: <https://digitalcommons.lmu.edu/llr/vol55/iss1/1>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# DEFINING EMPLOYEE: CALIFORNIA STYLE

*Harvey Gelb\**

*Many states have enacted laws that benefit workers designated “employees” as distinguished from “independent contractors.” This Article deals primarily with legislation designed to define the term employee with sufficient clarity so as to avoid or thwart misclassification. It focuses on California’s recent and robust legislative efforts which, though praiseworthy, still require some additional work.*

---

\* Professor and Kepler Chair in Law and Leadership Emeritus, University of Wyoming College of Law; B.A. 1957, Harvard College; J.D. 1960, Harvard Law School. The author is very appreciative of the University of Wyoming College of Law’s continuing support led by Debora A. Person, Director of the Law Library, who contributed outstanding service in the production of this article. The author also recognizes with thanks Raevyn D. Heinzen, J.D. Candidate 2022, for her excellent research assistance and his daughters Sarah Felman and Barbara Gelb, who very ably facilitated the required computer interactions for a bi-city product.

## TABLE OF CONTENTS

INTRODUCTION .....	3
I. CALIFORNIA LAW .....	4
A. <i>Borello</i> .....	7
1. The Common Law Line .....	9
2. The Statutory Line .....	10
3. <i>Borello</i> Court Decision .....	11
B. <i>Dynamex</i> .....	12
C. California Legislation .....	16
II. EVALUATING THE CALIFORNIA LAW .....	23
A. Role of the Control Factor .....	23
B. <i>Borello</i> Cases .....	25
C. Reviewing Classification Goals.....	26
III. CONCLUSION.....	27
A. The <i>Borello</i> Problem .....	27
B. What Must Be Done .....	28

## INTRODUCTION

There is no inherent, uniform legal definition of the word “employee.” Nor does such a definition exist for the words “independent contractor.” The correct labelling of a worker in either category is not analogous to properly identifying cucumbers or watermelons based on the distinctive characteristics of each. The sources for defining these categories of workers for purposes of the application of laws are the persons or bodies authorized to enact or interpret law. And it must be admitted that those sources—a legislature for example—have considerable range in their use of words. For instance, the new California statute A.B. 2257, enacted in 2020, itself provides different tests for classifying workers, distinguishing employees from independent contractors.<sup>1</sup>

Our federal system with both national and state bodies of law may provide persons responsible for legal compliance with multiple challenges in researching, analyzing, and understanding their rights and responsibilities. Yet that same federal system compensates for its difficulties to some extent by furnishing opportunities for jurisdictions to study the laws and experiences of each other and perhaps improve on their own abilities to achieve their objectives.

In the course of attempts to provide humanitarian assistance for workers in poor bargaining positions with respect to their terms and conditions of employment, and to achieve other worthy objectives, state and federal governments have enacted laws to benefit and protect them. In drafting such laws, it has been necessary to select the proper word or words to identify with as much clarity as possible which workers are the intended beneficiaries. Although workers classified as employees rather than independent contractors are often designated as the beneficiaries of such laws, the meaning of those terms has frequently been a matter of controversy. A variety of approaches to this issue can be found in studying the laws of different jurisdictions in the United States.<sup>2</sup> The California statute A.B. 2257, referred to earlier, appears to be the product of significant hard work. This Article points to motivations for this legislation, matters of interpretation of certain important provisions, and a need for further improvement. Hopefully, the

---

1. Assemb. B. 2257, 2019–2020 Reg. Sess. (Cal. 2020) (codified at CAL. LAB. CODE §§ 2775–2287).

2. See Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733, 748–61 (2020).

work by California will prove useful to other governments within our federal system as they seek reasonable and fair working conditions for employees.

## I. CALIFORNIA LAW

California, the most populous state in our nation and the fifth largest economy in the world, was reported by the U.S. Bureau of Labor Statistics to have close to nineteen million persons in its labor force for November 2020.<sup>3</sup> Its behavior impacting relationships between business and labor are of consequence, economic and otherwise, within and even beyond its borders. Its state government has enacted a number of laws for the benefit and protection of persons referred to as “employees.” Among them are minimum wage and maximum hour, unemployment insurance, and workers compensation laws.<sup>4</sup> Recently enacted in California and effective in January 2020 was a statute designated as A.B. 5,<sup>5</sup> later amended in September 2020 by A.B. 2257,<sup>6</sup> which provides rules for defining workers who are to be classified as employees for the purpose of determining coverage under a number of benefit and protection laws.<sup>7</sup>

Because it is the later version of the law that is the principal statutory focus of this Article, A.B. 2257 or its Labor Code codification is the statute referred to unless language to the contrary indicates otherwise. Defining the term “employee” in order to decide who is covered as such by California laws involves interpreting and applying legal terms and rules in various factual contexts and may at times require the assistance of lawyers and rulings from tribunals. In achieving an appropriate legal classification, workers defined as “employees” for purposes of statutory coverage are often contrasted with workers defined as “independent contractors” who are not covered.<sup>8</sup> Misclassification of workers as independent contractors instead of employees may have harmful consequences beyond the benefits and protections

---

3. *Databases, Tables & Calculators by Subject*, U.S. BUREAU OF LAB. STAT., <https://data.bls.gov/timeseries/LASST0600000000000005> [<https://perma.cc/59EM-Q9GD>].

4. *See, e.g.*, CAL. LAB. CODE §§ 2700–6002 (West 2011, 2020 & Supp. 2021); CAL. UNEMP. INS. CODE §§ 1–18012 (West 2013 & Supp. 2021); *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 5–7 (Cal. 2018) (discussing wage orders).

5. Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019).

6. Assemb. B. 2257, 2019–2020 Reg. Sess. (Cal. 2020) (codified at CAL. LAB. CODE §§ 2775–2787).

7. *Id.*

8. *See, e.g., id.*

that misclassified workers lose. Employers who save money by misclassifying may gain competitive advantages over those complying with the law, and states may lose revenue when misclassification is used to avoid obligations such as payment of payroll taxes, payment of premiums for workers' compensation, Social Security, unemployment, and disability insurance.<sup>9</sup>

Much about A.B. 2257 is devoted to properly identifying which workers are in what category. It should be noted also that this Article does not discuss employees who work in administrative, executive, and professional capacities who are exempt from coverage with respect to some of the legal requirements applicable to employees,<sup>10</sup> or app-based drivers covered by the Proposition 22 voter initiative passed in the 2020 fall election.<sup>11</sup>

Deciding whether a worker hired by a business should be classified as an employee or an independent contractor is a question that has notably arisen over a long period of time in the somewhat different context involving the application of the *respondeat superior* doctrine.<sup>12</sup> Under that doctrine, an employer may be liable for an employee's torts causing damages to a third party.<sup>13</sup> Many in the legal profession are familiar with older terminology calling the employer a master and the employee a servant under that doctrine and also are aware that the crucial factor in classifying the worker as an employee (rather than an independent contractor) for purposes of the *respondeat superior* doctrine is that the hiring business can control how the worker does a job and not merely what the job is.<sup>14</sup>

But the principal subject in this Article is worker classification for purposes of California state legal requirements protective of and beneficial to employees, but inapplicable to independent contractors. Since adherence to such requirements may result in unfavorable financial consequences to employers, they may seek to avoid them, not only by hiring genuine independent contractors instead of employees, but also by efforts to secure by subterfuge the misclassification of persons

---

9. See *infra* note 88 and accompanying text.

10. See, e.g., CAL. CODE REGS. tit. 8, § 11010 (2020).

11. TEXT OF PROPOSED LAWS: PROPOSITION 22, CALIFORNIA GENERAL ELECTION INFORMATION GUIDE (2020), <https://vig.cdn.sos.ca.gov/2020/general/pdf/topl.pdf> [<https://perma.cc/LBY7-R24T>] (exempting app-based transportation and delivery companies from providing employee benefits to certain drivers).

12. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (AM. L. INST. 2006).

13. *Id.*

14. *Id.*

who are employees as independent contractors. Indeed, employer misclassification of persons as non-employees may result from intentional, reckless, or negligent behavior or even reasonable errors and confusion over their obligations, stemming from the lack of clarity in legislative or judicial or other pronouncements. The classification problem may also be complicated by policy decisions of legislatures or courts to stretch the linguistic bounds of the term “employee” to extend beyond those traditionally thought of as employees so as to cover workers in need of the same or similar benefits as traditional employees.<sup>15</sup> Finally, those acting as classifiers need to be aware that the task of employee classification in general is made more complex because there is neither a single definition of, nor approach to, distinguishing employees from independent contractors that applies with respect to all state and federal law dealing with employee benefits and protections of the kind under consideration in this Article.<sup>16</sup>

For whatever reason misclassification may occur, it not only frustrates the purpose of the state of California to help certain workers by granting them various benefits and protections, but also reduces state revenues and adversely affects competition. To at least some degree, misclassification may be reduced by achieving maximum clarity in legal classification requirements plus diligent and intelligent enforcement of such requirements. One can imagine what a huge task proper enforcement of employee benefit and protection law entails in the state of California.<sup>17</sup>

Two seminal California Supreme Court cases supplying law dealing with the classification of persons as employees have achieved a degree of codification in A.B. 2257: *S.G. Borello and Sons, Inc. v. Department of Industrial Relations*<sup>18</sup> (“Borello”) and *Dynamex Operations West, Inc. v. Superior Court*<sup>19</sup> (“Dynamex”). Separate discussions of each case follow.

---

15. For further discussion, see *infra* Section II.A.

16. See Sprague, *supra* note 2, at 748–61.

17. For an excellent article about enforcement, see Rachel Deutsch et al., *California’s Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations*, UCLA LAB. CTR. (Feb. 2020), [https://www.labor.ucla.edu/wp-content/uploads/2020/02/UCLA-Labor-Center-Report\\_WEB.pdf](https://www.labor.ucla.edu/wp-content/uploads/2020/02/UCLA-Labor-Center-Report_WEB.pdf) [<https://perma.cc/T6UG-73L8>].

18. 769 P.2d 399 (Cal. 1989).

19. 416 P.3d 1 (Cal. 2018).

### A. Borello

The A.B. 2257 statute specifically calls for the use of *Borello* to decide the employee versus independent contractor issue in a number of situations exempt from the coverage of its innovative statutory centerpiece, the ABC test.<sup>20</sup> The discussion of *Borello* is important in that regard and also because it furnishes a significant historical link in the chain of California legal history dealing with the employee/independent contractor classification problem. *Borello*, decided in 1989, raised the question of “whether agricultural laborers engaged to harvest cucumbers under a written ‘sharefarmer’ agreement are ‘independent contractors’ exempt from workers’ compensation coverage.”<sup>21</sup> In its discussion of the Worker’s Compensation Act (WCA), the court concluded otherwise, holding that the sharefarmers were employees entitled to worker’s compensation protection.<sup>22</sup> The legal principles and reasoning used by the court in making the “employee versus independent contractor” distinction are of special significance because of the important role assigned by the A.B. 2257 statute to the *Borello* case. It should be noted with some irony, however, that as of July 1, 2020 the WCA was revised in a way that eliminated the use of *Borello* to make the independent contractor or employee determination under that statute and instead became a matter to be resolved under the ABC test of Section 2750.3.<sup>23</sup> As indicated above, however, *Borello* lives on as a basis for deciding the employee issue under a number of sections of A.B. 2257, and so the somewhat detailed discussion of *Borello* here remains very important.

In its exposition of relevant law, the *Borello* court turned to the WCA for guidance. The pertinent part of the WCA, which extended only to injuries suffered by an employee arising out of and in the course of his employment, included as employees “most persons ‘in the service of an employer under any . . . contract of hire’ but do not include independent contractors.”<sup>24</sup> The court found that the WCA in defining the term independent contractor borrowed from the common

---

20. Assemb. B. 2257 § 2(b)(3), 2019–2020 Reg. Sess. (Cal. 2020) (codified at CAL. LAB. CODE § 2775).

21. *Borello*, 769 P.2d at 400.

22. *Id.* at 410.

23. CAL. LAB. CODE § 3351 (West 2011 & Supp. 2021). Section 2750.3 has been repealed and replaced by Section 2775. Grant P. Alexander et al., *2021 Labor & Employment Law Update for California Employers*, NAT’L L. REV. (Dec. 10, 2020), <https://www.natlawreview.com/article/2021-labor-employment-law-update-california-employers> [<https://perma.cc/H6ER-GX4U>].

24. *Borello*, 769 P.2d at 403 (omission in original) (quoting CAL. LAB. CODE § 3351).



law test pertaining to the vicarious liability of an employer to third persons injured by the acts of employees (rather than independent contractors).<sup>25</sup> Under the WCA, Section 3353, the borrowed test is that an independent contractor is “any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.”<sup>26</sup> The Division of Labor Standards Enforcement of the Department of Industrial Relations rejected the contention that the laborers involved in *Borello* were independent contractors exempt from coverage under the WCA,<sup>27</sup> and the superior court upheld the Division’s decision.<sup>28</sup> But the court of appeal reversed it,<sup>29</sup> leading to the appeal to the California Supreme Court (“court”) which reversed the court of appeal and held that the sharefarmers were employees entitled to WCA coverage.<sup>30</sup>

The court came to that decision based on the record that the harvesters’ work followed the usual line of employees and that they were in no practical sense operating independent businesses for their own accounts.<sup>31</sup> The court traced the use of the control test to distinguish employees from independent contractors to common law vicarious liability principles that made an employer liable for the misconduct of an employee working for him resulting in injury to a third party.<sup>32</sup> The court explained that in such a situation an employer’s control over details of the service to him “was . . . highly relevant to the question whether the employer ought to be legally liable for them.”<sup>33</sup> Still, explained the court, twentieth-century legislation, such as the WCA in this case, though not designed for the protection of third parties through the vicarious liability of employers, has borrowed the control test for use in defining “employees” in contrast to “independent contractors.”<sup>34</sup> The court explained the legal principles applicable in defining whether workers are employees or independent contractors in

---

25. *Id.* at 403–04.

26. *Id.* at 403 (quoting CAL. LAB. CODE § 3353).

27. *Id.* at 400.

28. *Id.*

29. *Id.*

30. *Id.* at 401.

31. *Id.* at 401, 409–10.

32. *Id.* at 403.

33. *Id.* (omission in original) (quoting 1C ARTHUR LARSON, THE LAW OF WORKMEN’S COMPENSATION § 43.42, at 8–20 (1986)).

34. *Id.* at 403–04.

what this Article has labeled two separate lines: one emphasizing common law elements, the other statutory ones.<sup>35</sup>

### 1. The Common Law Line

The court spelled out the following common law points. Courts do not rely solely on the “control test” in evaluating the service arrangement, but it is the most important consideration.<sup>36</sup> There are secondary ones, such as the right to discharge the worker at will, which is strong evidence in support of an employment relationship.<sup>37</sup> Other factors derived principally from the Restatement Second of Agency include:

(a) whether the one performing services is engaged in a distinct occupation or business; (b) 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; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.<sup>38</sup>

Certainly, a number of these points may be helpful in determining issues involving the reality of the hirer’s control and the independence of the worker.<sup>39</sup>

Illustrative of the potential complexity in the analysis of common law factors, the court indicated that application of the factors is generally intertwined, and “their weight depends often on particular combinations.”<sup>40</sup>

---

35. *Id.* at 405.

36. *Id.* at 404.

37. *Id.*

38. *Id.* (first citing *Tieberg v. Unemployment Ins. Appeals Bd.*, 471 P.2d 975, 979 (Cal. 1970); then citing *Empire Star Mines Co. v. Cal. Emp. Comm’n*, 168 P.2d 686, 692 (Cal. 1946); and then citing *RESTATEMENT (SECOND) OF AGENCY* § 220 (AM. L. INST. 1958)).

39. *See id.* at 404 n.5.

40. *Id.* at 404 (quoting *Germann v. Workers’ Comp. Appeals Bd.*, 176 Cal. Rptr. 868, 871 (Ct. App. 1981)).

## 2. The Statutory Line

The court's emphasis on the use of the statute in defining employment is significant.

The court stated that "the concept of 'employment' embodied in the Act is not inherently limited by common law principles"<sup>41</sup> and that the "the Act's definition of the employment relationship must be construed with particular reference to the 'history and fundamental purposes' of the statute."<sup>42</sup> The court also noted that the "control-of-work-details" test "must be applied with deference to the purposes of the protective legislation."<sup>43</sup>

Referring to the purposes of the Act as several, the court stated that the Act seeks:

- (1) to ensure that the cost of industrial injuries will be part of the costs of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries.<sup>44</sup>

The court further stated that the Act intends to achieve comprehensive coverage of injuries in employment and to do so by defining employment broadly in terms of service to an employer and includes a general presumption that any person in service to another is a covered employee.<sup>45</sup> On the other hand, the Act excludes independent contractors from coverage, recognizing that its goals are best served by imposing the risk of no-fault work injuries on the provider, rather than the recipient, of a compensated service where the provider has "the primary power over work safety, is best situated to distribute the risk and cost of injury as an expense of his own business, and has independently chosen the burdens and benefits of self-employment."<sup>46</sup> Indicating that this is the balance to be struck in deciding if the worker is an employee or independent contractor for purposes of the Act,<sup>47</sup> the court

---

41. *Id.* at 405.

42. *Id.* (quoting *Laeng v. Workmen's Comp. Appeals Bd.*, 494 P.2d 1, 4-5 (Cal. 1972)).

43. *Id.* at 406.

44. *Id.*

45. *Id.* (citing CAL. LAB. CODE §§ 3351, 5705(a) (West 2011 & Supp. 2021)); see *Laeng*, 494 P.2d at 3-6.

46. *Id.*

47. *Id.*

expressly refused to adopt new standards for examining the issue.<sup>48</sup> The court did, however, point to Restatement of Agency guidelines approved in California (which were discussed earlier) as a useful reference,<sup>49</sup> and to certain standards for contractor's licensees as helpful in identifying the employee/independent contractor distinctions.<sup>50</sup> It also noted a six-factor test from other jurisdictions that determined independent contractorship in light of the remedial purposes of the legislation, saw points of similarity between these guidelines and California traditional Restatement tests, and found that all are logically pertinent to the difficult determination of employee or independent contractor status for purposes of the WCA.<sup>51</sup>

Demonstrating clearly the difficulties that may arise in deciding the employee-independent contractor issue are the court's: (1) retention of the many guiding elements from common law and statutory considerations; (2) point that in the course of their consideration the factors are intertwined, and their weight often depends on particular combinations; (3) position that the concept of employment is not inherently limited by common law principles but rather that the Act's definition of the employment relationship must be construed with reference to its history and fundamental purposes.<sup>52</sup> Still, the court, in simple terms, puts the basic inquiry in compensation law as: who should be responsible for insuring against a particular worker's injuries?<sup>53</sup>

### 3. *Borello* Court Decision

Upon its review of the facts in *Borello*, the California Supreme Court decided that the control factor favored classification of the workers as employees; that the work involved no peculiar skill beyond that expected of any employee; that the payment system was essentially a variation of the piecework formula;<sup>54</sup> that the work of the harvesters formed a regular and integrated portion of *Borello's* business operation, which though seasonal, is permanent in the agricultural

---

48. *Id.*

49. *Id.* at 406–07.

50. *Id.* at 407.

51. *Id.*

52. *Id.* at 403–06.

53. *See id.* at 409.

54. *Id.*

process;<sup>55</sup> that the workers engage in no distinct trade or calling<sup>56</sup> or hold themselves out in business;<sup>57</sup> that they perform typical farm labor wherever jobs are available;<sup>58</sup> that the workers have no practical opportunity to insure themselves or their families against loss of income from non-tortious work injuries;<sup>59</sup> that if Borello is not their employer, the workers and society at large assume the entire financial burden when such injuries occur;<sup>60</sup> and that without doubt they are a class of workers for whom the protection of the Act is intended.<sup>61</sup> It should be noted that the court also rejected a Borello argument that the workers waived the Act's protection<sup>62</sup> and stated: "A conclusion that the sharefarmers are 'independent contractors' under the Act would suggest a disturbing means of avoiding an employer's obligations under other California legislation intended for the protection of 'employees' . . . ."<sup>63</sup>

### B. Dynamex

In 2018, the California Supreme Court again faced the question of deciding if certain workers were employees or independent contractors in the landmark *Dynamex* case, a case that proved to have a great impact on the provisions of the California A.B. 2257 statute.<sup>64</sup> That case stemmed from a complaint filed by two delivery drivers against Dynamex, a nationwide package and document delivery company, alleging that Dynamex had misclassified its delivery drivers as independent contractors rather than employees, thereby violating Industrial Welfare Commission wage order No. 9 governing the transportation industry, as well as various sections of the Labor Code, and as a result engaged in unfair and unlawful business practices under section 17200 of the California Business and Professions Code.<sup>65</sup> The court said:

---

55. *Id.* at 407.

56. *Id.* at 409.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 410.

64. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 5 (Cal. 2018).

65. *Id.*

The issue in this case relates to the resolution of the employee or independent contractor question in one specific context. Here we must decide what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees.<sup>66</sup>

The court pointed out that before 2004 the drivers were considered employees by Dynamex, which later adopted a new policy and contractual arrangement under which all drivers are considered independent contractors rather than employees.<sup>67</sup> In *Dynamex*, the trial court certified a class action embodying a class of drivers who, during a pay period, did not employ other drivers or do delivery work for other delivery businesses or for their own personal customers.<sup>68</sup> The trial court's certification relied upon the existence of three alternative definitions of "employ" and "employer" set forth in the wage order discussed in a 2010 case, *Martinez v. Combs*,<sup>69</sup> in which the California Supreme Court held that "[t]o employ . . . under the [wage order], has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship" and rejected the contention that *Borello* is the only appropriate standard for distinguishing employees and independent contractors.<sup>70</sup> After the court of appeal upheld the certification order of the trial court, Dynamex challenged the court of appeals' conclusion that the wage order definitions of employ and employer discussed in *Martinez* apply to the question of whether the worker is an employee or independent contractor for purposes of the obligations imposed by an applicable wage order, and the California Supreme Court granted review to consider that issue.<sup>71</sup>

The California Supreme Court agreed with the court of appeal that the "suffer or permit to work" standard of the wage order may be

---

66. *Id.*

67. *Id.* at 5–6.

68. *Id.*

69. 231 P.3d 259 (Cal. 2010).

70. *Id.* at 278.

71. *Dynamex Operations*, 416 P.3d at 7.

relied upon in evaluating whether a worker is an employee or an independent contractor for purposes of the obligations under the wage order.<sup>72</sup> The court concluded that such a standard should be broadly interpreted in light of its history and purpose to treat as employees and provide the order's protection to all workers who would ordinarily be viewed as working in the hiring business.<sup>73</sup> The court, at the same time, issued the caveat that:

the suffer or permit to work definition is a term of art that cannot be interpreted literally in a manner that would encompass within the employee category the type of individual workers, like independent plumbers or electricians, who have traditionally been viewed as *genuine* independent contractors who are working only in their own independent business.<sup>74</sup>

Recognizing the *Borello* opinion as one that has come to be regarded as the seminal decision in California on the employee or independent contractor question, the court said, “[b]ecause of the significance of this decision, we review the majority opinion in *Borello* at length.”<sup>75</sup> In delivering on that promise, the court pointed to the origins of the common law employee-independent contractor distinction in the context of determining the employer's vicarious liability for employees' tortious behavior toward third parties involving situations where there was employer control of the details of the employees' work.<sup>76</sup> The court noted how that standard was transplanted to determinations of who is an employee for purposes of social welfare legislation, which is of course what was involved in *Borello* and now again in *Dynamex*.<sup>77</sup> The court also noted references by *Borello* to relevant secondary factors as well as the weight to be accorded to them in their particular combinations.<sup>78</sup> Furthermore, the *Dynamex* court seemed very impressed by the *Borello* court's position that courts must apply the control-of-details test with deference to the purposes of the protective legislation.<sup>79</sup> The *Dynamex* court pointed with approval not only to the importance of statutory purpose but to other elements:

---

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 15.

76. *Id.* at 14.

77. *Id. passim.*

78. *Id.* at 12.

79. *Id.* at 16 (quoting *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 769 P.2d 399, 406 (Cal. 1989)).

In sum, the *Borello* court concluded that in determining whether a worker should properly be classified as a covered employee or an excluded independent contractor with deference to the purposes and intended reach of the remedial statute at issue, it is permissible to consider all of the various factors set forth in prior California cases, in Labor Code section 2750.5, and in the out-of-state cases adopting the six-factor test.<sup>80</sup>

But the court had further significant words for the proper interpretation of *Borello*, stating that “[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation.”<sup>81</sup>

The *Dynamex* court referred to more recent federal cases applying a more traditional common law test for distinguishing employees from independent contractors for purposes of most federal statutes.<sup>82</sup> In contrast, the *Dynamex* court noted that “in the almost 30 years since the *Borello* decision, the California Legislature has not exhibited or registered any disagreement with either the statutory purpose standard . . . [of] the *Borello* decision or its application of that standard in *Borello* regarding the proper classification of the workers involved in that case.”<sup>83</sup> Indeed, “in response to the continuing serious problem of worker misclassification as independent contractors, the California Legislature has acted to impose substantial civil penalties on those that willfully misclassify, or willfully aid in misclassifying, workers as independent contractors.”<sup>84</sup>

Essentially, the *Dynamex* court was faced with deciding if it should use a multifactor approach like the “economic reality test” of federal courts under the Federal Labor Standards Act, or California’s own multifactor *Borello* standard, or an entirely different approach. The *Dynamex* court acknowledged that there were certain advantages to the multifactor test but was more impressed by arguments about the need for greater guidance for businesses and workers than is offered

---

80. *Id.* at 18 (CAL. LAB. CODE § 2750.3, repealed by Act of Sept. 4, 2020, ch. 38, 2020 Cal. Stat. 1836).

81. *Id.* at 20.

82. *Id.*

83. *Id.*

84. *Id.*



by a totality-of-the-circumstances analysis.<sup>85</sup> The court also pointed to disadvantages of a multifactor analysis as affording a hiring business greater opportunity to evade its responsibilities under a wage and hour law.<sup>86</sup>

The court concluded that:

[I]t is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test—namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.<sup>87</sup>

### C. California Legislation

The California Legislature liked the ABC test (utilized in *Dynamex* in a wage order case) so much that it expanded its use to additional matters. Yet, its new legislation did not totally discard the landmark *Borello* case but chose to call for its application in some cases. After *Dynamex*, and obviously inspired by that case, the California Legislature took fairly extensive action in A.B. 5 to deal with problems of employee misclassification. In enacting A.B. 5—the precursor to A.B. 2257—the California legislature enacted the following informative findings and declarations:

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

SECTION 1. The Legislature finds and declares all of the following:

---

85. See *id.* at 33–35, for a discussion of tests.

86. See *id.* at 34.

87. *Id.* at 35 (footnote omitted).

(a) On April 30, 2018, the California Supreme Court issued a unanimous decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (*Dynamex*).

(b) In its decision, the Court cited the harm to misclassified workers who lose significant workplace protections, the unfairness to employers who must compete with companies that misclassify, and the loss to the state of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for workers' compensation, Social Security, unemployment, and disability insurance.

(c) The misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality.

(d) It is the intent of the Legislature in enacting this act to include provisions that would codify the decision of the California Supreme Court in *Dynamex* and would clarify the decision's application in state law.

(e) It is also the intent of the Legislature in enacting this act to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous *Dynamex* decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law.

(f) The *Dynamex* decision interpreted one of the three alternative definitions of "employ," the "suffer or permit" definition, from the wage orders of the Industrial Welfare Commission (IWC). Nothing in this act is intended to affect the application of alternative definitions from the IWC wage orders of the term "employ," which were not addressed by the holding of *Dynamex*.

(g) Nothing in this act is intended to diminish the flexibility of employees to work part-time or intermittent schedules or to work for multiple employers.<sup>88</sup>

Noteworthy, too, is a statement from the Assembly Committee on Labor and Employment regarding the A.B. 5 bill as amended March 26, 2019, stating:

According to the *Dynamex* court, a broad interpretation of employee status for purposes of California’s wage orders “finds its justification in the fundamental purposes and necessity of the minimum wage and maximum hour legislation in which the standard has traditionally been embodied. Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers’ fundamental need to earn income for their families’ survival may lead them to accept work for substandard wages or working conditions. The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers’ health and welfare.”<sup>89</sup>

It is easy to see the importance of the issues addressed by A.B. 5 in the findings and declarations and Assembly Committee Statement above. The A.B. 5 statute, enacted in 2019 and effective on January 1, 2020, made it easier for at least some workers to be designated as “employees” in order to receive protection and benefits under three California laws. It did so by establishing fairly rigorous standards encompassed within the statute as ABC requirements, all of which must be satisfied before a worker can be classified as an independent contractor. As explained earlier, this statute was amended effective September 5, 2020 primarily to expand exemptions to the ABC test.<sup>90</sup> Also, as earlier stated for purposes of this Article, and in the interests of clarity and utility, and unless otherwise indicated, statutory language

---

88. See Assemb. B. 5 § 1, 2019–2020 Reg. Sess. (Cal. 2019). See *supra* note 5 for subsequent history of this bill.

89. *Bill Analysis of Assemb. B. 5 Before the Assemb. Comm. on Lab. & Emp.*, at 3, 2019–2020 Reg. Sess. (Cal. 2019) (quoting *Dynamex*, 416 P.3d at 32).

90. See Assemb. B. 2257, 2019–2020 Reg. Sess. (Cal. 2020). See *supra* note 1 for subsequent history of this bill.

quoted herein reflects the amended version of the statute—as further developed under A.B. 2257—the ABC test codified in Section 2775 of the California Labor Code and numerous exemptions codified in other sections of that Code unless otherwise indicated. The ABC requirements apply to the Labor Code, the Unemployed Insurance Code, and IWC wage orders. Additionally, they apply to WCA determinations since July 1, 2020, because of an amendment to that Act.<sup>91</sup> It is clear that the ABC requirements go a long way to counter the use of subterfuge or other erroneous approaches to deprive workers of being classified as employees where state policy supports that classification.

To begin, the California Labor Code, Section 2775(b)(1) sets forth the ABC test as follows:

For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity’s business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.<sup>92</sup>

Under the above section, it is obviously difficult for an employer—as hiring entity—to use a subterfuge or other incorrect approach to satisfy its burden to demonstrate that a worker is an independent contractor. It is true that the statutory language of condition (A) involving “control and direction” may be subject to interpretive difficulties when applying it to the facts of a particular case. But quite properly, the condition prevents an employer from hiding the reality of a relationship behind contract language, which does not reflect the true facts of the situation. And conditions (B) and (C) place significant stumbling blocks in the way of employer misclassification. Consider,

---

91. CAL. LAB. CODE § 3351 (West 2011 & Supp. 2021).

92. *Id.* § 2775(b)(1).

for example, the extent to which condition (B), requiring that a person perform work outside the usual course of the hiring entity's business, may defeat efforts to classify that worker as an independent contractor. Indeed, the requirement that all three conditions must be satisfied by the hiring entity goes very far to help workers achieve their status as "employees" rather than be misclassified as independent contractors. Additionally, the ABC test should bring a reasonable degree of advance notice to a hiring entity as to which workers must be classified as employees; and the ABC test should, to some degree, reduce or simplify misclassification disputes and litigation. Moreover, the *Dynamex* case itself, which is such an inspiration for the ABC test legislation, offers some useful interpretive guidance on each of the provisions of the test it established. Thus, it explains if the worker is subject either by contract:

or in actual practice, to the type and degree of control a business typically exercises over employees would be considered an employee under the common law test, such a worker would, a fortiori, also properly be treated as an employee for purposes of the suffer or permit to work standard.<sup>93</sup>

The *Dynamex* court also pointed out that:

depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees but does not possess over a genuine independent contractor.<sup>94</sup>

Yet even with this guidance from the *Dynamex* court, the job of resolving issues pertaining to Part A will at times be challenging.

The *Dynamex* court, referring to Part B of its test, says that the category of employee includes all individuals reasonably viewed as providing services to the business in a role comparable to that of an employee rather than in a role comparable to that of an independent contractor; that is, working in the hiring entity's business and not in the worker's own independent business.<sup>95</sup> The court referenced *inter alia* an outside plumber called to repair a leak in a retail store bathroom

---

93. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 36 (Cal. 2018).

94. *Id.* (citing *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel.*, 769 P.2d 399, 405–06, 407–08 (Cal. 1989)).

95. *Id.* at 37.

or an outside electrician called to install a new electric line who would not reasonably be seen to be providing services to the store as an employee.<sup>96</sup> It contrasted other positions such as a clothing manufacturer company hiring work-at-home seamstresses to make dresses from patterns and cloth it supplies, dresses which are to be sold by the company, or a bakery hiring cake decorators on a regular basis to work on custom-designed cakes in which the worker's role within the hiring entity's usual business operations is more like an employee than an independent contractor.<sup>97</sup>

The *Dynamex* court also has some words of explanation directed at Part C of its test: "As a matter of common usage, the term 'independent contractor,' when applied to an individual worker, ordinarily has been understood to refer to an individual who *independently* has made the decision to go into business for himself or herself."<sup>98</sup> The court believes that such an individual generally takes the usual steps to establish and promote his or her independent business and lists examples of such steps.<sup>99</sup>

In any event, that court did not suggest that the California Supreme Court's guidance regarding the meaning of the ABC test components as reported above is intended to close the door on other evidence being received or approaches taken to make decisions relating to those components.

There are exceptions to the application of the ABC provisions. Labor Code section 2775(b)(2) refers to exceptions or extensions expressly made to the terms "employee," "employer," "employ," or "independent contractor," and any extensions of employer status or liability by the Labor Code, the Unemployment Insurance Code, or applicable order of the Industrial Welfare Commission.<sup>100</sup>

And section 2775(b)(3) of the Labor Code refers to certain court rulings precluding the application of the ABC test and calls for the determination of employee or independent contractor status in such cases to be governed by *Borello*.<sup>101</sup>

In addition, there are numerous exceptions to the application of section 2775 of the Labor Code contained in sections 2776 through

---

96. *Id.*

97. *Id.*

98. *Id.* at 39 (citing *Borello*, 769 P.2d at 406).

99. *Id.*

100. CAL. LAB. CODE § 2775(b)(2) (West Supp. 2021).

101. *Id.* § 2775(b)(3).

2785, which continue the life of *Borello* as the alternative to the ABC test. For example, section 2780 deals with certain occupations connected to sound recordings or musical compositions;<sup>102</sup> section 2783(h) involves newspaper distributors;<sup>103</sup> section 2778 speaks of “professional services.”<sup>104</sup>

It is beyond the scope of this writing to list and discuss each statutory exception. While one cannot be unmindful of the possibility that political considerations played a part in the development of exceptions, one can also rationalize some exceptions on other bases. Thus, lawmakers may determine that certain desirable business arrangements would be overly discouraged or even precluded if subject to the rigorous ABC test. Section 2776 of the statute illustrates one notable exception, which precludes application of the ABC test to a bona fide business-to-business contracting relationship between a described kind of business entity, which contracts to provide services to another business (contracting business), and states that if the contracting business demonstrates the satisfaction of certain criteria, the determination of the employee-independent contractor status in such case shall be governed by the *Borello* case.<sup>105</sup>

Among the criteria to be satisfied under section 2776 is one dealing with the business service provider being free from control and direction of the hiring entity in performing work<sup>106</sup> and another requiring the business service provider to be customarily engaged in an independently established business of the same nature as that involved in the work performed, and allowing it to contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.<sup>107</sup>

Significantly, unlike condition B of the ABC test found in section 2775, section 2776 contains no provision requiring the service provider to perform work outside the usual course of the hiring entity’s business.<sup>108</sup> Thus, the statute exchanges a part of the rigidity of the ABC test for the multifactor *Borello* approach, thereby leaving space open for what may be desirable business arrangements for some

---

102. *Id.* § 2780.

103. *Id.* § 2783(h).

104. *Id.* § 2778.

105. *Id.* § 2776.

106. *Id.*

107. *Id.*

108. *Id.*

parties under section 2776 while containing some provisions aimed at preventing misclassification of workers through the use of subterfuge or otherwise.

## II. EVALUATING THE CALIFORNIA LAW

### A. *Role of the Control Factor*

There is a certain logic in retaining a “control test” akin to that used in the *respondeat superior* doctrine to determine whether a worker is an employee under the ABC test of section 2775(b)(1)(A) as well as in cases exempt from that test, which are to be resolved under the *Borello* approach. It should be recalled that a control test was required by the WCA applicable in 1989 when the court decided *Borello* with its multifactor test.<sup>109</sup> Indeed, in the circumstances of *Borello*, the need for complying with the WCA provides a reason for employer support for the safety of employees in their behavior toward each other, just as the vicarious liability of employers to third parties provided an incentive for employer promotion of safe behavior by employees toward such persons through the *respondeat superior* doctrine. In either situation, it is employer control over how workers do their jobs that supplies power the employer needs to promote safety.<sup>110</sup>

But the transfer of the traditional *respondeat superior* control test, i.e., “control over how work is to be done,” serves the purpose of differentiating employees from independent contractors beyond safety promotion considerations. Use of the control factor may aid in the proper classification of a worker as an “employee” or an “independent contractor” either under *Borello* or the statutory ABC test. Legislative draftsmen can take comfort in using the well-recognized control standard, to indicate that the employee label may be affixed to workers needing the benefits and protections of those statutes. The right to control how a job is done furnishes, from a historical and practical point of view, a good indicium that a hirer with that power has engaged the services of an employee rather than an independent contractor. Such control furnishes a good contrast with the word “independent”—as in independent contractor—since it is difficult to associate that word with a worker commonly thought of as subject to direction and control from above as to how to do a job. Indeed, the exercise of power over

---

109. S.G. Borello & Sons, Inc. v. Dep’t of Indus. Rels., 769 P.2d 399, 406 (Cal. 1989).

110. See *id.* at 403, 406; CAL. LAB. CODE §3351.



workers with regard to “how” their work is done may be perceived generally as characteristic of their greater vulnerability as employees in their work environment—which differs with the more typical freedom of an independent contractor such as an electrician or a plumber. While employees may be thought of as subject at times to serious and even distressing differences of opinion with, or exercises of power by, their superiors in their chain of command as to how to accomplish tasks, such interference is much less easily associated with persons properly labeled as independent contractors. Frequently, for example, the work of an electrician may be thought of as likely to be independent of a hirer’s control over how to do a job. Perhaps that notion may arise from a perceived inability of non-electricians to safely perform the work that the electrician is engaged to do. This is not to say that electricians are never hired into positions subject to control over how to do their jobs, that all hirers lack the expertise to assert control, or that electricians can never be classified as employees.

As a general proposition, employer control over how to do a job erects a formidable barrier to classifying a worker as an independent contractor. Sadly, however, problems of proof in determining proper classification may be complicated by employer efforts to conceal the truth about the control relationship or misclassifications resulting from other elements, as referred to earlier. The ABC test takes one such serious problem into account when it demands that the control inquiry be not simply based on the contract with the worker but on actual behavior.<sup>111</sup>

Of great significance, however, in the analysis of the impact of the ABC test is that the control test may not become a factor in an ABC determination of whether a worker is an independent contractor, making them ineligible for statutory protection and benefits intended for employees. That is so because use of the word “employee” under the statutory language of the ABC test should not be taken to signify a legislative intent that the control factor is always a relevant consideration in deciding if a worker is an employee, since proof regarding factors B or C simply may render a determination under factor A irrelevant. This interpretation of the statutory language of the ABC test is persuasively supported by the following passage from the California Supreme Court opinion in *Dynamex*, in which it adopted an ABC test

---

111. CAL. LAB. CODE § 2775(b)(1)(A).

for use in a wage order case decided prior to passage of ABC legislation:

a court is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for a court to determine whether or not part B or part C of the ABC standard has been satisfied than for the court to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard—in terms of increased clarity and consistency—will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question.<sup>112</sup>

It is a point worth emphasizing that California, by its passage of the ABC test, allows workers to qualify as “employees” for benefits under laws referred to in the ABC statute even if they are not proven to qualify as employees under the control test. The ABC legislation, therefore, reflects inter alia two important legislative objectives: (1) that some workers who may not fall into the traditional employee category—which puts emphasis on control—may still qualify for certain legislative benefits and protections assigned to the employee category, but also that workers can still rely on the control test in their efforts to qualify as employees, even if they have difficulty doing so under conditions B or C. Furthermore, there may be times when control over a person's job is so evident as to discourage an employer's effort to classify the person as an independent contractor. Since the ABC formula is implementing legislation intended to help workers in a humanitarian way, this is as it should be; and (2) the legislation also reflects a strong attack on the misclassification of employees as independent contractors.

### B. Borello Cases

Regarding those categories of workers exempt from the ABC test requirements and covered by *Borello*, the control test as impacted by statutory purpose would still be an important factor, more so as a practical matter, than under the ABC test where in some cases the control issue may be avoided. Also, *Borello* requires the use of a multifactor

---

112. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 40 (Cal. 2018).

test, which complicates matters.<sup>113</sup> Moreover, the prospect of weighing combinations of intertwined factors, as called for in *Borello*, is daunting.<sup>114</sup>

It is important to recognize that the use of *Borello* instead of the ABC test is likely to place workers in a less predictable position when it comes to identifying who is an employee and not an independent contractor. It should also be recalled that the ABC test, unlike *Borello*, widens the category of covered workers who may receive statutory benefits and protection to include some for whom the control test would lack relevance. This leaves us to question to what extent there was California legislative consideration given to the needs of the various categories of workers exempt from the ABC test and deprived of its benefits and whether the *Borello* approach is the best alternative to the ABC test.

In truth, one might wonder about what led the California Legislature to use *Borello* as its primary test to apply to situations exempt from the ABC test. One can imagine a legislature tired from its admirable work in providing for the ABC test and beset by the need for an alternative test, whether in the face of convincing policy arguments or strong political realities, turning to the well-established and respectable *Borello* approach and saying “here is your alternative, the California *Borello* approach, with which we have lived for a long time.”

### C. Reviewing Classification Goals

California expressed its concern for employees very well in its unrepealed findings and declarations enacted in support of A.B. 5 in 2019,<sup>115</sup> the statute later amended and as such passed in 2020 as A.B. 2257 and codified in the Labor Code.<sup>116</sup> The state wanted to prevent or counter the misclassification of employees as independent contractors in order to enable them to receive certain benefits and protections intended to be available under state laws. In addition, the state sought to thwart unfair competition, loss of state revenue, erosion of the

---

113. *Borello*, 769 P.2d at 404 (citing RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958)).

114. *See id.*

115. *See* Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019) (codified at CAL. LAB. CODE § 2750.3).

116. *See* Assemb. B. 2257, 2019–2020 Reg. Sess. (Cal. 2020) (codified at CAL. LAB. CODE §§ 2775–2787).

middle class and the rise of income inequality that sprang from the misclassification of workers as independent contractors.<sup>117</sup>

And as earlier described by an Assembly Committee on Labor and Employment, the A.B. 5 bill also pointed to the basic objective of wage and hour legislation and wage orders as ensuring that workers receive minimal wages and working conditions needed to enable them to obtain a subsistence standard of living and protect their health and welfare.<sup>118</sup> The Committee further reminded that such statutes and wage orders reflected the fact that individual workers generally had less bargaining power and that their need to support their families' survival may lead them to accept work for substandard wages or working conditions.<sup>119</sup>

And so, there are high stakes in protecting against misclassification of those workers who under the law are to be classified as employees in accordance with the legislature's purposes.

### III. CONCLUSION

#### A. *The Borello Problem*

Section 2775 of the California Labor Code with its ABC test has made it easier for certain workers to achieve their classification as employees and thereby qualify for benefits and protections called for in designated laws. And as earlier explained, that test even widened the meaning of the term employee with respect to some workers beyond traditional views (which required application of the control test). Under the ABC test, it is the hirer of workers who has the burden of proving the existence of the three factors necessary to label the workers as independent contractors and not employees. And in contrast to the *Borello* principles as they apply to worker classification, under the ABC test, a hirer who simply fails to prove one of the ABC requirements must accept the reality that the worker involved be classified as an employee and not an independent contractor.

Meanwhile, the more complex *Borello* multifactor approach lives on to determine classification issues for a number of specified exemptions. Experience and study may be helpful in deciding the wisdom and justice of having two such different approaches to the

---

117. See Cal. Assemb. B. 5.

118. See *Bill Analysis of Assemb. B. 5 Before the Assemb. Comm. on Lab. & Emp.*, supra note 89 and accompanying text.

119. *Id.*

problem of employee classification. Perhaps there could be some statutory effort to develop more clarity, simplicity, and wisdom with respect to formulating a test to be applied in lieu of *Borello*.

### *B. What Must Be Done*

After the innovative approach demonstrated by the *Dynamex* court to classify workers as employees or independent contractors in a wage order case, the California Legislature enacted legislation on a broader scale, that is to say, to apply the ABC test to several laws including but in addition to wage orders. But the resulting legislation left *Borello* alive to deal with a number of cases involving exemptions from the ABC test.

The legislature deserves a lot of credit for much of what it did, particularly in terms of its approval of the ABC test, but its continued use of *Borello* to define the term “employee” in exempt cases is questionable. While *Borello* with its multifactor test may often resolve the classification issue satisfactorily, that test is complicated by listing an unnecessarily wide variety of factors that may obfuscate the classification issue. This vagueness may promote employer evasion or even confusion in classifying workers and ultimately create more disputes along with the expenses to resolve them. What the legislature needs to do is consider the rationale for each of its exemptions, i.e., those situations it chose not to cover with the ABC test, and the content of a test or tests that will determine in a manner appropriate to that rationale, and with regard to the public interest, who is an employee. Hopefully, the legislature can improve on the clarity of its tests and not simply consign the matter of defining employees to the needless complexities of *Borello*.