

California Law Alert

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The ABC Independent Contractor Test

Recently, the California Legislature codified much of a previous California Supreme Court ruling relating to independent contractor classifications. For a worker to be properly classified as an independent contractor (sometimes called a “1099 contractor” or “1099 employee”), they must pass certain tests under federal and state law. California employers have been subject to the “ABC test” since April of 2018 because of a California Supreme Court ruling. Effective January 1, 2020, the ABC test will become part of California’s statutes as well.

The fact that the law is now written into the Labor Code is drawing significant attention, much of which is focused on the gig economy and its workers. But the test applies to all employers. The primary difference between the law now and the law as of January 1 is that the new statute includes certain types of workers that will not be subject to the ABC test, but instead a less strict test (*Borello*)

The ABC Test

A worker may be classified as an independent contractor only if:

- A. The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- B. The worker performs work that is outside the usual course of the hiring entity’s business; and
- C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Unless all three elements are true, the worker will be considered an employee. A more in-depth look at each of these three factors can be found on the HR Support Center by searching for *ABC test* with the search bar.

Be aware that the right to be treated as an employee *cannot be waived*, so even if a worker begs to be paid as an independent contractor and signs something to that effect, they must be treated as an employee unless they pass the applicable test.

The Exceptions

The workers listed below will not be subject to the ABC test, but instead the *Borello* test. The factors evaluated in *Borello* still create a fairly high bar for classifying a worker as an independent contractor, which is explained below.

Workers exempt from the ABC test but subject to *Borello* include the following:

- Licensed insurance agents
- Certain licensed health care professionals
- Licensed lawyers, architects, engineers, private investigators, and accountants
- Registered securities broker-dealers or investment advisers
- Direct salespeople who are exempt from unemployment insurance
- Real estate licensees (may be subject to tests other than *Borello*)
- Commercial fishermen
- Certain providers of professional services (full list in the HR Support Center)
- Others performing work pursuant to a subcontract in the construction industry if certain criteria are met

The Borello Test

The *Borello* test is a multi-factor test, similar to the DOL's Economic Realities test for independent contractors. The primary factor is whether the employer has control or the right to control the work done as well as the manner and means in which the work is performed. *Borello* provides eleven more factors or questions that will help you determine the appropriate classification for a worker. An employer must evaluate the answers as a whole and determine whether the working relationship and conditions point toward an employee or independent contractor relationship. You can find this test by searching for *Borello* using the search bar on the HR Support Center.