

AB 2257 IN “LEGISLATIVE FORMAT”

August 26, 2020

New Labor Code Section 2775 [The ABC Test, compare to current LC § 2750.3(a)]

(a) As used in this article:

(1) “Dynamex” means Dynamex Operations W. Inc. v. Superior Court (2018) 4 Cal.5th 903.

(2) “Borello” means the California Supreme Court’s decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341.

(b) (1) For purposes of the provisions 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.

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

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

New Labor Code Section 2776 [Business-to-Business, compare to current LC § 2750.3(e)]

~~(e) Subdivision (a) Section 2775~~ and the holding in Dynamex do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions:

~~(1a) If an individual acting as a sole proprietor, or a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation (“business service provider”) contracts to provide services to another such business or to a public agency or quasi-public corporation (“contracting business”), the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied:~~

~~(A1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.~~

~~(B2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider’s employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.~~

~~(C3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.~~

~~(D4)~~ If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.

~~(E5)~~ The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business.

~~(F6)~~ The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

~~(G7)~~ The business service provider ~~actually contracts~~ can contract with other businesses to provide the same or similar services and ~~maintains~~ maintain a clientele without restrictions from the hiring entity.

~~(H8)~~ The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

~~(I9)~~ Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.

~~(J10)~~ The business service provider can negotiate its own rates.

~~(K11)~~ Consistent with the nature of the work, the business service provider can set its own hours and location of work.

~~(L12)~~ The business service provider is not performing the type of work for which a license from the ~~Contractor's~~ Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

~~(2) This b)~~ When two bona fide businesses are contracting with one another under the conditions set forth in subdivision does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.

~~(3) The~~ (a), the determination of whether an individual working for worker who is not acting as a sole proprietor or formed as a business service provider entity, is an employee or independent contractor of the business service provider or contracting business is governed by paragraph (1) of subdivision (a). Section 2775.

~~(4c)~~ This subdivision section does not alter or supersede any existing rights under Section 2810.3.

New Labor Code Section 2777 [Referral Agencies, compare to current LC § 2750.3(g)]

~~(g)~~ Subdivision (a) Section 2775 and the holding in Dynamex do not apply to the relationship between a referral agency and a service provider, as defined below, under the following conditions:

~~(1a)~~ If an individual acting as a sole proprietor, or a business entity formed as a sole proprietor, partnership, limited liability company, limited liability partnership, or corporation ("service provider") provides services to clients through a referral agency, the determination of whether the service provider is an employee or independent contractor of the referral agency shall be governed by Borello, if the referral agency demonstrates that all of the following criteria are satisfied:

~~(A1)~~ The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.

~~(B2)~~ If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration in order to provide the services under the contract, the service provider has shall certify to the referral agency that they have the required business license or business tax registration. The referral agency shall keep the certifications for a period of at least three years. As used in this paragraph:

~~(C(A))~~ "Business license" includes a license, tax certificate, fee, or equivalent payment that is required or collected by a local jurisdiction annually, or on some other fixed cycle, as a condition of providing services in the local jurisdiction.

~~(B)~~ "Local jurisdiction" means a city, county, or city and county, including charter cities.

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

(D4) If there is an applicable professional licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, the service provider shall certify to the referral agency that they have the appropriate professional licensure, permit, certification, or registration. The referral agency shall keep the certifications for a period of at least three years.

(5) The service provider delivers services to the client under the service provider's name, rather than without being required to deliver the services under the name of the referral agency.

(E6) The service provider provides its own tools and supplies to perform the services.

(F7) The service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as that involved in, or related to, the work performed for the client.

(G8) The referral agency does not restrict the service provider maintains from maintaining a clientele without any restrictions from the referral agency and the service provider is free to seek work elsewhere, including through a competing referral agency.

(H9) The service provider sets its their own hours and terms of work or negotiates their hours and terms of work directly with the client.

(10) Without deduction by the referral agency, the service provider sets their own rates, negotiates their rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client.

(11) The service provider is free to accept or reject clients and contracts-

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

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

(2b) For purposes of this subdivision section, the following definitions apply:

(A)(1) "Client" means:

(A) A person who utilizes a referral agency to contract for services from a service provider, or

(B) A business that utilizes a referral agency to contract for services from a service provider that are otherwise not provided on a regular basis by employees at the client's business location, or to contract for services that are outside of the client's usual course of business. Notwithstanding subdivision (a), it is the responsibility of a business that utilizes a referral agency to contract for services, to meet the conditions outlined in this subparagraph.

(2) (A) "Referral agency" is a business that provides clients with referrals for service providers to provide services under a contract, with the exception of services in subparagraph (C).

(B) Under this paragraph, referrals for services shall include, but are not limited to, graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and interpreting services.

(C) Under this paragraph, referrals for services do not include services provided in an industry designated by the Division of Occupational Safety and Health or the Department of Industrial Relations as a high hazard industry pursuant to subparagraph (A) of paragraph (3) of subdivision (e) of Section 6401.7 of the Labor Code or referrals for businesses that provide janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.

(3) (A) "Referral agency contract" is the agency's contract with clients and service providers governing the use of its intermediary services described in paragraph (2). The intermediary services provided to the

service provider by the referral agency are limited to client referrals and other administrative services ancillary to the service provider's business operation.

(B) A referral agency's contract may include a fee or fees to be paid by the client for utilizing the referral agency. This fee shall not be deducted from the rate set or negotiated by the service provider as set forth in paragraph (10) of subdivision (a).

(4) "Service provider" means an individual acting as a sole proprietor or business entity that agrees to the referral agency's contract and uses the referral agency to connect with clients.

(5) "Tutor" means a person who develops and teaches their own curriculum, teaches curriculum that is proprietary and privately developed, or provides private instruction or supplemental academic enrichment services by using their own teaching methodology or techniques. A "tutor" does not include an individual who contracts with a local education agency or private school through a referral agency for purposes of teaching students of a public or private school in a classroom setting.

(6) (A) "Youth sports coaching" means services provided by a youth sports coach who develops and implements their own curriculum, which may be subject to requirements of a youth sports league, for an athletic program in which youth who are 18 years of age or younger predominantly participate and that is organized for the purposes of training for and engaging in athletic activity and competition. "Youth sports coaching" does not mean services provided by an individual who contracts with a local education agency or private school through a referral agency for purposes of teaching students of a public or private school.

(7) "Interpreting services" means:

(A) Services provided by a certified or registered interpreter in a language with an available certification or registration through the Judicial Council of California, State Personnel Board, or any other agency or department in the State of California, or through a testing organization, agency, or educational institution approved or recognized by the state, or through the Registry of Interpreters for the Deaf, Certification Commission for Healthcare Interpreters, National Board of Certification for Medical Interpreters, International Association of Conference Interpreters, United States Department of State, or the Administrative Office of the United States Courts.

(B) Services provided by an interpreter in a language without an available certification through the entities listed in subparagraph (A).

(8) "Consulting" means providing substantive insight, information, advice, opinions, or analysis that requires the exercise of discretion and independent judgment and is based on an individual's knowledge or expertise of a particular subject matter or field of study.

(9) "Animal services" means services related to daytime and nighttime pet care including pet boarding under Section 122380 of the Health and Safety Code.

(B) "Client" means a person or business that engages a service contractor through a referral agency.

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

(D) "Referral agency contract" is the agency's contract with clients and service contractors governing the use of its intermediary services described in subparagraph (C).

(E) "Service provider" means a person or business who agrees to the referral agency's contract and uses the referral agency to connect with clients.

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

(3) This subdivision does not apply to an individual worker, as opposed to a business entity, who performs services for a client through a referral agency. c) The determination

of whether such an individual worker is an employee of a referral agency service provider or whether an individual worker is an employee of a client is governed by subdivision (a)-Section 2775.

New Labor Code Section 2778 [Professional Services, compare to current LC § 2750.3(c)]

~~(c) (1) Subdivision (a) Section 2775~~ and the holding in Dynamex do not apply to a contract for “professional services” as defined below, and instead the determination of whether the individual is an employee or independent contractor shall be governed by Borello if the hiring entity demonstrates that all of the following factors are satisfied:

~~(A)1~~ The individual maintains a business location, which may include the individual’s residence, that is separate from the hiring entity. Nothing in this ~~subdivision~~paragraph prohibits an individual from choosing to perform services at the location of the hiring entity.

~~(B)2~~ If work is performed more than six months after the effective date of this section and the work is performed in a jurisdiction that requires the individual to have a business license or business tax registration, the individual has ~~a~~the required business license or business tax registration in order to provide the services under the contract, in addition to any required professional licenses or permits for the individual to practice in their profession.

~~(C)3~~ The individual has the ability to set or negotiate their own rates for the services performed.

~~(D)4~~ Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual’s own hours.

~~(E)5~~ The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.

~~(F)6~~ The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

~~(2b)~~ For purposes of this ~~subdivision~~section:

~~(A)1~~ An “individual” includes an individual providing services ~~through~~as a sole proprietorship~~proprietor~~ or other business entity.

~~(B)2~~ “Professional services” means services that meet any of the following:

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

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

~~(iii)C~~ Travel agent services provided by either of the following:~~(i) a~~

~~(i) A~~ person regulated by the Attorney General under Article 2.6 (commencing with Section 17550) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, ~~or (ii) an~~

~~(ii) An~~ individual who is a seller of travel within the meaning of subdivision (a) of Section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (g) of Section 17550.20 of the Business and Professions Code.

~~(iv)D~~ Graphic design.

~~(v)E~~ Grant writer.

~~(vi)F~~ (i) Fine artist.

~~(vii)ii~~ For the purposes of this subparagraph, “fine artist” means an individual who creates works of art to be appreciated primarily or solely for their imaginative, aesthetic, or intellectual content, including drawings, paintings, sculptures, mosaics, works of calligraphy, works of graphic art, crafts, or mixed media.

(G) Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service pursuant to Part 10 of Subtitle A of Title 31 of the Code of Federal Regulations.

~~(VIII)~~ Payment processing agent through an independent sales organization.

~~(IX)~~ Services provided by any of the following:

~~(i) By a still photographer or photojournalist who do not license content submissions, videographer, or photo editor who works under a written contract that specifies the rate of pay and obligation to the putative employer pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; the individual does not primarily perform the work at the hiring entity's business location, notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than 35 times per year one hiring entity. This clause/subclause is not applicable to an individual a still photographer, photojournalist, videographer, or photo editor who works on motion pictures, which includesis inclusive of, but is not limited to, projects produced for theatrical, television, internet streaming for any device, or commercial productions, broadcast news, television, and music videos, and live shows, whether distributed live or recorded for later broadcast, regardless of the distribution platform. Nothing in this section restricts a still photographer, photojournalist, photo editor, or videographer from distributing, licensing, or selling their work product to another business, except as prohibited under copyright laws or workplace collective bargaining agreements.~~

~~(ii) To a digital content aggregator by a still photographer, photojournalist, videographer, or photo editor.~~

~~(iii) For the purposes of this clause a "submission" is one or more items or forms of content produced by a still photographer or photojournalist that: (I) pertains to a specific event or specific subject; (II) is provided for in a contract that defines the scope of the work; and (III) is accepted by and licensed to the publication or stock photography company and published or posted. Nothing in this section shall prevent a photographer or artist from displaying their work product for sale. subparagraph the following definitions apply:~~

~~(I) "Photo editor" means an individual who performs services ancillary to the creation of digital content, such as retouching, editing, and keywording.~~

~~(II) "Digital content aggregator" means a licensing intermediary that obtains a license or assignment of copyright from a still photographer, photojournalist, videographer, or photo editor for the purposes of distributing that copyright by way of sublicense or assignment, to the intermediary's third party end users.~~

~~(J) Services provided by a freelance writer, translator, editor, copy editor, illustrator, or newspaper cartoonist who works under a written contract that specifies the rate of pay, intellectual property rights, and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; the individual does not provide content submissions to the putative employer primarily perform the work at the hiring entity's business location, notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than 35 times per year. Items of content produced on a recurring basis related to a general topic shall be considered separate submissions for purposes of calculating the 35 times per year. For purposes of this clause, a "submission" is one or more items or forms of content by a freelance journalist that: (I) pertains to a specific event or topic; (II) is hiring entity.~~

~~(K) Services provided for in a contract that defines the scope of the work; (III) is accepted by the by an individual as a content contributor, advisor, producer, narrator, or cartographer for a journal, book, periodical, evaluation, other publication or company and published or posted for sale educational, academic, or instructional work in any format or media, who works under a written contract that specifies the rate of pay, intellectual property rights and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the~~

same work at the same volume for the hiring entity, the individual does not primarily perform the work at the hiring entity's business location notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity.

(~~H~~L) Services provided by a licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist provided that the individual:

(~~H~~i) Sets their own rates, processes their own payments, and is paid directly by clients.

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

(~~H~~iii) Has their own book of business and schedules their own appointments.

(~~H~~iv) Maintains their own business license for the services offered to clients.

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

(~~V~~vi) This subdivision subparagraph shall become inoperative, with respect to licensed manicurists, on January 1, 2022.

(M) A specialized performer hired by a performing arts company or organization to teach a master class for no more than one week. "Master class" means a specialized course for limited duration that is not regularly offered by the hiring entity and is taught by an expert in a recognized field of artistic endeavor who does not work for the hiring entity to teach on a regular basis.

(N) Services provided by an appraiser, as defined in Part 3 (commencing with Section 11300) of Division 4 of the Business and Professions Code.

(O) Registered professional foresters licensed pursuant to Article 3 (commencing with Section 750) of Chapter 2.5 of Division 1 of the Public Resources Code.

(b) Section 2775 and the holding in Dynamex do not apply to the following, which are subject to the Business and Professions Code:

(1) A real estate licensee licensed by the State of California pursuant to Division 4 (commencing with Section 10000) of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by subdivision (b) of Section 10032 of the Business and Professions Code. If that section is not applicable, then this determination shall be governed as follows:

(A) For purposes of unemployment insurance by Section 650 of the Unemployment Insurance Code.

(B) For purposes of workers' compensation by Section 3200 et seq.

(C) For all other purposes in the Labor Code by Borello. The statutorily imposed duties of a responsible broker under Section 10015.1 of the Business and Professions Code are not factors to be considered under the Borello test.

(2) A home inspector, as defined in Section 7195 of the Business and Professions Code, and subject to the provisions of Chapter 9.3 (commencing with Section 7195) of Division 3 of that code.

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

New Labor Code Section 2779 [Single Engagement event, no comparable provision in AB 5]

(a)Section 2775 and the holding in Dynamex do not apply to the relationship between two individuals wherein each individual is acting as a sole proprietor or separate business entity formed as a partnership, limited liability company, limited liability partnership, or corporation performing work pursuant to a contract for purposes of providing services at the location of a single-engagement event, as defined below, under the following conditions:

- (1) Neither individual is subject to control and direction by the other, in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- (2) Each individual has the ability to negotiate their rate of pay with the other individual.
- (3) The written contract between both individuals specifies the total payment for services provided by both individuals at the single-engagement event, and the specific rate paid to each individual.
- (4) Each individual maintains their own business location, which may include the individual's personal residence.
- (5) Each individual provides their own tools, vehicles, and equipment to perform the services under the contract.
- (6) If the work is performed in a jurisdiction that requires an individual to have a business license or business tax registration, then each individual has the required business license or business tax registration.
- (7) Each individual is customarily engaged in the same or similar type of work performed under the contract or each individual separately holds themselves out to other potential customers as available to perform the same type of work.
- (8) Each individual can contract with other businesses to provide the same or similar services and maintain their own clientele without restrictions.
- (b) "Single-engagement event" means a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week.
- (c) "Services" under this section do not include services provided in an industry designated by the Division of Occupational Safety and Health or the Department of Industrial Relations as a high hazard industry pursuant to subparagraph (A) of paragraph (3) of subdivision (e) of Section 6401.7 or janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.

New Labor Code Section 2780 [Recording Industry, no comparable provision in AB 5]

- (a) (1) Section 2775 and the holding in Dynamex do not apply to the following occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions, and instead the holding in Borello shall apply to all of the following:
- (A) Recording artists, subject to the below.
- (B) Songwriters, lyricists, composers, and proofers.
- (C) Managers of recording artists.
- (D) Record producers and directors.
- (E) Musical engineers and mixers engaged in the creation of sound recordings.
- (F) Musicians engaged in the creation of sound recordings, subject to the below.
- (G) Vocalists, subject to the below.
- (H) Photographers working on recording photo shoots, album covers, and other press and publicity purposes.
- (I) Independent radio promoters.
- (J) Any other individual engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions.
- (2) This subdivision shall not apply to any of the following:

(A) Film and television unit production crews, as such term is commonly used in the film and television industries, working on live or recorded performances for audiovisual works, including still photographers and cinematographers.

(B) Publicists who are not independent music publicists.

(3) Notwithstanding Section 2775, paragraphs (1) and (2), and the holding in Dynamex, the terms and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employers shall govern the determination of employment status in all events.

(4) The following shall apply to recording artists, musicians, and vocalists:

(A) Recording artists, musicians, and vocalists shall not be precluded from organizing under applicable provisions of labor law, or otherwise exercising rights granted to employees under the National Labor Relations Act (29 U.S.C. Sec. 151 et seq.).

(B) (i) Musicians and vocalists who are not royalty-based participants in the work created during any specific engagement shall be treated as employees solely for purposes of receiving minimum and overtime wages for hours worked during the engagement, as well as any damages and penalties due to the failure to receive minimum or overtime wages. Any such wages, damages, and penalties owed under this subparagraph shall be determined according to the applicable provisions of this code, wage orders of the Industrial Welfare Commission, or applicable local laws.

(ii) "Royalty-based participant" means an individual who has either negotiated for the collection or direct administration of royalties derived from the exploitation of a sound recording or musical composition, or is entitled to control, administer or collect royalties related to the exploitation of a sound recording or musical composition as a co-author or joint owner thereof.

(C) In all events, and notwithstanding subparagraph (B), the terms and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employers shall govern the determination of employment status.

(b) (1) Section 2775 and the holding in Dynamex do not apply to a musician or musical group for the purpose of a single-engagement live performance event, and instead the determination of employee or independent contractor status shall be governed by Borello, unless one of the following conditions is met:

(A) The musical group is performing as a symphony orchestra, the musical group is performing at a theme park or amusement park, or a musician is performing in a musical theater production.

(B) The musical group is an event headliner for a performance taking place in a venue location with more than 1,500 attendees.

(C) The musical group is performing at a festival that sells more than 18,000 tickets per day.

(2) This subdivision is inclusive of rehearsals related to the single-engagement live performance event.

(3) As used in this subdivision:

(A) "Event headliner" means the musical group that appears most prominently in an event program, advertisement, or on a marquee.

(B) "Festival" means a single day or multiday event in a single venue location that occurs once a year, featuring performances by various musical groups.

(C) "Musical group" means a solo artist, band, or a group of musicians who perform under a distinct name.

(D) "Musical theater production" means a form of theatrical performance that combines songs, spoken dialogue, acting, and dance.

(E) “Musician” means an individual performing instrumental, electronic, or vocal music in a live setting.

(F) “Single-engagement live performance event” means a stand-alone musical performance in a single venue location, or a series of performances in the same venue location no more than once a week. This does not include performances that are part of a tour or series of live performances at various locations.

(G) “Venue location” means an indoor or outdoor location used primarily as a space to hold a concert or musical performance. “Venue location” includes, but is not limited to, a restaurant, bar, or brewery that regularly offers live musical entertainment.

(c) Section 2775 and the holding in Dynamex do not apply to the following, and instead, the determination of employee or independent contractor status shall be governed by Borello:

(1) An individual performance artist performing material that is their original work and creative in character and the result of which depends primarily on the individual’s invention, imagination, or talent, given all of the following conditions are satisfied:

(A) The individual is free from the control and direction of the hiring entity in connection with the performance of the work, both as a matter of contract and in fact. This includes, and is not limited to, the right for the performer to exercise artistic control over all elements of the performance.

(B) The individual retains the rights to their intellectual property that was created in connection with the performance.

(C) Consistent with the nature of the work, the individual sets their terms of work and has the ability to set or negotiate their rates.

(D) The individual is free to accept or reject each individual performance engagement without being penalized in any form by the hiring entity.

(2) “Individual performance artist” shall include, but is not limited to, an individual performing comedy, improvisation, stage magic, illusion, mime, spoken word, storytelling, or puppetry.

(3) This subdivision does not apply to an individual participating in a theatrical production, or a musician or musical group as defined in subdivision (b).

(4) In all events, notwithstanding paragraph (1), the terms and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employer shall govern the determination of employment status.

New Labor Code Section 2781 [Construction industry, compare to current LC § 2750.3(f)]

~~(f) Subdivision (a)~~ Section 2775 and the holding in Dynamex do not apply to the relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry, and instead the determination of whether the individual is an employee of the contractor shall be governed by Section 2750.5 and by Borello, if the contractor demonstrates that all the following criteria are satisfied:

~~(1a)~~ The subcontract is in writing.

~~(2b)~~ The subcontractor is licensed by the ~~Contractors~~Contractors’ State License Board and the work is within the scope of that license.

~~(3c)~~ If the subcontractor is domiciled in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor has the required business license or business tax registration.

~~(4d)~~ The subcontractor maintains a business location that is separate from the business or work location of the contractor.

~~(5e)~~ The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.

~~(6f)~~ The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, legally authorized indemnity obligations, performance bonds, or warranties relating to the labor or services being provided.

~~(7g)~~ The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.

~~(8)~~ ~~(A)~~ Paragraph ~~(2)(h)~~ ~~(1)~~ Subdivision ~~(b)~~ shall not apply to a subcontractor providing construction trucking services for which a contractor's license is not required by Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, provided that all of the following criteria are satisfied:

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

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

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

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

~~(B2)~~ For work performed after January 1, 2020, any business entity that provides construction trucking services to a licensed contractor utilizing more than one truck shall be deemed the employer for all drivers of those trucks.

~~(C3)~~ For purposes of this ~~paragraph~~ subdivision, "construction trucking services" mean hauling and trucking services provided in the construction industry pursuant to a contract with a licensed contractor utilizing vehicles that require a commercial driver's license to operate or have a gross vehicle weight rating of 26,001 or more pounds.

~~(D4)~~ This ~~paragraph~~ subdivision shall only apply to work performed before January 1, 2022.

~~(E5)~~ Nothing in this ~~paragraph~~ subdivision prohibits an individual who owns their truck from working as an employee of a trucking company and utilizing that truck in the scope of that employment. An individual employee providing their own truck for use by an employer trucking company shall be reimbursed by the trucking company for the reasonable expense incurred for the use of the employee-owned truck.

New Labor Code Section 2782 [Data Aggregator, no comparable provision in AB 5]

(a) (1) Section 2775 and the holding in Dynamex do not apply to the relationship between a data aggregator and an individual providing feedback to the data aggregator, and instead the holding in Borello shall apply, under the following conditions:

(A) The individual is free from control and direction from the data aggregator with respect to the substance and content of the feedback.

(B) Any consideration paid for the feedback provided, if prorated to an hourly basis, is an amount equivalent to or greater than the minimum wage.

(C) The nature of the feedback requested requires the individual providing feedback to the data aggregator to exercise independent judgment and discretion.

(D) The individual has the ability to reject feedback requests, without being penalized in any form by the data aggregator.

(2) As used in this section:

(A) “Data aggregator” is a business, research institution, or organization that requests and gathers feedback on user interface, products, services, people, concepts, ideas, offerings, or experiences from individuals willing to provide it.

(B) “Minimum wage” is local or state minimum wage, whichever is greater.

New Labor Code Section 2783 [Specified Occupations, compare to current LC § 2750.3(b)]

~~(b) Subdivision (a) Section 2775 and the holding in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (*Dynamex*), do not apply to the following occupations as defined in the paragraphs below, and instead, the determination of employee or independent contractor status for individuals in those occupations shall be governed by *Borello*:~~

~~(1a) A person or organization who is licensed by the Department of Insurance pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Part 2 of Division 1 of the Insurance Code or a person who provides underwriting inspections, premium audits, risk management, or loss control work for the insurance and financial service industries.~~

~~(2b) A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian licensed by the State of California pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation as defined in Section 13401 of the Corporations Code. Nothing in this subdivision shall apply circumvent, undermine, or restrict the rights under federal law to the employment settings currently or potentially governed by collective bargaining agreements for the licensees identified in this paragraph organize and collectively bargain.~~

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

~~(4d) A securities broker-dealer or investment adviser or their agents and representatives that are registered either of the following:~~

~~(1) Registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed.~~

~~(2) Licensed by the State of California under Chapter 2 (commencing with Section 25210) or Chapter 3 (commencing with Section 25230) of Division 1 of Part 3 of Title 4 of the Corporations Code.~~

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

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

~~(A) (f) A manufactured housing salesperson, subject to all obligations under Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code, including all regulations promulgated by the Department of Housing and Community Development relating to manufactured home salespersons and all other obligations of manufactured housing salespersons to members of the public.~~

~~(g) A commercial fisher working on an American vessel.~~

~~(1) For the purposes of this paragraph subdivision:~~

~~(1A) “American vessel” has the same meaning as defined in Section 125.5 of the Unemployment Insurance Code.~~

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

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

~~(B2)~~ For the purposes of this ~~paragraph~~subdivision, a commercial ~~fisherman~~fisher working on an American vessel is eligible for unemployment insurance benefits if they meet the definition of “employment” in Section 609 of the Unemployment Insurance Code and are otherwise eligible for those benefits pursuant to the provisions of the Unemployment Insurance Code.

~~(C3)~~ On or before March 1, 2021, and each March 1 thereafter, the Employment Development Department shall issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry. This report shall include, but not be limited to, ~~reporting~~ the number of commercial ~~fishermen~~fishers who apply for unemployment insurance benefits, the number of commercial ~~fishermen~~fishers who have their claims disputed, the number of commercial ~~fishermen~~fishers who have their claims denied, and the number of commercial ~~fishermen~~fishers who receive unemployment insurance benefits. The report required by this subparagraph shall be submitted in compliance with Section 9795 of the Government Code.

~~(D4)~~ This ~~paragraph~~subdivision shall become inoperative on January 1, 2023, unless extended by the Legislature.

(h) A newspaper distributor working under contract with a newspaper publisher, as defined in subparagraph (A), and a newspaper carrier working under contract either with a newspaper publisher or newspaper distributor.

(1) For purposes of this subdivision:

(A) “Newspaper” means a newspaper of general circulation, as defined in Section 6000 of the Government Code, and any other publication circulated to the community in general as an extension of or substitute for that newspaper’s own publication, whether that publication be designated a “shoppers’ guide,” as a zoned edition, or otherwise.

(B) “Publisher” means the natural or corporate person that manages the newspaper’s business operations, including circulation.

(C) “Newspaper distributor” means a person or entity that contracts with a publisher to distribute newspapers to the community.

(D) “Carrier” means a person who effects physical delivery of the newspaper to the customer or reader.

(2) This subdivision shall become inoperative on January 1, 2021, unless extended by the Legislature.

(i) An individual who is engaged by an international exchange visitor program that has obtained and maintains full official designation by the United States Department of State under Part 62 (commencing with Section 62.1) of Title 22 of the Code of Federal Regulations for the purpose of conducting, instead of participating in, international and cultural exchange visitor programs and is in full compliance with Part 62 (commencing with Section 62.1) of Title 22 of the Code of Federal Regulations.

(j) A competition judge with a specialized skill set or expertise providing services that require the exercise of discretion and independent judgment to an organization for the purposes of determining the outcome or enforcing the rules of a competition. This includes, but is not limited to, an amateur umpire or referee.

New Labor Code Section 2784 [Motor Club, compare to current LC § 2750.3(h)]

~~(h) Subdivision (a)~~Section 2775 and the holding in Dynamex do not apply to the relationship between a motor club holding a certificate of authority issued pursuant to Chapter 2 (commencing with Section 12160) of Part 5 of Division 2 of the Insurance Code and an individual performing services pursuant to a contract between the motor club and a third party to provide motor club services utilizing the employees and vehicles of the third party and, instead, the determination of whether such an

individual is an employee of the motor club shall be governed by Borello, if the motor club demonstrates that the third party is a separate and independent business from the motor club.

New Labor Code Section 2785 [Effective Date and Misc., compare to current LC § 2750.3(i)]

~~(i) (1) The addition of subdivision (a) to this section of the Labor Code by this act (a) Section 2775 does not constitute a change in, but is declaratory of, existing law with regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code this code relating to wage orders. (2b) Insofar as the application of subdivisions (b), (c), (d), (e), (f), (g), and (h) of this section Sections 2776 to Section 2784 would relieve an employer from liability, those subdivisions sections shall apply retroactively to existing claims and actions to the maximum extent permitted by law.~~

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

~~(d) If a hiring entity can demonstrate compliance with all of conditions set forth in any one of Sections 2776 to 2784, inclusive, then Section 2775 and the holding in Dynamex do not apply to that entity, and instead the determination of an individual's employment status as an employee or independent contractor shall be governed by Borello.~~

New Labor Code Section 2786 [Enforcement, compare to current LC § 2750.3(j)]

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

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