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GOVERNOR NEWSOM SIGNS LEGISLATION CODIFYING *DYNAMEX* DECISION AND ENACTING LIMITED EXEMPTIONS

On September 18, 2019, Governor Newsom signed Assembly Bill 5 (AB 5), legislation that codifies the decision in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) and creates exemptions for certain industries. The construction industry was able to obtain limited safe harbor exemptions in AB 5 for contractors hiring licensed subcontractors and companies providing trucking services. Both exemptions require that certain specific criteria be met.

The safe harbor exemptions enacted in AB 5 are expressly stated to be retroactive, so that contractors who can meet the criteria for the exemptions should be protected from liability both as to past transactions and going forward.¹

Leonidou & Rosin has prepared checklists and declaration forms to assist contractors in utilizing the safe harbor exemptions established by AB 5.

A. *Dynamex Operations West, Inc. v. Superior Court* – Who Is An Employee for Purposes of Wage and Hour Laws

Employees enjoy many rights under California law, including the right to overtime (for

¹ Attorneys representing claimants may attempt to argue that the retroactivity provisions of AB 5 are unenforceable. It will be some time before there is a definitive ruling on the retroactivity of the safe harbor exemptions of AB 5.

nonexempt employees). On the other hand, if an individual is classified as an independent contractor, the company using the individual's services has a much greater ability to control by contract what amounts will be paid and other aspects of the parties' relationship.

The California Industrial Welfare Commission, operating under authority granted by the Legislature, issues "wage orders" that govern what wages must be paid and under what circumstances. These wage orders govern not only minimum wages, overtime, and similar matters, but also who is an employee who is subject to the provisions of wage orders. Other states use similar systems of wage orders to regulate the payment of wages to employees.

The California Supreme Court in *Dynamex* reviewed the DIR's wage orders in order to establish a legal test for determining who is an employee for purposes of payment of prevailing wages. In *Dynamex*, the question was whether delivery/pick-up truck drivers ought to be considered independent contractors or employees. Two delivery drivers sued on behalf of a purported class alleging that they were employees and not contractors. (Several years earlier, *Dynamex* treated all drivers as employees; subsequently, it changed its classification of all drivers to independent contractors).

On April 30, 2018, the Court issued its ruling and held that it is the hiring entity's burden to prove that someone rendering labor is really an independent contractor for California Wage Order compliance. Rejecting the trucking company's arguments, the Court adopted what is known as the "ABC" test. The Court's decision replaced the *Borello* test that had been in use since 1989.

Under the now-controlling ABC test, to establish that an individual is an independent contractor and not a worker, the hiring entity must show that the worker

- A. is free from the control and direction of the hiring entity in connection with the performance of the work not just per the terms of the contract but also in fact;
- B. perform works that is outside the usual course of the hiring entity's business; *and*
- C. is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed by the worker for the hiring entity.

The ABC test is a broad one that will result in many people being deemed to be employees who previously had been treated as independent contractors.

B. AB 5

To lock in an advantageous ruling by the Supreme Court, organized labor worked with lawmakers to propose and pass legislation codifying the *Dynamex* decision. Various industries, concerned about potential liability, lobbied for complete or partial exemptions. The final bill that passed the Senate on September 11, 2019, and that Governor Newsom signed, added Section 2750.3 to the Labor Code and amended Labor Code Section 3351

and Unemployment Code Section 606.5 and 621.

AB 5 granted partial or complete exemptions for marketing professionals, HR administrators, travel agents, graphic designers, grant writers, fine artists, enrolled agents licensed by the IRS, photographers and photojournalists, freelance writers, editors, or cartoonists, licensed estheticians, electrologists, manicurists, barbers, or cosmetologists, and repossession agents, among others. Uber, Lyft, and other “gig economy” companies tried and failed to obtain exemptions.

Construction trade associations, by working with organized labor, were able to obtain amendments to the bill that established limited safe harbor exemptions for contractors hiring bona fide licensed subcontractors and trucking companies. To qualify for these exemptions, however, a contractor must meet specific criteria.

1. *Criteria for Licensed Subcontractors*

A contractor who wishes to avoid liability under *Dynamex* for hiring a subcontractor must satisfy the following criteria:

- (a) There must be a written contract with the subcontractor;
- (b) The subcontractor must be licensed by the Contractors State License Board and its work must within the scope of its license;
- (c) If the subcontractor is domiciled in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor must have the required business license or business tax registration;
- (d) The subcontractor must maintain a business location that is separate from the business or work location of the contractor;
- (e) The subcontractor must have the authority to hire and to fire persons who will be providing or who will assist in providing the services;
- (f) The subcontractor must have assumed 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; and
- (g) The subcontractor must be customarily engaged in an independently established business of the same nature as that involved in the work performed.

2. *Criteria for Companies Providing Construction Trucking Services*

To qualify for the safe harbor exemption for construction trucking services, a licensed contractor who hires another company to perform such services must satisfy all of the criteria listed above, except for (2), the licensing requirement. Instead of the licensing requirement, the following additional criteria must be satisfied:

- (a) The company providing the services must be a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation;
- (b) For work performed after January 1, 2020, the company providing the services must registered with the Department of Industrial Relations as a public works contractor pursuant to Section 1725.5, regardless of whether the contract involves public work;
- (c) The company providing services must utilizes its own employees to perform the construction trucking services, unless the company is a sole proprietor who operates his or her own truck to perform the entire contract and holds a valid motor carrier permit issued by the Department of Motor Vehicles; and
- (d) The company must have negotiated and contracted with, and be compensated directly by, the licensed contractor.

For purposes of this exemption, “construction trucking services” is defined as “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.” Thus, hauling performed using a vehicle that would not require a commercial driver’s, or a vehicle that has a gross weight of 26,000 pounds or less would not qualify for the exemption.

Conclusion

Qualifying for safe harbor exemption under AB 5 will be complicated. To provide guidance regarding the requirements needed to qualify, we have prepared forms for our clients to use. These include a checklist, to ensure that all of the exemption criteria are being met, and a declaration form, to be signed by the subcontractor or company providing construction trucking services. Separate checklists and declaration forms are provided for the subcontractor exemption and the construction trucking services exemption.

Using these forms cannot guarantee that a court will find that the safe harbor exemptions apply. However, the forms are a good way to make sure that specific criteria are not overlooked and that there is documentation to support the position that a transaction is within the exemptions established by AB 5.

For further information, please contact Bob Rosin, Patricia Walsh, or Michael Lum at (650) 691-2888.

<p>This alert is intended to provide information about changes in legislation and should not be relied upon as legal advice. This document may be considered to be advertising under the California Rules of Professional Conduct. Copyright 2019. A. Robert Rosin, Esq., Patricia Walsh, Esq., and Michael Lum, Esq., Leonidou & Rosin Professional Corporation (650) 691-2888.</p>
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AB 5 CHECKLIST – CONSTRUCTION TRUCKING SERVICES

Under AB 5, “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.

For each company providing construction trucking services (“CTS Provider”), complete the following checklist:

- 1. Will the CTS Provider be (a) utilizing vehicles that require a commercial driver’s license to operate or (b) have a gross vehicle weight rating of 26,001 pounds or more? *If yes*, then complete all other checklist items.**
- 2. The CTS Provider has completed and signed a Declaration of Compliance.**
- 3. Confirm there is a written contract signed by the CTS Provider.**
- 4. Confirm that the CTS Provider is a business entity** formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation:
 - For sole proprietorships, ask for a copy of the CTS Provider’s “Fictitious Business Name Statement” (a Fictitious Business Name Statement is not required where the company name includes the owner’s last name and does not include words, such as “& Sons” implying additional owners). If no Fictitious Business Name Statement is required, ask to see current business permits or registrations in the name of the CTS Provider. (see checklist item #8)
 - For partnerships, ask for a copy of documents forming the partnership.
 - For LLCs, LLPs, and corporations, check the California Secretary of State website to confirm the CTS Provider exists and currently is in good standing.
<https://businesssearch.sos.ca.gov>.
- 5. Confirm with the Department of Industrial Relations that the CTS Provider is registered** as a public works contractor (this requirement applies notwithstanding that the CTS Provider is not a contractor and regardless of whether the project is a public work of improvement).
<https://cadir.secure.force.com/ContractorSearch>
- 6. Confirm with that the CTS Provider utilizes its own employees** to perform the construction trucking services, unless the CTS Provider is a sole proprietor who operates his or her own truck to perform the entire contract and holds a valid motor carrier permit issued by the Department of Motor Vehicles.
 - **Have the CTS Provider fill out, sign, and submit a declaration** with the names of any individuals who will be providing trucking services (see checklist item #2).
 - **If the CTS Provider is a sole proprietor**, verify that the company is a sole proprietorship (see checklist item #4), and obtain a copy of the owner’s current DMV motor carrier permit.

- 7. **Confirm that the CTS Provider negotiates and contracts with, and is compensated directly by, your company.**
 - The **CTS Provider must sign a written contract** with your company.
 - **Payments to the CTS Provider must be made directly to the CTS Provider**, and not to a broker or other third party (except where required by law, such as when payments are garnished or subject to a writ of attachment).

- 8. **Verify that the CTS Provider has valid and current business license(s) and tax registration(s).**
 - **Ask the CTS Provider to provide evidence (e.g., a photocopy or pdf) that it has a business license and tax registrations** in the town or location where it has its principal place of business.
 - **Check what business license requirements and tax registration requirements apply** in the town or location where the CTS Provider has its principal place of business (e.g., google search and telephone call to town or government offices).
 - **Ask the CTS Provider to provide you with evidence that it has a seller's permit** from California Department of Tax and Fee Administration (CDTFA) if it is disposing of materials or otherwise would be required to charge sales or use tax.

- 9. **Verify that the CTS Provider's business location is separate** from your business and work location.

- 10. **Confirm with the CTS Provider that it has authority to hire and fire** persons to provide or assist in providing construction trucking services.
 - Have the CTS Provider fill out, sign, and submit a declaration attesting to this fact (see checklist item #2).

- 11. **Confirm that the written contract with the CTS Provider requires it to provide insurance and to indemnify** your company.
 - Make sure that the CTS Provider has provided additional ensured certificates and endorsements.

- 12. **Ask the CTS Provider to list of other examples of hauling services of a similar nature** being performed or that have been performed in the past year, to verify that it is “customarily engaged in an independently established business of the same nature.”
 - **Have the CTS Provider fill out, sign, and submit a declaration listing examples of other trucking services contracts** and attesting to the fact that it is customarily engaged in an independently established business of the same nature (see checklist item #2).

Labor Code Section 250.3, subparagraph (f), enacted by AB 5, provides:

(f) Subdivision (a) 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:

- (1) The subcontract is in writing.
- (2) The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.
- (3) 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.
- (4) The subcontractor maintains a business location that is separate from the business or work location of the contractor.
- (5) The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.
- (6) 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.
- (7) 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) 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:

- (i) The subcontractor is a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.
- (ii) 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.
- (iii) 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.
- (iv) The subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.

Labor Code Section 250.3, subparagraph (f), continued:

(B) 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.

(C) For purposes of this paragraph, “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.

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

(E) Nothing in this paragraph 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.

DECLARATION OF COMPLIANCE WITH LABOR CODE SECTION 250.3 (AB 5)
SUBCONTRACTOR
(NOT FOR USE FOR CONSTRUCTION TRUCKING SERVICES)

1. I am authorized to make this declaration on behalf of _____
_____ (the “Company.”) I have personal knowledge of the matters set forth herein.
2. The Company is in full compliance with Section 250.3(f) of the California Labor Code. I have read the copy of Section 250.3(f) which is included at the end of this declaration.
3. The Company is licensed by the Contractors State License Board. The Company’s License Number is: _____. The Company’s work is within the scope of its license.
4. The Company has valid business licenses and tax registrations for the jurisdiction where the Company’s business is located (domiciled), if the jurisdiction has a requirement for such licenses or registration. *Attach copies.*
5. The Company’s business location is separate from the business and work locations of the contractor to whom the Company is providing services (“Contractor”).
6. The Company has the authority to hire and fire other persons to provide or assist in providing services.
7. The Company has a written contract to provide services to Contractor. The Company has assumed financial responsibility for errors and omissions in labor and services it is providing, as evidenced by the fact that the Company’s written contract requires that it provide additional insured endorsements/certificates, warranties, and indemnity in certain specified instances.
8. The Company customarily engages in an independently established business of the same nature as the work the Company will be performing for Contractor. Examples of similar work performed by the Company for others include (*list*):

Signature and Verifications

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

Labor Code Section 250.3, subparagraph (f), enacted by AB 5, provides:

(f) Subdivision (a) 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:

- (1) The subcontract is in writing.
- (2) The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.
- (3) 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.
- (4) The subcontractor maintains a business location that is separate from the business or work location of the contractor.
- (5) The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.
- (6) 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.
- (7) The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.

AB 5 CHECKLIST – SUBCONTRACTORS

- 1. Confirm there is a written contract signed by subcontractor.**
- 2. Subcontractor has completed and signed a Declaration of Compliance.**
- 3. Confirm that the subcontractor is licensed. License No._____.**
 - **Check with CSLB:**
<https://www.cslb.ca.gov/OnlineServices/CheckLicenseII/CheckLicense.aspx>
 - Make sure that subcontractor has **workers compensation** if it has any employees working for it on this or any other job (a license is automatically suspended if a contractor has employees but does not have workers compensation coverage).
- 4. Verify that the subcontractor has business license(s) and tax registration(s)**
 - Ask the subcontractor to provide evidence (e.g., a photocopy or pdf) that it has a business license and tax registrations in the town or location where it has its principal place of business. Subcontractor to execute declaration. (see checklist item #2).
 - Check what business license requirements and tax registration requirements apply in the town or location where the subcontractor has its principal place of business (e.g., google search and telephone call to town or government offices).
 - Ask the subcontractor to provide evidence that it has a seller's permit from California Department of Tax and Fee Administration (CDTFA).
- 5. Verify that the subcontractor's business location is separate from your business and work addresses.**
- 6. Confirm with the subcontractor that it has authority to hire and fire persons to provide or assist in providing services; subcontractor to sign a declaration attesting to this fact (see checklist item #2).**
- 7. Confirm that the written subcontract requires the subcontractor to provide insurance, furnish warranties, and to indemnify your company.**
 - Make sure that the subcontractor has provided additional ensured certificates and endorsements.
- 8. Ask the subcontractor to provide a list of other projects of a similar nature being performed or that have been performed in the past year, to verify that the subcontractor is "customarily engaged in an independently established business of the same nature" (see checklist item #2).**

Labor Code Section 250.3, subparagraph (f), enacted by AB 5, provides:

(f) Subdivision (a) 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:

- (1) The subcontract is in writing.
- (2) The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.
- (3) 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.
- (4) The subcontractor maintains a business location that is separate from the business or work location of the contractor.
- (5) The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.
- (6) 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.
- (7) The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.

**DECLARATION OF COMPLIANCE WITH LABOR CODE SECTION 250.3 (AB 5)
CONSTRUCTION TRUCKING SERVICES**

1. I am authorized to make this declaration on behalf of _____
_____ (the “Company.”) I have personal knowledge of the matters set forth herein.

2. The Company is a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.

3. The Company is in full compliance with Section 250.3(f) of the California Labor Code. I have read the copy of Section 250.3(f) which is included at the end of this declaration.

4. The Company has registered as a Public Works Contractor with the Department of Industrial Relations (“DIR”). Our DIR registration number is _____.

5. The Company complies with the requirement to utilize our own employees as follows (*check one and complete*):

- The Company utilizes its own bona fide employees to perform construction trucking services. The following are the names of our current employees who operate trucks and vehicles (*attach list or printout if more space is needed*).

- The Company is a sole proprietorship. The Company’s owner (sole proprietor) operates his or her own truck to perform all of the services covered by this declaration and has a current valid motor carrier permit issued by the Department of Motor Vehicles. *Attach copy of motor vehicle permit.*

6. The Company negotiated its contract directly with the customer (*insert name of the contractor receiving trucking services, i.e., your company*) _____
_____ (“Contractor”).

7. The Company is being compensated directly by Contractor and not through a broker or other third party.

8. The Company has a direct written contract with Contractor. The Company has assumed financial responsibility for errors and omissions in labor and services it is providing, as evidenced by the fact that the Company’s written contract requires that it provide additional insured endorsements/certificates and indemnity in certain specified instances.

9. The Company has valid business licenses and tax registrations for the jurisdiction where the Company's business is located (domiciled), if the jurisdiction has a requirement for such licenses or registration. *Attach copies.*

10. Our business location is separate from the Contractor's business and work locations.

11. The Company has the authority to hire and fire other persons to provide or assist in providing services.

12. The Company customarily engages in an independently established business of the same nature as the work the Company will be performing for Contractor. Examples of similar work performed by the Company for others include (*list*):

Signature and Verifications

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

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(f) Subdivision (a) 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:

- (1) The subcontract is in writing.
- (2) The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.
- (3) 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.
- (4) The subcontractor maintains a business location that is separate from the business or work location of the contractor.
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- (6) 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.
- (7) 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) 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:

- (i) The subcontractor is a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.
- (ii) 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.
- (iii) 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.
- (iv) The subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.

Labor Code Section 250.3, subparagraph (f), continued:

(B) 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.

(C) For purposes of this paragraph, “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.

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

(E) Nothing in this paragraph 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.