
THIRD READING

Bill No: AB 2496
Author: Gonzalez Fletcher (D), et al.
Amended: 4/25/18 in Assembly
Vote: 21

SENATE LABOR & IND. REL. COMMITTEE: 5-0, 6/13/18
AYES: Lara, Stone, Jackson, Mitchell, Wieckowski

SENATE JUDICIARY COMMITTEE: 5-1, 6/26/18
AYES: Jackson, Hertzberg, Monning, Stern, Wieckowski
NOES: Anderson
NO VOTE RECORDED: Moorlach

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: 57-7, 5/21/18 - See last page for vote

SUBJECT: Janitorial employees: employment status: burden of proof

SOURCE: Alameda County District Attorney, Nancy O'Malley

DIGEST: This bill creates a rebuttable presumption that a worker in the janitorial field is an employee, and therefore is due the same protections and privileges as other employees.

ANALYSIS:

Existing law:

- 1) Establishes a comprehensive set of protections for employees, including a time-sure minimum wage, meal and rest periods, workers' compensation coverage in the event of an industrial injury, sick leave, disability insurance (DI) in the event of a non-industrial disability, paid family leave, and unemployment insurance (UI).

(Labor Code §§201, 226.7, 246, 512, 1182.12, & 3600 and UI Code §§1251 & 2601)

- 2) Provides that there is a rebuttable presumption that a worker performing services for which a contractor's license is required, or who is performing such services for a person who is required to obtain such a license, is *an employee rather than an independent contractor*. (Labor Code §2750.5)
- 3) Provides that in order to rebut the presumption described above, an employer must prove the following:
 - a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor;
 - b) That the individual is customarily engaged in an independently established business.
 - c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors, which includes substantial investment other than personal services in the business, holding out to be in business for oneself, and bargaining for a contract to complete a specific project for compensation by project rather than by time. (Labor Code §2750.5)
- 4) Requires that an individual holds a valid contractor's license as a condition of having independent contractor status.
- 5) Requires that any entity or individual who contracts, subcontracts, or creates franchise arrangements to provide janitorial services must register with the Division of Labor Standards Enforcement (DLSE) on an annual basis. The DLSE is prohibited from registering a janitorial contractor unless they have met specified conditions, including payment of all unpaid wages or judgments. (Labor Code §§1420-1429)

This bill:

- 1) Adds janitorial workers employed by a janitorial contractor to the existing rebuttable presumption of being an employee, rather than an independent contractor.

- 2) Requires an individual to hold a valid janitorial registration as a condition of having independent contractor status.
- 3) Defines, explicitly, for the purposes of UI benefits, DI benefits, and paid family leave, an employee of a registered janitorial contractor as eligible for benefits and necessary payroll tax withholding.

Comments

Independent Contractors, Borello, and Dynamex

The cornerstone of Labor Law is the employer-employee relationship. Specifically, the employer-employee relationship is a social contract: the employer provides wages and benefits (some legally required) to the employee, in return for the employee's labor, time, and intellectual and/or physical product. The legal roots of this relationship go back to Medieval England, yet are durable enough to shape our current world.

In the past 30 years, this relationship has been put under pressure and strain due to the increasing utilization of independent contractors. For employers who lawfully utilize independent contractors, it allows a business to utilize the services of a skilled individual for specific tasks. The employer trades control over the working conditions for being released from many of the primary obligations of being an employer, including paying overtime, remitting payroll taxes, securing workers' compensation coverage, and ensuring a healthy and safe work environment.

This creates a tremendous incentive for employers to misclassify their employees and illegally avoid paying the cost of benefits. This amounts to a cost-shift from an employer to the employee specifically and, in the case of particularly egregious examples, the people of California generally in the form of increased safety net spending. And it may be a growing issue: according to a 2016 study conducted by Alan Krueger, the number of workers classified as independent contractors rose 30% from 2005 to 2015.

In short, misclassification impacts all Californians, not just the Californians who are misclassified, and may be getting worse, rather than better.

This challenge was further exacerbated because the primary court precedent was less than precise on who was and who was not an independent contractor. Specifically, in *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341, the California Supreme Court created an 11-point "economic realities"

test on if someone could lawfully be considered an independent contractor. Outside of particularly clear-cut or egregious situations, this made determining who was or was not an independent contractor complicated, expensive, and prone to litigation. This created considerable frustration for both worker and employer stakeholders.

However, this period of considerable confusion appears to be drawing to a close. Earlier this year, the California Supreme Court revisited the independent contractor issue in *Dynamex Operations West v. Superior Court* (2018). Under *Dynamex*, the test for if a worker is an independent contractor or an employee is greatly simplified to a three-prong test:

- (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.*

Like *Dynamex*, AB 2496 creates a three prong test for who is and is not an independent contractor in the janitorial industry. Noting that the *Dynamex* three-prong test is very similar to the three prong test found under AB 2496, this bill fits within existing law and will likely serve to limit litigation in the janitorial industry while other industries struggle with the practical applicability of the “ABC” test.

Related/Prior Legislation

AB 1897 (Hernandez, Chapter 728, Statutes of 2014) required client employers that obtain workers from third party labor contractors to share liability for certain labor violations such as failure to pay wages and workers' compensation.

FISCAL EFFECT: Appropriation: Yes Fiscal Com.: Yes Local: No

SUPPORT: (Verified 8/6/18)

Alameda County District Attorney, Nancy O'Malley (source)
California District Attorneys Association
California Employment Lawyers Association
California Labor Federation, AFL-CIO

OPPOSITION: (Verified 8/6/18)

None received

ARGUMENTS IN SUPPORT: The California Employment Lawyers Association writes in support, arguing:

“Many of our attorneys represent workers in low-wage industries and find that these workers, especially those who are undocumented, are particularly vulnerable to wage-theft and other workplace abuse and misconduct. Despite efforts to curtail abuse against property service workers, it is well documented that numerous unscrupulous businesses prey on migrant labor workers for this industry by offering them long hours with little-to-no pay.

“One of the most common strategies employers use to try to get around basic labor law requirements, is to misclassify employees as independent contractors, rather than employees. This allows employers to evade California’s strong wage and hour laws, anti-discrimination laws, as well as state and federal safety regulations. Additionally, this misclassification prevents employers from being responsible to pay overtime, workers’ compensation or a number of other benefits.

“This kind of abuse is particularly prevalent in California, which attracts a high rate of both labor and sex trafficking due to its strong economy, large immigrant communities, and close proximity to the U.S./Mexico border. A 2012 study conducted by San Diego State University found that the rates of labor trafficking of immigrant workers in the property service industry were among the highest of any industry. The study also found that most cases of forced labor involve migrant workers in economic sectors, such as agriculture, construction, factories, restaurants, and hotels.

“... Labor Code Section 2750.5 was enacted to ensure that construction workers are not misclassified as independent contractors.... AB 2496 protects the rights of property service workers by also including them under the same Labor Code section. For these reasons, we support AB 2496 and thank you for your leadership on this very important issue.”

ASSEMBLY FLOOR: 57-7, 5/21/18

AYES: Acosta, Aguiar-Curry, Arambula, Baker, Berman, Bloom, Bonta, Burke, Caballero, Calderon, Carrillo, Cervantes, Chau, Chávez, Chiu, Chu, Cooley, Cunningham, Daly, Flora, Frazier, Friedman, Gipson, Gloria, Gonzalez Fletcher, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kamlager-Dove, Lackey, Levine, Low, Maienschein, McCarty, Medina, Melendez, Mullin, Muratsuchi, Nazarian,

O'Donnell, Quirk, Quirk-Silva, Reyes, Rodriguez, Rubio, Salas, Santiago, Mark Stone, Thurmond, Ting, Voepel, Waldron, Weber, Wood, Rendon
NOES: Travis Allen, Brough, Choi, Gallagher, Harper, Kiley, Obernolte
NO VOTE RECORDED: Bigelow, Chen, Cooper, Dahle, Eggman, Fong, Cristina Garcia, Eduardo Garcia, Gray, Limón, Mathis, Mayes, Patterson, Steinorth

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8/8/18 16:00:33

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