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CALIFORNIA LEGISLATURE—2019–20 REGULAR SESSION

ASSEMBLY BILL

No. 5

Introduced by Assembly Member Gonzalez

(Principal coauthor: Assembly Member Rendon)

*(Coauthors: Assembly Members Bonta, Carrillo, Gloria, Kalra,
McCarty, Medina, Mark Stone, and Wicks)*

(Coauthors: Senators Durazo, Leyva, and Skinner)

December 3, 2018

An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 5, as amended, Gonzalez. Worker status: employees and independent contractors.

Existing law, as established in the case of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (*Dynamex*), creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising

under wage orders issued by the Industrial Welfare Commission. Existing law requires a 3-part test, commonly known as the “ABC” test, to establish that a worker is an independent contractor for those purposes.

Existing law, for purposes of unemployment insurance provisions, requires employers to make contributions with respect to unemployment insurance and disability insurance from the wages paid to their employees. Existing law defines “employee” for those purposes to include, among other individuals, any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

This bill would state the intent of the Legislature to codify the decision in the *Dynamex* case and clarify its application. The bill would provide that for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the 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 the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity’s business, and the person is customarily engaged in an independently established trade, occupation or business. The bill, notwithstanding this provision, would provide that any statutory exception from employment status or any extension of employer status or liability remains in effect, and that if a court rules that the 3-part test cannot be applied, then the determination of employee or independent contractor status shall be governed by the test adopted in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (Borello). The bill would exempt specified occupations from the application of *Dynamex*, and would instead provide that these occupations are governed by *Borello*. These exempt occupations would include, among others, licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry.

The bill would also require the Employment Development Department, on or before March 1, 2021, and each March 1 thereafter,

to issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry. The bill would make the exemption for commercial fishermen applicable only until January 1, 2023. 2023, and the exemption for licensed manicurists applicable only until January 1, 2022. The bill would authorize an action for injunctive relief to prevent employee misclassification to be brought by the Attorney General and specified local prosecuting agencies.

This bill would also redefine the definition of “employee” described above, for purposes of unemployment insurance provisions, to include an individual providing labor or services for remuneration who has the status of an employee rather than an independent contractor, unless the hiring entity demonstrates that the individual meets all of specified conditions, including that the individual performs work that is outside the usual course of the hiring entity’s business. Because this bill would increase the categories of individuals eligible to receive benefits from, and thus would result in additional moneys being deposited into, the Unemployment Fund, a continuously appropriated fund, the bill would make an appropriation. The bill would state that addition of the provision to the Labor Code does not constitute a change in, but is declaratory of, existing law with regard to violations of the Labor Code relating to wage orders of the Industrial Welfare Commission. The bill would also state that specified Labor Code provisions of the bill apply retroactively to existing claims and actions to the maximum extent permitted by law while other provisions apply to work performed on or after January 1, 2020. The bill would additionally provide that the bill’s provisions do not permit an employer to reclassify an individual who was an employee on January 1, 2019, to an independent contractor due to the bill’s enactment.

Existing provisions of the Labor Code make it a crime for an employer to violate specified provisions of law with regard to an employee. The Unemployment Insurance Code also makes it a crime to violate specified provisions of law with regard to benefits and payments.

By expanding the definition of an employee for purposes of these provisions, the bill would expand the definition of a crime, thereby imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: yes. Fiscal committee: yes.
State-mandated local program: yes.

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

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

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

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

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

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

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

31 ~~(e)~~

32 (f) The *Dynamex* decision interpreted one of the three alternative
33 definitions of "employ," the "suffer or permit" definition, from
34 the wage orders of the Industrial Welfare Commission (IWC).
35 Nothing in this act is intended to affect the application of

1 alternative definitions from the IWC wage orders of the term
2 “employ,” which were not addressed by the holding of Dynamex.

3 (g) *Nothing in this act is intended to diminish the flexibility of*
4 *employees to work part-time or intermittent schedules or to work*
5 *for multiple employers.*

6 SEC. 2. Section 2750.3 is added to the Labor Code, to read:

7 2750.3. (a) (1) For purposes of the provisions of this code
8 and the Unemployment Insurance Code, and for the wage orders
9 of the Industrial Welfare Commission, a person providing labor
10 or services for remuneration shall be considered an employee rather
11 than an independent contractor unless the hiring entity demonstrates
12 that all of the following conditions are satisfied:

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

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

18 (C) The person is customarily engaged in an independently
19 established trade, occupation, or business of the same nature as
20 that involved in the work performed.

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

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

37 (b) Subdivision (a) and the holding in *Dynamex Operations*
38 *West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903
39 (*Dynamex*), do not apply to the following occupations as defined
40 in the paragraphs below, and instead, the determination of

1 employee or independent contractor status for individuals in those
2 occupations shall be governed by Borello. ~~The exemptions in this~~
3 ~~subdivision for health care occupations shall not apply to facilities~~
4 ~~owned or operated by the state or the University of California.~~

5 (1) A person or organization who is licensed by the Department
6 of Insurance pursuant to Chapter 5 (commencing with Section
7 1621), Chapter 6 (commencing with Section 1760), or Chapter 8
8 (commencing with Section 1831) of Part 2 of Division 1 of the
9 Insurance Code.

10 (2) A physician and surgeon, dentist, podiatrist, ~~or psychologist~~
11 *psychologist, or veterinarian* licensed by the State of California
12 pursuant to Division 2 (commencing with Section 500) of the
13 Business and Professions Code, performing professional or medical
14 services provided to or by a health care entity, including an entity
15 organized as a sole proprietorship, partnership, or professional
16 corporation as defined in Section 13401 of the Corporations Code.
17 *Nothing in this subdivision shall apply to the employment settings*
18 *currently or potentially governed by collective bargaining*
19 *agreements for the licensees identified in this paragraph.*

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

24 (4) A securities broker-dealer or investment adviser or their
25 agents and representatives that are registered with the Securities
26 and Exchange Commission or the Financial Industry Regulatory
27 Authority or licensed by the State of California under Chapter 2
28 (commencing with Section 25210) or Chapter 3 (commencing with
29 Section 25230) of Division 1 of Part 3 of Title 4 of the
30 Corporations Code.

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

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

36 (A) For the purposes of this paragraph:

37 (i) “American vessel” has the same meaning as defined in
38 Section 125.5 of the Unemployment Insurance Code.

39 (ii) “Commercial fisherman” means a person who has a valid,
40 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.

(iii) “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.

(B) For the purposes of this paragraph, a commercial fisherman 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.

(C) 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 who apply for unemployment insurance benefits, the number of commercial fishermen who have their claims disputed, the number of commercial fishermen who have their claims denied, and the number of commercial fishermen who receive unemployment insurance benefits. The report required by this subparagraph shall be submitted in compliance with Section 9795 of the Government Code.

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

(c) (1) Subdivision (a) 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) The individual maintains a business location, which may include the individual’s residence, that is separate from the hiring

1 entity. *Nothing in this subdivision prohibits an individual from*
2 *choosing to perform services at the location of the hiring entity.*

3 (B) If work is performed more than six months after the effective
4 date of this section, the individual has a business license, in
5 addition to any required professional licenses or permits for the
6 individual to practice in their profession.

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

9 (D) Outside of project completion dates and reasonable business
10 hours, the individual has the ability to set the individual's own
11 hours.

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

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

18 (2) For purposes of this subdivision:

19 (A) An "individual" includes an individual providing services
20 through a sole proprietorship or other business entity.

21 (B) "Professional services" means services that meet any of the
22 following:

23 ~~(i) Marketing.~~

24 ~~(ii) Administrator of human resources.~~

25 (i) *Marketing, provided that the contracted work is original and*
26 *creative in character and the result of which depends primarily*
27 *on the invention, imagination, or talent of the employee or work*
28 *that is an essential part of or necessarily incident to any of the*
29 *contracted work.*

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

35 (iii) Travel agent services provided by either of the following:

36 (I) a person regulated by the Attorney General under Article 2.6
37 (commencing with Section 17550) of Chapter 1 of Part 3 of
38 Division 7 of the Business and Professions Code, or (II) an
39 individual who is a seller of travel within the meaning of
40 subdivision (a) of Section 17550.1 of the Business and Professions

1 Code and who is exempt from the registration under subdivision
2 (g) of Section 17550.20 of the Business and Professions Code.

3 (iv) Graphic design.

4 (v) Grant writer.

5 (vi) Fine artist.

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

10 (viii) Payment processing agent through an independent sales
11 organization.

12 (ix) Services provided by a still photographer or photojournalist
13 who do not ~~provide~~ *license* content submissions to the putative
14 employer more than 35 times per year. This clause is not applicable
15 to an individual who works on motion pictures, which includes,
16 but is not limited to, projects produced for theatrical, television,
17 internet streaming for any device, commercial productions,
18 broadcast news, music videos, and live shows, whether distributed
19 live or recorded for later broadcast, regardless of the distribution
20 platform. For purposes of this clause a “submission” is one or more
21 items or forms of content produced by a still photographer or
22 photojournalist that: (I) pertains to a specific event or specific
23 subject; (II) is provided for in a contract that defines the scope of
24 the work; and (III) is accepted by *and licensed to* the publication
25 or stock photography company and published or ~~posted~~ *posted*.
26 *Nothing in this section shall prevent a photographer or artist from*
27 *displaying their work product* for sale.

28 (x) Services provided by a freelance writer, editor, or newspaper
29 cartoonist who does not provide content submissions to the putative
30 employer more than 35 times per year. Items of content produced
31 on a recurring basis related to a general topic shall be considered
32 separate submissions for purposes of calculating the 35 times per
33 year. For purposes of this clause, a “submission” is one or more
34 items or forms of content by a freelance journalist that: (I) pertains
35 to a specific event or topic; (II) is provided for in a contract that
36 defines the scope of the work; (III) is accepted by the publication
37 or company and published or posted for sale.

38 (xi) Services provided by a licensed esthetician, licensed
39 electrologist, *licensed manicurist*, licensed barber, or licensed
40 *cosmetologist*. ~~This subparagraph does not apply to a manicurist,~~

1 ~~unless the manicurist also is a licensed cosmetologist. However,~~
2 ~~the individual shall:~~ *cosmetologist provided that the individual:*

3 (I) ~~Set~~*Sets* their own ~~rates~~ *rates*, ~~processes their own payments,~~
4 ~~and be is~~ paid directly by clients.

5 (II) ~~Set~~*Sets* their own hours of work and ~~have~~ *has* sole discretion
6 to decide the number of clients and which clients for whom they
7 will provide services.

8 (III) ~~Have~~*Has* their own book of business and schedules their
9 own appointments.

10 (IV) ~~Maintain~~*Maintains* their own business license for the
11 services offered to clients.

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

15 (VI) *This subdivision shall become inoperative, with respect to*
16 *licensed manicurists, on January 1, 2022.*

17 (d) Subdivision (a) and the holding in *Dynamex* do not apply
18 to the following, which are subject to the Business and Professions
19 Code:

20 (1) A real estate licensee licensed by the State of California
21 pursuant to Division 4 (commencing with Section 10000) of the
22 Business and Professions Code, for whom the determination of
23 employee or independent contractor status shall be governed by
24 subdivision (b) of Section 10032 of the Business and Professions
25 Code. If that section is not applicable, then this determination shall
26 be governed as follows: (A) for purposes of unemployment
27 insurance by Section 650 of the Unemployment Insurance Code;
28 (B) for purposes of workers compensation by Section 3200 et seq.;
29 and (C) for all other purposes in the Labor Code by *Borello*. The
30 statutorily imposed duties of a responsible broker under Section
31 10015.1 of the Business and Professions Code are not factors to
32 be considered under the *Borello* test.

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

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

(1) If 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 (“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:

(A) 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.

(B) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.

(C) The contract with the business service provider is in writing.

(D) 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.

(E) The business service provider maintains a business location that is separate from the business or work location of the contracting business.

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

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

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

(I) The business service provider ~~has no other financial relationships with the contracting business.~~ *provides its own tools, vehicles, and equipment to perform the services.*

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

1 (K) ~~The~~ *Consistent with the nature of the work, the business*
2 service provider can set its own hours and location of work.

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

7 (2) This subdivision does not apply to an individual worker, as
8 opposed to a business entity, who performs labor or services for
9 a contracting business.

10 (3) The determination of whether an individual working for a
11 business service provider is an employee or independent contractor
12 of the business service provider is governed by paragraph (1) of
13 subdivision (a).

14 (4) This subdivision does not alter or supersede any existing
15 rights under Section 2810.3.

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

23 (1) The subcontract is in writing.

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

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

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

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

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

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

1 (8) (A) Paragraph (2) shall not apply to a subcontractor
2 providing construction trucking services for which a contractor's
3 license is not required by Chapter 9 (commencing with Section
4 7000) of Division 3 of the Business and Professions Code, provided
5 that all of the following criteria are satisfied:

6 (i) The subcontractor is a business entity formed as a sole
7 proprietorship, partnership, limited liability company, limited
8 liability partnership, or corporation.

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

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

18 (iv) The subcontractor negotiates and contracts with, and is
19 compensated directly by, the licensed contractor.

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

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

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

32 (E) Nothing in this paragraph prohibits an individual who owns
33 their truck from working as an employee of a trucking company
34 and utilizing that truck in the scope of that employment. An
35 individual employee providing their own truck for use by an
36 employer trucking company shall be reimbursed by the trucking
37 company for the reasonable expense incurred for the use of the
38 employee owned truck.

(g) Subdivision (a) 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:

(1) If 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 whether the service provider is an employee of the referral agency shall be governed by *Borello*, if the referral agency demonstrates that all of the following criteria are satisfied:

(A) 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.

(B) 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, the service provider has the required business license or business tax registration.

(C) 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.

(D) The service provider delivers services to the client under service provider’s name, rather than under the name of the referral agency.

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

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

(G) The service provider maintains a clientele without any restrictions from the referral agency and *the service provider* is free to seek work elsewhere, including through a competing agency.

(H) The service provider sets its own hours and terms of work and 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 penalized in any form for rejecting clients or contracts. This subparagraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

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

(A) “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 ~~with clients~~ that provide ~~graphic design, 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, ~~and~~ *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 contractor~~” *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. The determination whether such an individual is an employee of a referral agency is governed by subdivision (a).

(h) Subdivision (a) 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 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.

1 ~~(h)~~

2 (i) (1) The addition of subdivision (a) to this section of the
3 Labor Code by this act does not constitute a change in, but is
4 declaratory of, existing law with regard to wage orders of the
5 Industrial Welfare Commission and violations of the Labor Code
6 relating to wage orders.

7 (2) Insofar as the application of subdivisions (b), (c), (d), (e),
8 (f), ~~and (g)~~ (g), and (h) of this section would relieve an employer
9 from liability, those subdivisions shall apply retroactively to
10 existing claims and actions to the maximum extent permitted by
11 law.

12 (3) Except as provided in paragraphs (1) and (2) of this
13 subdivision, the provisions of this section of the Labor Code shall
14 apply to work performed on or after January 1, 2020.

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

25 SEC. 3. Section 3351 of the Labor Code, as amended by
26 Section 33 of Chapter 38 of the Statutes of 2019, is amended to
27 read:

28 3351. “Employee” means every person in the service of an
29 employer under any appointment or contract of hire or
30 apprenticeship, express or implied, oral or written, whether lawfully
31 or unlawfully employed, and includes:

32 (a) Aliens and minors.

33 (b) All elected and appointed paid public officers.

34 (c) All officers and members of boards of directors of
35 quasi-public or private corporations while rendering actual service
36 for the corporations for pay. An officer or member of a board of
37 directors may elect to be excluded from coverage in accordance
38 with paragraph (16), (18), or (19) of subdivision (a) of Section
39 3352.

1 (d) Except as provided in paragraph (8) of subdivision (a) of
2 Section 3352, any person employed by the owner or occupant of
3 a residential dwelling whose duties are incidental to the ownership,
4 maintenance, or use of the dwelling, including the care and
5 supervision of children, or whose duties are personal and not in
6 the course of the trade, business, profession, or occupation of the
7 owner or occupant.

8 (e) All persons incarcerated in a state penal or correctional
9 institution while engaged in assigned work or employment as
10 defined in paragraph (1) of subdivision (a) of Section 10021 of
11 Title 8 of the California Code of Regulations, or engaged in work
12 performed under contract.

13 (f) All working members of a partnership or limited liability
14 company receiving wages irrespective of profits from the
15 partnership or limited liability company. A general partner of a
16 partnership or a managing member of a limited liability company
17 may elect to be excluded from coverage in accordance with
18 paragraph (17) of subdivision (a) of Section 3352.

19 (g) A person who holds the power to revoke a trust, with respect
20 to shares of a private corporation held in trust or general partnership
21 or limited liability company interests held in trust. To the extent
22 that this person is deemed to be an employee described in
23 subdivision (c) or (f), as applicable, the person may also elect to
24 be excluded from coverage as described in subdivision (c) or (f),
25 as applicable, if that person otherwise meets the criteria for
26 exclusion, as described in Section 3352.

27 (h) A person committed to a state hospital facility under the
28 State Department of State Hospitals, as defined in Section 4100
29 of the Welfare and Institutions Code, while engaged in and
30 assigned work in a vocation rehabilitation program, including a
31 sheltered workshop.

32 (i) Beginning on July 1, 2020, any individual who is an
33 employee pursuant to Section 2750.3. This subdivision shall not
34 apply retroactively.

35 SEC. 4. Section 606.5 of the Unemployment Insurance Code
36 is amended to read:

37 606.5. (a) Whether an individual or entity is the employer of
38 specific employees shall be determined pursuant to subdivision
39 (b) of Section 621, except as provided in subdivisions (b) and (c).

(b) As used in this section, a “temporary services employer” and a “leasing employer” is an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and performs all of the following functions:

(1) Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services.

(2) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.

(3) Retains the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.

(4) Assigns or reassigns the worker to perform services for a client or customer.

(5) Sets the rate of pay of the worker, whether or not through negotiation.

(6) Pays the worker from its own account or accounts.

(7) Retains the right to hire and terminate workers.

(c) If an individual or entity contracts to supply an employee to perform services for a customer or client, and is a leasing employer or a temporary services employer, the individual or entity is the employer of the employee who performs the services. If an individual or entity contracts to supply an employee to perform services for a client or customer and is not a leasing employer or a temporary services employer, the client or customer is the employer of the employee who performs the services. An individual or entity that contracts to supply an employee to perform services for a customer or client and pays wages to the employee for the services, but is not a leasing employer or a temporary services employer, pays the wages as the agent of the employer.

(d) In circumstances which are in essence the loan of an employee from one employer to another employer wherein direction and control of the manner and means of performing the services changes to the employer to whom the employee is loaned, the loaning employer shall continue to be the employer of the employee if the loaning employer continues to pay remuneration to the employee, whether or not reimbursed by the other employer. If the employer to whom the employee is loaned pays remuneration to the employee for the services performed, that employer shall be considered the employer for the purposes of any remuneration

1 paid to the employee by the employer, regardless of whether the
2 loaning employer also pays remuneration to the employee.

3 SEC. 5. Section 621 of the Unemployment Insurance Code is
4 amended to read:

5 621. "Employee" means all of the following:

6 (a) Any officer of a corporation.

7 (b) Any individual providing labor or services for remuneration
8 has the status of an employee rather than an independent contractor
9 unless the hiring entity demonstrates all of the following
10 conditions:

11 (1) The individual is free from the control and direction of the
12 hiring entity in connection with the performance of the work, both
13 under the contract for the performance of the work and in fact.

14 (2) The individual performs work that is outside the usual course
15 of the hiring entity's business.

16 (3) The individual is customarily engaged in an independently
17 established trade, occupation, or business of the same nature as
18 that involved in the work performed.

19 (c) (1) Any individual, other than an individual who is an
20 employee under subdivision (a) or (b), who performs services for
21 remuneration for any employing unit if the contract of service
22 contemplates that substantially all of those services are to be
23 performed personally by that individual either:

24 (A) As an agent-driver or commission-driver engaged in
25 distributing meat products, vegetable products, fruit products,
26 bakery products, beverages (other than milk), or laundry or
27 drycleaning services, for their principal.

28 (B) As a traveling or city salesperson, other than as an
29 agent-driver or commission-driver, engaged upon a full-time basis
30 in the solicitation on behalf of, and the transmission to, their
31 principal (except for sideline sales activities on behalf of some
32 other person) of orders from wholesalers, retailers, contractors, or
33 operators of hotels, restaurants, or other similar establishments for
34 merchandise for resale or supplies for use in their business
35 operations.

36 (C) As a home worker performing work, according to
37 specifications furnished by the person for whom the services are
38 performed, on materials or goods furnished by that person that are
39 required to be returned to that person or a designee thereof.

(2) An individual shall not be included in the term “employee” under the provisions of this subdivision if that individual has a substantial investment in facilities used in connection with the performance of those services, other than in facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

(d) Any individual who is an employee pursuant to Section 601.5 or 686.

(e) Any individual whose services are in subject employment pursuant to an election for coverage under any provision of Article 4 (commencing with Section 701) of this chapter.

(f) Any member of a limited liability company that is treated as a corporation for federal income tax purposes.

SEC. 6. No provision of this measure shall permit an employer to reclassify an individual who was an employee on January 1, 2019, to an independent contractor due to this measure’s enactment.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.