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The Fallacy of the AB 5 Business-to-Business Exemption

California Freelancers Adversely Impacted by the Dynamex Decision and AB 5

- More than a hundred thousand freelancers have been asking legislators to fix AB 5 as they are losing work and the result has been serious economic distress.
- Musicians have a [petition](#) with over 150,000 people who have signed, court reporters have a [petition](#) with over 13,000 people signed, writers, organic [freelancer groups](#) are forming to share stories on social media and reaching out to legislators asking them to fix AB 5.
- Others are sharing stories about lost non-profits that help people in need, health care access, shut down art productions, and more, as a result of the Dynamex court decision and AB 5.

The Author of AB 5 Mistakenly Relies On the "B2B Exemption" as the Solution

- The author continues to point to the business-to-business exemption in the legislation as the solution to the serious economic challenges that face many freelancers. *"If they want to start their own business and be a sole-proprietor, and contract with different people, they can do that under this law." "My daily effort to provide truth about #AB5, if you are a true independent sole proprietor, you can still operate as one. Here is the business to business exemption from Dynamex, the ABC test, and AB 5 (Right from the bill!)" - Assemblymember Lorena Gonzalez, Author of AB 5*

Why the AB 5 B2B Exemption Does Not Work

Many freelancers have shared stories that it is too cost-prohibitive for them to become an LLC while others say the companies they contract with, do not want the liability as the B2B exemption is too unclear and creates more questions than answers. **While many of the factors are problematic, the following four factors make it nearly impossible for businesses to benefit from this ABC test exemption:**

1. **Factor (B). The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.**
 - Factor (B) creates significant impediments for businesses in a B2B relationship. Many service providers are hired for the specific purpose of providing services directly to the hiring entity's clients, customers or patients. That is the entire purpose of being able to contract out work. For example, a hospital may keep a Spanish translator on staff full-time, but not a Dutch translator because the need for such a service is rare. However, when needed, the Dutch translator is providing translation services to the patients of the hospital, not to the hospital itself.

2. **Factor (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.***
 - Factor (G) is problematic because, while a service provider should be free to contract with other entities, the requirement is that it “actually contracts” with other entities. What exactly does this mean? Does there need to be multiple contracts through the duration of the contractual relationship for the B2B exemption to apply? What happens if at the time of forming the contractual relationship, the service provider has 5 other contracts, but it eventually stops renewing the other contracts, does the B2B exemption still apply? Does the hiring entity have to sever the relationship when the service provider stops contracting with others? If so, what breach of contract concerns will arise?
3. **Factor (H). *The business service provider advertises and holds itself out to the public as available to provide the same or similar services.***
 - Factor (H) presents similar concerns. “Advertise” is not defined in AB 5, creating uncertainty. Does “advertise” mean that the service provider simply needs to tell people that it provides these services? What about social media postings, do those count? Or, does it need to place ads in the local paper? Also, what happens if the service provider only advertises one time, does that count for the duration of the contractual relationship? The burden should not fall on the hiring entity to keep checking in to see if the service provider is still advertising. Again, if it is not, is the hiring entity expected to sever the relationship and be liable for breach of contract?
4. **Factor (K). *Consistent with the nature of the work, the business service provider can set its own hours and location of work.***
 - Factor (K) creates a number of concerns because the service provider will not always be able to set its own hours or location of work. Again, using the translator as an example, the translator will need to work while the patient is in the hospital and need to provide services at the hospital itself, not at a location of its choosing.

Solution: Fix AB 5 and Make a B2B Exemption Work

- Failing to further amend AB 5 to broaden the B2B exemption has the potential to eliminate the vast majority of independent contractors/freelancers in California.
- The current B2B exemption language is not workable and needs significant cleanup to allow entrepreneurs in this State to continue providing services.
- The Legislature should amend the law further to provide a holistic approach to the application of the ABC test that reflects today’s modern workforce.

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