



AB 5 – FREELANCE JOURNALISM

BACKGROUND

In April 2018, the California Supreme Court issued the unanimous landmark *Dynamex* decision, which established a three part “ABC” test. Under the ABC test, a worker can only be classified as an independent contractor if they are: (A) free from the control and direction of the hiring company, (B) if the worker performs work that’s outside of the hiring company’s usual course of business, and (C) if the worker has their own independently established trade or business performing that work.

AB 5 codified this decision and clarified certain circumstances when workers are subject to the *Borello* standard that existed prior to the *Dynamex* decision. The bill will go into effect on January 1, 2020. All provisions of this statute apply to an individual operating and performing services in the state of California, regardless of whether the individual’s hiring entity is also located in California or based out-of-state.

UNDER AB 5, WHICH EMPLOYMENT TESTS APPLY TO FREELANCERS?

If a **freelance writer, still photographer, photojournalist, editor, or newspaper cartoonist** meets all six of the criteria below, and provides any single publication or stock photography company 35 or fewer licensed content submissions per year, then they are subject to the **Borello test**. This applies to an individual providing services through a sole proprietorship or other business entity. The onus is always on the hiring entity to ensure individuals they contract with meet the outlined criteria.

- 1) The individual sets or negotiates their rates for services performed.
- 2) Outside of project completion dates and reasonable business hours, the individual has the ability to set their own hours.
- 3) The professional maintains a business location, which may include the individual’s residence or another location separate from the hiring entity. If they choose, the individual may perform services at the location of the hiring entity.
- 4) If work is performed after July 1, 2020, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession.
- 5) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.

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

If a **freelance writer, still photographer, photojournalist, editor, or newspaper cartoonist** provides any single publication or stock photography company more than 35 content submissions per year, then they are subject to the **ABC test**. The onus is on the hiring entity to then classify the individual as an hourly, piece rate, or salaried employee.

WHAT IS CONSIDERED A SUBMISSION?

- A “submission” is broadly defined as one or more items or forms of content produced by a freelance journalist that pertains to a specific event or specific subject, and is provided for in a contract that defines the scope of the work. (E.g. A news publisher and freelance photographer could negotiate a contract stipulating that all the content related to coverage of San Diego Comic-Con over the course of a weekend is counted as a single submission.)
- When calculating the amount of submissions per year, items of content related to a general topic produced on a recurring basis are considered separate submissions. (E.g. A freelancer regularly producing articles for a publication that cover crime in a particular region are still considered separate submissions.)
- An individual can provide licensed content submissions to an unlimited number of publications or stock photography companies. The submission must actually be accepted by the publication or stock photography company in order to count towards the 35-submission threshold.
- Nothing under AB 5 prevents a photographer or artist from displaying their work product for sale.