

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

SEAN P. REDMOND
EXECUTIVE DIRECTOR, LABOR POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5384

September 5, 2019

The Honorable Toni G. Atkins
President Pro Tempore
California State Senate
State Capitol
Sacramento, CA 95814

Dear Senator Atkins:

On behalf of the U.S. Chamber of Commerce, I urge you and your colleagues to oppose A.B. 5, a bill that would amend California's Labor and Unemployment Insurance codes to severely restrict the ability of employers to utilize the legitimate services of independent contractors. The bill as written threatens to undermine longstanding business relationships by codifying the California Supreme Court's misguided 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*.

The *Dynamex* decision abandoned a relatively stable eleven-factor test for determining employment status established in the 1989 *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* case (the *Borello* test). The *Dynamex* court arbitrarily replaced the *Borello* test with the so-called ABC test that several states have adopted. The typical ABC test typically requires a business to meet three conditions to classify a worker as an independent contractor:

(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) the worker performs work that is outside the usual course of the hiring entity's business ***or that the work performed is outside all the places of business of the hiring entity***; and

(C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

In *Dynamex*, however, the court deliberately removed the second element from part B of its new standard, which will make it exceptionally difficult to classify an individual as an independent contractor. A.B. 5 would enshrine that restrictive standard into law, and in so doing jeopardize many business models that rely on individuals who voluntarily and legitimately operate as independent contractors.

There have been discussions about exempting many types of workers from A.B. 5, and the U.S. Chamber is supportive of these discussions. However, exemptions must also include legitimate independent contractors working for app-based platforms who provide their services while

exercising a great deal of independence. In addition, to keep the ABC test in line with what other states have done, additional language should be added to part B of the test, specifically: “*or that the work performed is outside all the places of business of the hiring entity.*”

The U.S. Chamber does not support the misclassification of bona fide employees as independent contractors, and we understand the concerns motivating A.B. 5. Amendments such as those discussed above would allow the California legislature to address those concerns while helping resolve the problems raised by the *Dynamex* decision. However, we cannot support the bill as drafted, and urge you to oppose A.B. 5 until a more reasonable approach can be considered.

Sincerely,

A handwritten signature in black ink that reads "Sean Redmond". The signature is fluid and cursive, with a long horizontal stroke at the beginning and a large, looping flourish at the end.

Sean P. Redmond
Executive Director, Labor Policy