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To: All Clients

Re: Changes to Independent Contractor Status/California Assembly Bill 5

Dear Clients:

As many of you may have heard, the California Supreme Court issued a landmark decision in the matter of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (“*Dynamex*”) back in 2018. Essentially, the Court established a standard of presuming that all workers in California are employees rather than independent contractors for purposes of the wage orders adopted by the California’s Industrial Welfare Commission. The Court also eliminated the previous Borello test in favor of the newly adopted “ABC” test to establish that a worker is an independent contractor.

Before *Dynamex*, the Court applied what is known as the “Borello” test to determine whether an individual was an independent contractor. The Borello test included ten factors, the primary of which was whether the “person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” Not all factors of the Borello test had to be met to establish independent contractor status, making it relatively easy to establish an individual as an independent contractor if they were free from control of the hiring party (or satisfied any one of the other ten Borello factors).

The law established in *Dynamex* dismissed the application of the Borello test and increased the burden on the hiring party by requiring the application of the “ABC” test. Under the ABC test, workers will be presumed to be employees unless the hiring party can satisfy the following three prongs:

- (A) that 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) that the worker performs work that is outside the usual course of the hiring entity’s business;
and
- (C) that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

This ABC test makes it much more difficult for the hiring party to establish independent contractor status because *all* three prongs of the test must be satisfied.

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As a result of Dynamex, many hiring parties were forced to convert their workers to employee status. In response to Dynamex and the upheaval surrounding the strict ABC test, on September 18, 2019, the Governor of California approved California Assembly Bill 5 (the "Bill").

The intent of the Bill is to codify the decision in Dynamex and clarify its application. Most importantly, however, is that the Bill brings some relief to certain hiring parties by exempting certain occupations from the application of Dynamex, and instead provides that those exempt occupations are to be governed by the old Borello test (rather than the ABC test). These exempt occupations "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 provided 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."

What does this mean for you? The adoption of these exemptions may allow you or your entity to classify a worker as an independent contractor despite Dynamex and the ABC test, provided certain criteria is met. Please note, however, the Bill does **NOT** permit an employer to reclassify an individual who was an employee on January 1, 2019 to an independent contractor. Please contact us should you wish to discuss whether you or your business qualifies for an exemption under the Bill.

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Sincerely,

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