
SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT
Senator Lola Smallwood-Cuevas, Chair
2023 - 2024 Regular

Bill No: AB 224 **Hearing Date:** August 27, 2024
Author: Blanca Rubio
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Urgency: No **Fiscal:** Yes
Consultant: Emma Bruce

SUBJECT: Worker status: employees and independent contractors: newspaper distributors and carriers

KEY ISSUE

This bill 1) extends the existing exemption for newspaper distributors and carriers from the ABC test under *Dynamex* (AB 5, Gonzalez, Chapter 296, Statutes of 2019) until January 1, 2030 and instead applies the *Borello* test, and 2) requires newspaper distributors and carriers to submit specified information to the Labor Workforce and Development Agency.

ANALYSIS

Existing law:

- 1) Establishes a comprehensive set of protections for employees, including a time-sure minimum wage, meal and rest periods, workers' compensation coverage in the event of an industrial injury, sick leave, disability insurance (DI) in the event of a non-industrial disability, paid family leave, and unemployment insurance (UI). (Labor Code §§201, 226.7, 246, 512, 1182.12, & 3600 and UI Code §§1251 & 2601)
- 2) Provides that for purposes of the Labor Code and the Unemployment Insurance Code, where another definition of "employee" is not otherwise specified, and for the wage orders of the Industrial Welfare Commission (IWC), a person providing labor or services for remuneration shall be considered an employee unless the hiring entity satisfies the 3-part ABC test (per *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903):
 - a. The person 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 person performs work that is outside the usual course of the hiring entity's business.
 - c. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. (Labor Code §2775)
- 3) Exempts from the application of the ABC test, and instead, applies the definition of an employee as set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) (*Borello*), to specified occupations and business relationships, including newspaper distributors working under contract with a newspaper publisher, as defined, or a newspaper carrier. This newspaper distributor exemption expires on January 1, 2025. (Labor Code §2783)

- 4) Requires every newspaper publisher and distributor that hires or directly contracts with newspaper carriers to submit to the Labor and Workforce Development Agency (LWDA), on or before March 1, 2022, March 1, 2023, and March 1, 2024, the following information related to their workforce each year:
 - a. The number of carriers for which the publisher or distributor paid payroll taxes in the previous year and the number of carriers for which the publisher or distributor did not pay payroll taxes in the previous year.
 - b. The average wage rate paid to carriers classified as independent contractors and as employees.
 - c. The number of carrier wage claims filed, if any, with the Labor Commissioner or in a court of law. (Labor Code §2783)
- 5) Specifies that for the March 1, 2022 reporting date only every newspaper publisher and distributor shall also report the number of carrier wage claims filed with the Labor Commissioner or in a court of law for the preceding three years. (Labor Code §2783)
- 6) Provides the following definitions:
 - a. “Newspaper” means a newspaper of general circulation, as defined in Section 6000 or 6008 of the Government Code, and any other publication circulated to the community in general as an extension of or substitute for that newspaper’s own publication, whether that publication be designated a “shoppers’ guide,” as a zoned edition, or otherwise. “Newspaper” may also be a publication that is published in print and that may be posted in a digital format, and distributed periodically at daily, weekly, or other short intervals, for the dissemination of news of a general or local character and of a general or local interest.
 - b. “Publisher” means the natural or corporate person that manages the newspaper’s business operations, including circulation.
 - c. “Newspaper distributor” means a person or entity that contracts with a publisher to distribute newspapers to the community.
 - d. “Newspaper carrier” means a person who effects physical delivery of the newspaper to the customer or reader, who is not working as an app-based driver, as defined in Chapter 10.5 (commencing with Section 7448) of Division 3 of the Business and Professions Code, during the time when the newspaper carrier is performing the newspaper delivery services. (Labor Code §2783)

This bill:

- 1) Extends the exemption for newspaper distributors working under contract with a newspaper publisher and newspaper carriers from the ABC test from January 1, 2025 to January 1, 2030.
- 2) Requires every newspaper publisher and distributor that hires or directly contracts with newspaper carriers to submit to the Labor and Workforce Development Agency, on or before March 1, 2025, March 1, 2026, March 1, 2027, March 1, 2028, and March 1, 2029 the following information related to their workforce each year:
 - a. The number of carriers for which the publisher or distributor paid payroll taxes in the previous year and the number of carriers for which the publisher or distributor did not pay payroll taxes in the previous year.

- b. The average wage rate paid to carriers classified as independent contractors and as employees.
 - c. The number of carrier wage claims filed, if any, with the Labor Commissioner or in a court of law.
- 3) Specifies that for the March 1, 2025 reporting date only, every newspaper publisher and distributor shall also report the number of carrier wage claims filed with the Labor Commissioner or in a court of law for the preceding three years.

COMMENTS

1. Background: *Dynamex* and AB 5

Within the Labor Code, the employer-employee relationship is essential when determining which rights and obligations are applicable in a given situation. California's wage and hour laws (e.g., minimum wage, overtime, and meal and rest breaks), workplace safety laws, and retaliation laws protect employees, but not independent contractors. Additionally, employees can go to state agencies such as the Labor Commissioner's office to seek enforcement of these laws, whereas independent contractors must resolve their disputes or enforce the rights under their contract through other means.

Employers lawfully using the independent contract model trade control over working conditions, like worker supervision and availability, in exchange for being released from many of the primary obligations of being an employer. This includes paying overtime, remitting payroll taxes, securing workers' compensation coverage, and ensuring a healthy and safe work environment. Unfortunately, this model creates incentives for employers to misclassify employees as independent contractors. For several decades, misclassification strained the employer-employee relationship, forcing law-abiding employers to compete with businesses that do not follow the rules. In 2017, California's Employment Development Department Tax Audit Program conducted 7,937 audits and investigations, resulting in assessments totaling \$249,981,712, and identified nearly half a million unreported employees.¹

The misclassification issue culminated in a 2018 California Supreme Court decision, *Dynamex Operations West, Inc. v. Superior Court (2018) 4 Cal.5th 903*. Under *Dynamex*, a worker is considered an employee and not an independent contractor, unless the hiring entity satisfies all three of the following conditions (ABC test):

- (A) The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- (B) The worker performs work that is outside the usual course of the hiring entity's business; and
- (C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

¹ Employment Development Department 2018 Annual Report on Fraud Deterrence and Detection Activities, https://edd.ca.gov/About_EDD/pdf/Fraud_Deterrence_and_Detection_Activities_2018.pdf.

In 2019, AB 5 (Gonzalez, Chapter 296, Stats. 2019) codified the *Dynamex* decision, requiring the application of the ABC test to determine if workers in California are employees or independent contractors for purposes of the Labor Code, the Unemployment Insurance Code, and the Industrial Welfare Commission wage orders. AB 5 also provided specified industrial categories where the long-standing *Borello* test would remain the standard for determining who is an employee. Under *Borello*, in *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341, the California Supreme Court created an 11 point “economic realities” test to determine whether someone could lawfully be considered an independent contractor.

Also in 2019, AB 170 (Gonzalez, Chapter 415) provided newspaper distributors and carriers an exemption from the ABC test and specified that instead the *Borello* test would be applicable. The exemption was set to sunset January 1, 2021. In 2020, AB 323 (Rubio, Chapter 341), among other things, extended the sunset date on this exemption from January 1, 2021, to January 1, 2022. In 2021, AB 1506 (Kalra, Chapter 328) extended the exemption until January 1, 2025. This bill, AB 224 (Rubio) would extend the exemption until January 1, 2030.

2. Need for this bill?

According to the author:

“The news media is in the middle of a critical transition. Like other industry sectors, market disruption has forced the news media to embrace new delivery models while maintaining traditional revenue streams that serve their customer base. Delivery of print publications is a key component of preserving the industry, and that revenue stream is dependent on the continuation of the independent contractor status for carriers.

Not all newspaper carriers work the same hours. Many carriers are contracted with distribution companies that allow them to deliver multiple, competing publications on the same route. The independent contractor status allows carriers to have the freedom and flexibility needed to accommodate their lifestyles. While newspapers are transitioning to the digital format, newspaper carriers are asking to preserve the independent contractor status...

This bill will extend the provisions exempting news publishers from AB 5 in current law for an additional 5 years, allowing them to operate independently with protections provided by law and through the legal system.”

3. Proponent Arguments:

According to the sponsors of the measure, the California News Publishers Association:

“The news media is in a critical transition. Our members have embraced new delivery models, while maintaining traditional revenue streams that serve our readers. Between 2008 and 2018, there was a national 68% decrease in advertising revenue, and almost two dozen daily papers closing in California in the last five years.

Without extension of the sunset clause in AB 224, publications already struggling to survive will see costs increase anywhere from 40 to 100 percent. A recent survey of California publications shows that 40 percent of publications would have to consider closing their doors

forever, 64 percent would eliminate delivery areas, 57 percent would raise prices, and 71 percent would reduce staff...

Since the previous extension, more and more publications have moved to distributing newspapers through the mail service. This means a drop in the number of daily newspapers, decreasing the amount of vital, trusted news coverage in smaller communities.

Extending the current sunset date for newspaper carriers will allow hundreds of publications across the state to keep serving their communities and protect thousands of newspaper carrier positions. For those reasons, we are proud to sponsor AB 224(Rubio). We respectfully request your “aye” recommendation and vote.”

4. Opponent Arguments:

According to the California Federation of Labor Unions:

“Six years ago, in April 2018, the California Supreme Court issued a unanimous decision in *Dynamex*, adopting the ABC test to determine employment status. The *Dynamex* decision reflected the Court’s concern about widespread misclassification of workers, across all industries. Not only does it strip workers of basic rights on the job and safety net benefits, but it also puts responsible employers at a competitive disadvantage with companies that refuse to pay minimum wage, workers’ compensation, or social security taxes.

AB 5 was a compromise measure to maintain protection for the most vulnerable workers and clarify that the decision does not apply to specified professionals like real estate agents, doctors, lawyers, and accountants. It created one simple, standard definition of employment across all codes for most California workers. This helps businesses comply, reduces unfair competition, and saves the taxpayers billions of dollars per year.

While AB 5 did not exempt news delivery, a companion bill gave the newspaper industry an additional year to come into compliance. Newspaper delivery is a dangerous job. It fits squarely within the court decision as work that is core to the business. These workers are so underpaid that the Newspaper Publishers were quoted saying they are largely immigrant families, and the entire family works to deliver the papers. That is why the legislation only provided for one additional year under the Borello test before the industry has to come into compliance with the *Dynamex* test.

This bill would extend the exemption, which was always meant to be temporary, for newspaper distributors, until 2030. The extension would trap this low-wage workforce indefinitely in dangerous and unfair working conditions. It would be unfair to those newspapers like the *Sacramento News & Review* that treats its delivery drivers as employees. It would leave taxpayers to foot the bill for the safety net benefits these workers need and deserve”

5. Prior Legislation:

AB 2955 (Committee on Labor and Employment, Chapter 443, Statutes of 2022) extended from January 1 2023 to January 1, 2026, the sunset date on the exemption from the application of the ABC test for commercial fishers working on an American vessel.

AB 1561 (Committee on Labor and Employment, Chapter 422, Statutes of 2021) extended from January 1, 2022 to January 1, 2025, the sunset date on the exemption from the application of the ABC test for licensed manicurists and construction trucking subcontractors. This bill also clarified the scope of the exemption previously granted to a data aggregator and a research subject who willingly engages with a data aggregator to provide individualized feedback, as specified, and clarified that the exemption previously granted to occupations in the insurance industry also extends to an individual providing claims adjusting or third party administration work.

AB 1506 (Kalra, Chapter 328, Statutes of 2021) extended for three years an existing exemption for newspaper distributors and carriers from the ABC Test and required them to submit specified information to the LWDA on the number of carriers for which the publisher or distributor paid and did not pay payroll taxes for, as well as the wage rates and information to demonstrate compliance of their carriers with the *Borello* test.

AB 2257 (Gonzalez, Chapter 38, Statutes of 2020) recast and clarified the business-to-business referral agency, and professional services exemption from the ABC test for employment status and exempted additional occupations and business relationships.

AB 323 (Rubio, Chapter 341, Statutes of 2020) extended an existing exemption for newspaper distributors and carriers from the ABC test from January 1, 2021 to January 1, 2022, and required an assessment of the effectiveness of contracts to conduct outreach and marketing to specified communities.

AB 170 (Gonzalez, Chapter 415, Statutes of 2019) provided an exemption for newspaper distributors and carriers from the ABC test, as specified, until January 1, 2021. The bill specified that the applicable test for determining if an individual is an employee or an independent contractor in the newspaper distributor and carrier industry is the predecessor to that until January 1, 2021 newspaper distributors and carriers, as specified *Dynamex* developed by the California Supreme Court in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.

AB 5 (Gonzalez, Chapter 296, Statutes of 2019) codified the decision of the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) requiring that employers prove that their workers can meet a 3 part (ABC) test in order to be lawfully classified as independent contractors, and exempted from the test certain professions and business-to-business relationships.

SUPPORT

California News Publishers Association (Sponsor)
Latino Media Collaborative

OPPOSITION

California Federation of Labor Unions

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SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT
Senator Lola Smallwood-Cuevas, Chair
2023 - 2024 Regular

Bill No: AB 1034 **Hearing Date:** August 27, 2024
Author: Grayson
Version: August 21, 2024
Urgency: No **Fiscal:** Yes
Consultant: Alma Perez-Schwab

SUBJECT: Labor Code Private Attorneys General Act of 2004: exemption: construction industry employees

KEY ISSUE

This bill extends the sunset date on provisions exempting specified construction industry employers and employees from the Private Attorneys General Act (PAGA).

ANALYSIS

Existing law:

- 1) Establishes a comprehensive set of protections for employees, including a time-sure minimum wage, meal and rest periods, overtime, prevailing wages on public works projects, and a broad series of occupational health and safety protective orders. (Labor Code §§201, 226.7, 246, 511, 512, 1182.12, 1771, & 6300)
- 2) Establishes the Department of Industrial Relations (DIR) in the Labor and Workforce Development Agency (LWDA) and vests it with various powers and duties to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment. (Labor Code §50.5)
- 3) Establishes within the DIR, various entities including the Division of Labor Standards Enforcement (DLSE) under the direction of the Labor Commissioner (LC), and empowers the LC with ensuring a just day's pay in every workplace through robust enforcement of labor laws. (Labor Code §79-107)
- 4) Establishes the Private Attorneys General Act (PAGA) of 2004, which permits aggrieved employees to pursue civil actions to recover civil penalties on behalf of themselves or other current or former employees against whom a violation of the same provision was committed for specified Labor Code violations. (Labor Code §2698-2699.8)
- 5) PAGA specifies that, notwithstanding any other provision of law, any provision of the Labor Code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency (LWDA) or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of the Labor Code, *may, as an alternative*, be recovered through a civil action pursuant to specified procedures. (Labor Code §2699(a))

- 6) Exempts from PAGA provisions, an employee in the construction industry with respect to work performed under a valid collective bargaining agreement (CBA) in effect any time before January 1, 2025, that expressly provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and for the employee to receive a regular hourly pay rate of not less than 30 percent more than the state minimum wage rate, and the agreement does *all* of the following:
 - a. Prohibits all of the violations of the Labor Code that would be redressable pursuant to PAGA, and provides for a grievance and binding arbitration procedure to redress those violations.
 - b. Expressly waives the requirements of PAGA in clear and unambiguous terms.
 - c. Authorizes the arbitrator to award any and all remedies otherwise available under PAGA. (Labor Code §2699.6)
- 7) Sunsets the above-mentioned exemption on the date the collective bargaining agreement expires or on January 1, 2028, whichever is earlier and repeals all provisions on January 1, 2028.

This bill:

- 1) Extends the sunset on the provisions under PAGA that exempt construction industry employers and employees working under a CBA that meet specified criteria by:
 - a. Deleting the January 1, 2025 date before which contracts would have to be in effect for the exemption to apply;
 - b. Deleting the provisions specifying that the exemption ends on the date the CBA expires or on January 1, 2028, whichever is earlier; and
 - c. Extending the sunset date on all exemption provisions from January 1, 2028 to January 1, 2038 and as of that date are repealed.

COMMENTS**1. Background:**

Wage theft is a problem that has plagued California and the country for a long time. According to the Economic Policy Institute, workers in California are cheated out of an estimated \$2 billion in stolen wages every year.¹ A worker experiencing wage theft can file a wage claim with DIR's Division of Labor Standards Enforcement, led by the Labor Commissioner and referred to as the Labor Commissioner's Office. The DLSE is tasked with ensuring a just day's pay in every workplace through robust enforcement of labor laws. The LC is authorized to investigate employee complaints and to provide for a hearing in any action to recover wages, and penalties owed.

Private Attorneys General Act of 2004:

Enacted in 2004 in response to a growing underground economy and the state's lack of staffing resources to adequately enforce Labor Code violations, PAGA authorizes an aggrieved employee to recover civil penalties normally assessed and collected by the Labor

¹ Economic Policy Institute, "Employers steal billions from workers' paychecks each year." May 10, 2017.
<https://www.courts.ca.gov/opinions/links/S241812-LINK1.PDF#page=11>

and Workforce Development Agency (LWDA) through a private right of action. PAGA authorizes individual workers to step into the role of the state's labor enforcement entity and bring a lawsuit against their employer on behalf of themselves or current or former employees for violations of the Labor Code.

AB 1654 (Rubio, Chapter 529, Statutes of 2018)

AB 1654 enacted the original PAGA exemption for the construction industry that is being extended with this bill. The sponsors of the measure at the time, the California Conference of Carpenters, argued that, "CBA's are fair to workers and employers because they are mutually agreed upon with a relative "balance of power" between employees and employers and policed by unions to ensure that signatory employers are abiding not only with the terms of those CBA's but any and all applicable law. These mutually agreed upon grievance/arbitration procedures provide an effective private forum to resolve contract and legal disputes without resorting to litigation."

Recent PAGA Reforms: On July 1, 2024, Governor Newsom signed into law two bills with negotiated PAGA reforms aimed at making improvements to the system for both workers and businesses. The reforms, part of a compromise reached between labor and business groups, were signed into law after proponents of a PAGA ballot initiative to repeal PAGA withdrew their measure.

2. Need for this bill?

According to the author:

"This bill would extend the exemption sunset date for lawsuits originated under the Private Attorney Generals Act (PAGA) for contractors in the building and construction trades that are party to a valid collective bargaining agreement (CBA) meeting specified criteria and have negotiated with their local union to include the waiver in their CBA. The statute doesn't alter a local union's ability to decide to include or not include the PAGA waiver in their CBA. Including the waiver would continue to be a subject of bargaining at the local level by each union.

There are two PAGA exemption sunset dates under existing law with one expiring 1/1/25 and the other expiring on 1/1/28. The first sunset date will not allow CBA's to benefit from the exemption if a CBA expires between those two dates, yet the policy rationale remains the same. This bill eliminates the confusion of the first sunset date and simply extend the 2028 date out ten years to 2038."

3. Proponent Arguments:

According to the sponsors of the measure, various labor and construction employer organizations listed below:

"Without this exception, contractor's signatory to a CBA face double jeopardy as they are unfairly subjected to the procedures and penalties outlined in both their CBA and PAGA when dealing with an aggrieved employee. These overlapping penalties diminish the value of the CBA and place union contractors at a specific disadvantage in the marketplace.

The PAGA CBA waiver authority has proven beneficial for both labor and management, as industry CBAs provide mutually agreed upon and more efficient processes for resolving worker grievances. Safeguarding the efficiency achieved through collective bargaining is essential for growth within the signatory construction industry.”

4. Opponent Arguments:

None received.

5. Prior/Related Legislation:

AB 2288 (Kalra, Chapter 44, Statutes of 2024) codified negotiated reforms to the California Labor Code’s Private Attorneys General Act of 2004 (PAGA) to further the purpose and intent of PAGA to protect workers from labor code violations.

SB 92 (Umberg, Chapter 45, Statutes of 2024) codified additional negotiated reforms to PAGA including the creation of a formal right to cure process for small and mid-sized companies.

AB 1654 (Rubio, Chapter 529, Statutes of 2018) enacted the original PAGA exemption for the construction industry that is being extend with this bill.

SUPPORT

- Associated General Contractors of California (Co-Sponsor)
- California Assoc. of Sheet Metal & Air Conditioning Contractors National Assoc. (Co-Sponsor)
- California Conference of Carpenters (Co-Sponsor)
- California-Nevada Conference of Operating Engineers (Co-Sponsor)
- California State Council of Laborers (Co-Sponsor)
- Construction Employers' Association (Co-Sponsor)
- National Electrical Contractors Association (Co-Sponsor)
- Southern California Contractors Association (Co-Sponsor)
- United Contractors (Co-Sponsor)
- Air Conditioning Sheet Metal Association
- California Legislative Conference of Plumbing, Heating & Piping Industry
- District Council of Iron Workers of The State of California and Vicinity
- Finishing Contractors Association of Southern California
- Northern California Allied Trades
- Northern California Floor Covering Association
- Southern California Glass Management Association
- Wall and Ceiling Alliance
- Western Line Constructors Chapter, Inc., NECA, INC.
- Western Painting and Coating Contractors Association
- Western Wall and Ceiling Contractors Association

OPPOSITION

None received.