

Assembly Bill 5 & California's Workers

Frequently Asked Questions for Workers in California

January 2020



NOTE ON CONTENT

With the passage of California Assembly Bill 5 (“AB 5”), California workers are trying to understand how the designation of independent contractor vs. employee has changed, and what parts of the new law affect their work and livelihoods. This document, developed by labor and worker advocates, aims to explain the law and answer some frequently asked questions posed by community members. While this document contains important information to understand the law and includes a list of organizations that directly support workers, it is not legal advice. If you require legal advice, please seek guidance from a qualified lawyer in your community who understands employment law.

INTRODUCTION

AB 5 is a win for all workers in California.

Why? Because it clarifies what it means to be an independent contractor and helps ensure that basic workers’ rights and protections apply to workers across the state.

Independent contractors work like separate businesses, contract with their employer for specific jobs, and don’t get access to most worker protections. For example, independent contractors are not owed a minimum wage or overtime, don’t have guaranteed access to health benefits through their job, and don’t get access to workers’ compensation if they’re hurt on the job. Employees, on the other hand, must follow the direction of their employer, but gain all of the wage and working condition protections written into law, including access to benefits.

Some employers try to have it both ways: control their worker’s activities, but call them independent contractors and avoid paying for any benefits or follow any obligation the law would otherwise require. This is ***misclassification***. Misclassification is a pervasive problem throughout California that

harms workers through lost wages, benefits, and other employee protections.

That is why on September 18, 2019, Governor Gavin Newsom signed Assembly Bill 5 (“AB 5”), which clarifies the test an employer must use to determine if their workers are independent contractors or employees.

This clarification matters because employees enjoy a number of protections under the law, such as overtime pay, meal and rest breaks, unemployment insurance, and more. The law goes into effect January 1, 2020, and it says that in order for you to be an independent contractor, the person or business that hires you must ensure the following:

- (A) You are free from their “control and direction;”
- (B) You carry out work that is “outside the usual course” of their business; and
- (C) You work in an “independently established trade, occupation, or business” that is related to the work you are being hired to do.

Some employers and businesses have circulated misinformation about AB 5. Despite this misinformation, it is important to know that **you do not need to be an independent contractor to have a part-time schedule, work remotely or on a flexible schedule, or work temporarily for a company.** In fact, nothing in the law prevents an employer from providing independence on the job while also allowing you to earn a fair wage in a safe workplace.

The most important thing to know about this law is that **you have rights**, regardless of your employment status, your immigration status, or the industry you work in. The **Frequently Asked Questions** below are meant to help you understand your rights at work and counteract the misinformation suggesting that you are not protected.

Please share this far and wide. Together, we can make sure that everyone is able to work with dignity.

For questions regarding the information presented here, please email Sasha Feldstein at sfeldstein@caimmigrant.org or Rey Fuentes at rey@forworkingfamilies.org.

Table of Contents

WHAT YOUR EMPLOYER IS REQUIRED TO DO UNDER AB 5	1
1. Does AB 5 require everyone who is an independent contractor to become an employee?	1
2. Will my employer be required to fire everyone who is currently hired as an independent contractor because of AB 5?	1
3. Will my employer be required to enforce strict scheduling requirements and other harsh penalties because of AB 5?	2
4. What should I expect if the company or person I work for transitions me from an independent contractor to an employee?	2
5. Does AB 5 require my employer to pay employee benefits, like healthcare?	3
WHAT AB 5 ACTUALLY SAYS ABOUT EMPLOYEES AND INDEPENDENT CONTRACTORS	3
6. Can I still have flexible hours as an employee?	3
7. Does AB 5 kill industries that rely on independent contracting, e.g. therapists, health care, stylists?	3
8. Will all independent contractors automatically be reclassified as employees?	4
9. I like working as an independent contractor. Does AB 5 prohibit me from working as an independent contractor?	4
10. Does AB 5 guarantee collective bargaining rights for independent contractors?	5
SPECIFIC QUESTIONS FOR PEOPLE WHO ARE UNDOCUMENTED	5
11. How does this bill affect people who are working and undocumented?	5
12. As someone who is undocumented, what are my rights as an independent contractor or business?	6
13. What are my rights as a day laborer?	6
HOW TO GET HELP	7
14. I have been incorrectly classified as an independent contractor OR my employer fired me because of AB 5, saying that the new law forced them to fire me. What can I do?	7
15. I've signed an arbitration agreement with my employer as a part of my contract. What do I do?	7
16. I still believe that I am being misclassified as an independent contractor, when in fact I'm an employee. However, my employer still says that I'm an independent contractor or that my work falls into one of the exceptions in the bill. What do I do?	8

WHAT YOUR EMPLOYER IS REQUIRED TO DO UNDER AB 5

1. Does AB 5 require everyone who is an independent contractor to become an employee?

- No, but some people who are currently misclassified as independent contractors may become employees. Assembly Bill 5 (“AB 5”) writes into law the California Supreme Court decision [*Dynamex Operations West, Inc. v. Superior Court*](#). The decision, and now AB 5, says that in order for you to be an independent contractor, the person who hires you must prove all three of the following things (known as the “ABC test”):
 - (A) That you are free from their “control and direction.” This means you must be free from their control in any agreement or contract for work *and* while you actually perform the work; and
 - (B) That the work you do is “outside the usual course” of what the company hiring you does. For example, an electrician who works sporadically making repairs at a fast food restaurant is “outside the usual course” of the restaurant’s business; and
 - (C) That you work in an “independently established trade, occupation, or business” that is related to the work you are being hired to do. This factor ensures that to be an independent contractor you work and act like an independent business or have special skills. For example, having business cards, a specialized certification, an independent office location, or being able to set your own rates and choose your customers are a few classic signs that you are an independent contractor.
- These requirements have been the law in California since 2018, and they **do not say that any one person is necessarily an employee**. You can still work as an independent contractor, as long as the person who hires you shows that the classification meets the ABC test.

2. Will my employer be required to fire everyone who is currently hired as an independent contractor because of AB 5?

- No. The only thing an employer is required to do under AB 5 is use the ABC test to determine whether a worker is an independent contractor or employee. All other lawful business decisions continue to be the employer’s. And, if your employer doesn’t meet the ABC test, they may need to offer you more benefits and protections like overtime pay, reimbursement for business expenses, paid sick leave, and more.

3. Will my employer be required to enforce strict scheduling requirements and other harsh penalties because of AB 5?

- No. AB 5 does not “force” employers to do anything other than use the ABC test to determine if a worker is an independent contractor or an employee. Again, if an employer wishes to continue classifying their workers as independent contractors, they are free to do so as long as the requirements of the ABC test are satisfied. That could mean extending more freedom to workers, such as the ability for workers to set their own rates or truly share in the profits of their work. But the choice of how an employer lawfully structures their business is up to them. Therefore, **you do not need to be an independent contractor to have a part-time schedule, work remotely or on a flexible schedule, or work as a temporary worker.** These are all features of work that employers can offer to employees as well as independent contractors.



4. What should I expect if the company or person I work for transitions me from an independent contractor to an employee?

- To start, you can expect to receive:
 - California's [minimum wage](#) (currently \$12-\$13 per hour, depending on the size of your workplace; it will increase each year until 2023 when every worker will be required to earn \$15 per hour);
 - Overtime pay (time-and-a-half for all hours over 8 in one day or hours over 40 in one week);
 - Travel time compensation while you work (including mileage reimbursement for the use of your car and/or possible reimbursements for the use of your personal phone at work), and
 - Compensation for any rest or meal breaks you might have missed.
- If you are injured on the job, you will be able to file for Workers' Compensation to help cover things like medical expenses and lost wages.
- In addition, you will gain access to:
 - Sick leave (paid for by your employer),

- State Disability Benefits if you're injured away from work,
 - Paid Family Leave to bond with your baby or care for a family member; and
 - Unemployment Insurance benefits if you unexpectedly lose your job through no fault of your own and are eligible for benefits.
- It is important to note that all workers, regardless of immigration status, can pursue claims related to all of the rights listed above. See the "Specific Questions for People who are Undocumented" below for more information about your rights.

5. Does AB 5 require my employer to pay employee benefits, like healthcare?

- Not directly, but if a company incorrectly classifies its workers as independent contractors and they are actually employees, they must follow all of the laws regarding employee benefits like health insurance. For example, an employer must comply with the Affordable Care Act (ACA). The ACA does not require *all* businesses to provide health benefits to their workers, but some large employers may face penalties if they don't make affordable coverage available. For instance, businesses with 50 or more full-time employees could face penalties if they do not offer health coverage or if their coverage is not affordable. All businesses need to comply with the ACA. Some cities and jurisdictions also have their own local laws that businesses must comply with, such as Healthy SF in San Francisco. For specific questions, see the "How to Get Help" section below.

WHAT AB 5 ACTUALLY SAYS ABOUT EMPLOYEES AND INDEPENDENT CONTRACTORS

6. Can I still have flexible hours as an employee?

- Yes! Being an employee can come with flexible and even part time job hours if that's how your employer chooses to structure the work. **Any employer who tells you that you cannot have flexible hours because of AB 5 is wrong.** As described above, a worker does not need to be an independent contractor to have flexibility and autonomy at work.

7. Does AB 5 kill industries that rely on independent contracting, e.g. therapists, health care, stylists?

- No. First, the new law contains several exemptions, including for doctors, psychologists, and lawyers - the type of workers who traditionally have power and special skills in the workplace and who would likely already be exempt from some wage and hour laws.
- Other licensed professionals such as hairstylists, barbers, and aestheticians are also exempt, but the law requires the employer to ensure that these workers are truly independent while doing their job. They must establish, for example, that the worker can:

- set their own rates,
 - decide the hours they work, and
 - decide the number and type of clients they will work for.
- There are also exceptions for photographers, photojournalists, and freelance writers who do only a certain amount of work each year for a publication.
 - There are more exemptions in the law and if you think you are exempt, or your employer tells you that you are, reach out to the organizations listed in the “How to Get Help” section below for assistance.
 - It is important to note, however, that some businesses claim they will go bankrupt without independent contractors. **There is little to no evidence that companies *must* rely on independent contracting in order to survive.** That is another scare tactic.

8. Will all independent contractors automatically be reclassified as employees?

- No. While AB 5 will go into effect on January 1, 2020, **people will not be automatically reclassified by the law.** Your employer is responsible for determining whether they are following the ABC test, and the new law does not require automatic reclassification for all workers. Many workers will continue to be independent contractors under the test described above. If an employer would like to continue to hire their workers as independent contractors, they are free to do so, so long as they are able to meet the requirements of the ABC test. For some employers, this might mean extending new freedoms to their workers, such as allowing them to set their own rates, choose which customers to work for, or even to work for a competitor. For other employers, they may no longer be able to claim that their workers are independent contractors and will then have to comply with California employment laws.



9. I like working as an independent contractor. Does AB 5 prohibit me from working as an independent contractor?

- Not necessarily. It depends on your job and the work you're hired to do. AB 5 does not prohibit all independent contracting, but some workers who are independent contractors may learn that they are actually misclassified after applying the ABC test.

- It is important to note that some people like working as an independent contractor, and they may work for companies that call them one. However, this preference alone does not make a worker an independent contractor.
 - For example, some workers do not have independence and freedom at work. Instead, they are directed by the person who hired them and are instructed to use certain logos, follow specific rules, and are prevented from setting their own rates.
 - Yet, those same workers might still be required to pay for their own equipment and bear all the financial, personal safety, and health risks of their job, while the companies they work for build wealth off their work.
- If a worker is truly an independent contractor, they should be able to set their own terms, rates of pay, and choose the clients they want to work with. For example, an independent plumber hired by a retail store sets their own hours and rates, uses their own equipment, and can decline any and all projects. They are only obligated to finish jobs they agree to perform and they work without detailed supervision or direction. If an employer is able to offer this level of freedom and control, then a worker may be an independent contractor.

10. Does AB 5 guarantee collective bargaining rights for independent contractors?

- No, not directly. For many workers, the ability to form a union and exert collective bargaining rights is governed by federal law, which AB 5 does not change.
- For workers who are prevented from forming a union under federal law, California could adopt a separate law to allow them to form a union (as it has for farm workers), but that has not happened yet.
- **However**, there are always ways for workers to engage in collective action and assert their rights, even if they're not forming a union. See the "How to Get Help" section below for organizations who might be able to advise you of your rights.

SPECIFIC QUESTIONS FOR PEOPLE WHO ARE UNDOCUMENTED

11. How does this bill affect people who are working and undocumented?

- With very few exceptions, **people who are working and undocumented have access to the same legal rights and remedies provided to any other worker** under federal, state, and local laws. All workers, regardless of immigration status:
 - Are protected against wage theft,
 - May access workers' compensation,
 - Have the right to be free from discrimination and harassment at work, and
 - May access state programs such as Paid Family Leave or State Disability Insurance.

- Additionally, if you have been misclassified, you have the right to seek relief and bring a claim against your employer for back wages, meal and rest breaks, and other rights for the time that you were being misclassified.
- If you have not been misclassified, then nothing changes. You are still able to work as an independent contractor, set up your own business as an entrepreneur, and contract with employers for services under certain circumstances. You are also able to apply for business and professional licenses without a Social Security Number. However, if you have your own business and have concerns about your employment status, see the “How to Get Help” section below.

12. As someone who is undocumented, what are my rights as an independent contractor or business?

- You are able to become an independent contractor and apply for a business license without a Social Security Number (SSN). Additionally, California law allows anyone to use an Individual Tax Identification Number (ITIN) instead of an SSN to apply for any professional license issued by the state Department of Consumer Affairs, including a State Bar license, a Real Estate license, and a Contractor's license. The Department of Consumer Affairs is explicitly prohibited from denying a professional license to someone based on their immigration status. For more resources on becoming an independent contractor and starting your own business, visit [Immigrants Rising](#).

13. What are my rights as a day laborer?

- **AB 5 and the ABC test apply to day laborers just like all other workers.** However, applying the test can be more challenging for day laborers because of the nature of construction and landscaping industries, such as strict hiring structures; promises to pay by the day or by the project regardless of the number of hours worked; the use of personal tools and equipment on the job; and the frequent absence of any written contracts or payroll systems.
- If the person or business that hired you can show that the nature of your work satisfies the ABC test, you may be considered an independent contractor. As an independent contractor, it is important to keep in mind that if your work involves construction or alteration of any building, highway, road, parking facility, railroad, excavation, or other structure and the project costs more than \$500, you will need to obtain a contractor's license. Information on how to apply for a contractor's license is available through the [Contractor's State Licensing Board](#). You can apply for this license even if you do not have a Social Security Number (SSN).
- If you are a construction or landscaping employee who was misclassified as an independent contractor, you could be owed wages for work that you performed. To find

out more, contact [Legal Aid at Work](#) (which has clinics around the state), [Koreatown Immigrant Workers Alliance](#), or the [Wage Justice Center](#).

HOW TO GET HELP

14. I have been incorrectly classified as an independent contractor OR my employer fired me because of AB 5, saying that the new law forced them to fire me. What can I do?

- You have protections! First, AB 5 does not, by its terms, require any employer to fire someone who works for them, and anyone who says that is wrong.
- If your employer fired you and you should have actually been an employee, you may already have a claim against your employer.
 - This is because AB 5 restates *existing law* related to defining who is an employee or independent contractor. Therefore, you may have a claim against your employer for unlawful retaliation (if you were simply inquiring about your classification), back wages, meal and rest breaks, and other benefits.
 - This is true even if you are undocumented, because with few exceptions, **people who are undocumented have access to the same legal rights and remedies** provided to any other worker under federal, California, and local laws.
- Third, AB 5 gives cities and the Attorney General in California the power to force a company to stop misclassifying their workers. Unfortunately, not all cities have this power, but if your city is covered (e.g., [Los Angeles](#), [San Francisco](#), [San Diego](#), and [San Jose](#)), you can write a letter to your city attorney requesting relief. For more information, contact a local legal services provider listed below.
- Finally, the law is designed to prevent worker abuse. As long as your employer is able to establish that they meet the ABC test, then nothing about your work relationship needs to change.

15. I've signed an arbitration agreement with my employer as a part of my contract. What do I do?

- For any existing agreement you already signed, reach out to a legal services provider listed below. Many times these arbitration agreements cannot be enforced, which means you may have the power to go to court or the Labor Commissioner to enforce your rights.
- For any new agreements or a change to an existing agreement, you may have more rights. A new law that also goes into effect on January 1, 2020 (Assembly Bill 51), prohibits employers from forcing employees to agree to certain terms in an arbitration agreement as a condition of employment.

- After January 1, 2020, review any new agreement or modification that your employer presents for your signature, since you may have the right to refuse to sign.
- Importantly, when the new law goes into effect, an employer may not refuse to hire you, fire you, or retaliate against you for not agreeing to waive your right to bring a wage claim, for example.
- However, you may want to contact a legal service provider identified below to discuss the facts of your case, since the new law is expected to be challenged.

16. I still believe that I am being misclassified as an independent contractor, when in fact I'm an employee. However, my employer still says that I'm an independent contractor or that my work falls into one of the exceptions in the bill. What do I do?

- You have several options. For example, many non-profit legal service providers may be able to help and are members of the [Coalition of Low Wage and Immigrant Worker Advocates \(www.cliwa.org\)](http://www.cliwa.org) including:
 - [Legal Aid at Work](#) (which has clinics around the state),
 - [Katharine & George Alexander Community Law Center](#),
 - [Koreatown Immigrant Workers Alliance](#),
 - [Bet Tzedek](#),
 - [Centro Legal de la Raza](#),
 - [Asian Americans Advancing Justice-Asian Law Caucus](#),
 - [Center for Workers' Rights](#),
 - [Women's Employment Rights Clinic](#), and
 - [Community Legal Services in East Palo Alto](#).
- If you're a driver for Uber or Lyft, or get your work through an app, get in contact with [Gig Workers Rising](#), [Rideshare Drivers United](#), [Tech Workers Coalition](#), [Mobile Workers Alliance](#), or the [National Domestic Workers Alliance](#).
- Finally, you can also file a complaint with the state's California Labor Commissioner's Office on your own. Learn about how to file a complaint by going to: <https://www.dir.ca.gov/dlse/HowToFileWageClaim.htm>.

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