



## Relief Veterinarians: Employee or Independent Contractor?

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**T**he worker classification of relief veterinarians has been a hot button issue for many years. Traditionally, relief veterinarians and veterinary practices have preferred the classic independent contractor arrangement. However, given recent changes in worker classification laws and the legal risks associated with misclassification, it is a good time for both relief veterinarians and veterinary practices to revisit their independent contractor agreements to determine whether currently classified independent contractors are, in fact, properly classified.

As a brief background, on April 30, 2018, the California Supreme Court issued its opinion in *Dynamex Operations West, Inc. v. Superior Court* (“*Dynamex*”), adopting new standards for determining whether a California worker should be classified as an employee or an independent contractor for the purposes of wage orders adopted by California’s

Industrial Welfare Commission. On January 1, 2020, California Governor Gavin Newsom signed AB 5, expanding the application of *Dynamex* and making it more difficult for California workers to qualify as independent contractors. While this new standard has upended many traditional independent contractor industries, the California legislature acknowledged that some industries should be exempt from the AB 5 standard and, instead, the traditional analytical standard (known as the “*Borello*” test) should apply. Thus, AB 5 may have codified the *Dynamex* ruling, but it also carved out several exceptions, including for veterinarians.

AB 5 requires the application of the “ABC Test” to determine if workers are employees or independent contractors for purposes of the Labor Code, the Unemployment Insurance Code, and the Industrial Welfare Commission’s wage orders. Under the ABC Test, a worker is considered an employee and not an independent contractor unless the hiring entity satisfies all three of the following

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

By contrast, the *Borello* test relies on multiple factors, including whether the potential employer has all necessary control over the manner and means of accomplishing the result desired (although such control need not be direct, actually exercised, or detailed). This factor must be considered along with other factors, including but not limited to: (1) whether the worker performing the services holds themselves out as being engaged in an occupation or business distinct from that of the employer; (2) whether the work is a regular or integral part of the employer's business; (3) whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work; (4) whether the worker has invested in the business; (5) whether the worker hires their own employees; (6) whether the employer has a right to fire at-will; and (7) whether or not the worker and the potential employer believe they are creating an employer-employee relationship. Under *Borello*, no single factor controls the determination. Instead, the test relies on 13 different factors requiring consideration of the totality of circumstances attending the relationship. Accordingly, relief veterinarian classification can be complex, and subject to a case-by-case determination.

Both the *Borello* multifactor test and the ABC Test create a rebuttable presumption that the worker is an employee, and the hiring entity thus bears the burden

of establishing that the worker is an independent contractor. The ABC Test is designed to be more predictable than the multifactor approach used under *Borello*. While AB 5 itself may not have changed the classification test applicable to veterinarians, the analytical landscape has shifted, and there are practical implications to understand for relief veterinarians.

You may ask, what is the big deal, particularly if the worker wants to be classified as an independent contractor and the parties have agreed to this classification, and little to no risk flows to the worker? The party that bears the risk is the employer. In the event the worker is in fact misclassified, the employer could face significant liability—even if both the employer and employee agree to the classification. Employees are entitled to certain rights that independent contractors do not typically enjoy, such as overtime, benefits, meal and rest breaks, and more. Furthermore, federal and state agencies may look back to determine if employers correctly withheld taxes, disability, and other payments, and paid for workers' compensation benefits.

In the veterinary industry, many practices rely on relief veterinarians and the classification of those veterinarians as independent contractors. This article does not conclude that all relief veterinarians must be employees. Instead, it is a reminder to review any and all independent contractor agreements and their performance to determine whether such veterinarians may be classified as independent contractors. With recent legislation adversely impacting independent contractor designations in multiple industries, many current independent contractors have been given a moment to pause and ask whether they are in fact properly classified. Again, the penalties associated with misclassification can be high and can lead to significant employer liability.

The bottom line is that although AB 5 has been in effect for nearly three years, California veterinarians are still largely left guessing whether their classification is proper under the *Borello* standard. Given the trends discussed above, it will likely become increasingly difficult and risky to classify workers as independent contractors. Consequently, it is important for practices utilizing relief veterinarian assistance to revisit their relationships to determine whether an independent contractor classification is correct. In uncertain cases, consult qualified legal counsel! ■

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*Jizell Lopez is a civil litigation attorney who primarily represents clients in federal and state court litigation and before administrative agencies regarding all manner of employment claims, including single plaintiff lawsuits, class action lawsuits, and wage and hour representative lawsuits. Jizell's practice includes allegations of harassment, discrimination, wrongful termination, retaliation, wage and hour non-compliance, and more.*