

INDEPENDENT CONTRACTORS

Real Estate Exemptions

Executive Summary

In 2019, **California** enacted [AB 5](#), which made it more difficult for many businesses to classify workers as independent contractors. Under the bill, employers must meet a three-pronged test, known as the ABC Test, in order to classify a worker as an independent contractor.

The bill affected broad swaths of workers in the state, however it was particularly notable in that it contained a specific carve out for Real Estate, exempting real estate licensees from the ABC Test requirement. *To date, California remains the only state that has recently enacted an independent contractor carve-out exemption for real estate.*

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However, in the wake of AB 5, several other states have been active in attempting to enact similar ABC legislation. Legislation was introduced in **New Jersey** during the past session.

Legislators in **Illinois** and **New York** also [openly discussed similar legislation](#), though ultimately nothing was introduced.

Following the enactment of AB 5, it was widely expected that there would be an uptick in similarly restrictive independent contractor legislation. That expectation did not materialize. Instead, there has been a backlash against AB 5, most notably seen through the success of California's [Proposition 22](#), which scaled back some of the protections of AB 5 for certain occupations by reclassifying them as independent contractors. Because of this backlash, and the tepid rate of economic recovery, legislators will be extremely hesitant about enacting policy similar to AB 5 in the coming legislative session. In 2021, Republican successes in state-level legislative elections may further spur policy changes favoring additional protections to the employer-contractor relationship.



Federal Outlook

Federal policy on independent contractors currently remains in limbo due to the recent federal administrative transition. Under the Trump Administration, [new final rules](#) were scheduled to take effect on March 8, 2021. However, the Biden Administration has implemented a temporary freeze on these rules, leaving in question both when, and if, these rules will take effect.

The Department of Labor's adopted rules under the Trump Administration would have reaffirmed a "[five-factored](#)" test to determine contractor status. These rules would have reaffirmed the following considerations when determining whether an individual is a contractor or an employee:

1. An "economic reality" test, to determine whether a contractor is dependent on an employer for work.
2. Identifying the nature and degree of control over work performed, and the worker's opportunity for profit or loss.
3. Additional factors, including required skill, degree of permanency and the level of integration of work.
4. The actual practice of the worker.
5. Additional fact-specific examples.

The future of these rules remains undecided, as the new administration continues to re-evaluate regulations promulgated by the previous administration.



Appendix A: Current Legal Status of Contractors

State	General Classification Test	Workers' Compensation Exemption?	Unemployment Insurance Exemption?	Recent Enacted Legislation
Alabama	RTC Test	Yes	No	
Alaska	ABC Test	Yes	Yes	
Arizona	RTC	Yes	No	
Arkansas	ABC	Yes	No	
California	ABC	No	Yes	AB 5 , AB 2257
Colorado	ABC "A and C" only	Yes	Yes	
Connecticut	ABC	Yes	No	
Delaware	ABC	Yes	Yes	
District of Columbia	RTC	Yes	No	
Florida	RTC	Yes	No	
Georgia	ABC	Yes	Yes	
Hawaii	ABC	No	Yes	
Idaho	ABC "A and C" only	No	Yes	
Illinois	ABC	Yes	Yes	
Indiana	ABC	Yes	No	
Iowa	RTC	Yes	Yes	HF 650
Kansas	ABC	Yes	Yes	
Kentucky	RTC	No	No	
Louisiana	ABC	Yes	Yes	
Maine	ABC	Yes	No	
Maryland	ABC	Yes	No	
Massachusetts	ABC	Yes	Yes	
Michigan	RTC	No	Yes	

State	General Classification Test	Workers' Compensation Exemption?	Unemployment Insurance Exemption?	Recent Enacted Legislation
Minnesota	RTC	No	Yes	
Mississippi	RTC	No	No	
Missouri	RTC	No	Yes	
Montana	ABC "A and C" only	Yes	Yes	
Nebraska	ABC	No	Yes	
Nevada	ABC	No	Yes	SB 493
New Hampshire	ABC	Yes	No	
New Jersey	ABC	No	Yes	AB 1439 , SB 863 , SB 2753 *Note this legislation remains pending through 2021.*
New Mexico	ABC	Yes	No	
New York	RTC	Yes	Yes	
North Carolina	RTC	No	No	
North Dakota	RTC	No	No	
Ohio	ABC	No	No	
Oklahoma	ABC "A and B or A and C"	Yes	Yes	HB 1095 , HB 2367
Oregon	ABC	No	Yes	
Pennsylvania	ABC "A and C" only	Yes	No	HB 716
Rhode Island	ABC	Yes	Yes	
South Carolina	RTC	Yes	Yes	SB 214
South Dakota	RTC	No	No	HB 1048
Tennessee	ABC	No	Yes	HB 539
Texas	RTC	No	No	



State	General Classification Test	Workers' Compensation Exemption?	Unemployment Insurance Exemption?	Recent Enacted Legislation
U.S. - Federal	RTC	No	No	
Utah	ABC	Yes	Yes	
Vermont	ABC	Yes	No	
Virginia	ABC "A and B or A and C"	Yes	Yes	HB 984 , HB 1199 , HB 1407 , HB 1646 , SB 744
Washington	ABC	No	No	
West Virginia	ABC	No	No	
Wisconsin	ABC "A and C" only	Yes	No	
Wyoming	ABC "A and C" only	No	Yes	

Appendix B: Currently Pending Legislation, February 2021



Available Bills (36 bills)

Bill #	Summary	Ranking	Status
Arizona HB 2194 2021 Rep. Richard Andrade (D- AZ-029)	misclassification; tax fraud; task force		01/26/2021 - House Second Read History
California AB 25 2021 - 2022 Assemb. Kevin Kiley (R-CA-006)	Existing law requires a 3-part test, commonly known as the "ABC" test, to determine if workers are employees or independent contractors for purposes of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission. Under the ABC test, a person providing labor or services for remuneration is considered an employee rather than an independent contractor unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is customarily engaged in an independently established trade, occupation, or business. Existing law charges the Labor Commissioner with the enforcement of labor laws, including worker classification. Existing law exempts specified occupations and business relationships from the application of the ABC test described above. Existing law, instead, provides that these exempt relationships are governed by the multifactor test previously adopted in the case of S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello). This bill would generally repeal provisions relating to the "ABC" test for various specified occupations and business relationships. The bill would, instead, require the determination of whether a person is an employee or an independent contractor to be based on the specific multifactor test set forth in Borello, including whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired, and other identified factors. The bill would make related, conforming changes.		01/11/2021 - Referred to Committee on Committee on Labor and Employment History
California SB 28 2021 - 2022 Caballero, Anna M.	S.B.28: Digital Infrastructure and Video Competition Act of 2006.		01/28/2021 - Referred to Committee on Rules History
Florida SB 644 2021 Sen. Annette Taddeo (D- FL-040)	Reemployment Assistance; Increasing the minimum and maximum weekly and yearly benefit amounts for reemployment assistance; increasing the duration of such benefits; providing exceptions to reemployment assistance requirements during a declared state of emergency or public health emergency; creating the Reemployment Assistance Benefits Task Force adjunct to the Department of Economic Opportunity; requiring the task force to submit a report to the Governor and the Legislature by a specified date, etc.		01/28/2021 - Referred to Commerce and Tourism; Governmental Oversight and Accountability; Appropriations History
Related Bills: HB 207 SB 466 SB 592 SB 910			
Indiana SB 257 2021 Sen. Travis Holdman (R- IN-019)	Employee misclassification.		01/11/2021 - First reading: referred to Committee on Tax and Fiscal Policy; Authored by Senator Niezgodski History
Missouri HB 555 2021 Rep. J. "Jay" Eggleston (R-MO-002)	H.B. 555: Modifies provisions relating to taxation		01/29/2021 - Referred: Ways and Means(H) History



Bill #	Summary	Ranking	Status
Missouri SB 148 2021 Sen. Bob Onder (R-MO-002)	S.B. 148: Creates new provisions relating to worker classification		01/21/2021 - Second Read and Referred S Economic Development Committee History
Missouri SB 163 2021 Sen. Mike Cierpiot (R-MO-008)	Current Bill Summary SB 163 - This act modifies provisions relating to communications services offered in political subdivisions. The act modifies the definition of "gross revenues" for provisions of law relating to video service providers. Under the act, a franchise entity may collect a video service provider fee equal to not more than 5% of the gross revenues of a video service provider providing service in the geographic area of such franchise entity.		01/28/2021 - Second Read and Referred S Commerce, Consumer Protection, Energy and the Environment Committee History
New Jersey AB 1439 2020 - 2021 DeCroce, BettyLou	Revises test for employment or independent contractor status under certain State labor laws.		01/14/2020 - Introduced, Referred to Assembly Labor Committee History
New Jersey AB 3303 2020 - 2021 Zwicker, Andrew	Concerns payment of independent contractors.		02/25/2020 - Introduced, Referred to Assembly Labor Committee History
New Jersey SB 863 2020 - 2021 Sweeney, Stephen M.	Concerns employment status of individuals with respect to wage and hour and unemployment laws.		01/14/2020 - Introduced in the Senate, Referred to Senate Labor Committee History
New Jersey SB 2697 2020 - 2021 Sweeney, Stephen M.	""New Jersey COVID-19 Emergency Bond Act,"" authorizes issuance of State bonds totaling up to \$9.9 billion.		07/16/2020 - Substituted by A4175 (1R) History
Related Bills: AB 4175			
New Jersey SB 2753 2020 - 2021 Gopal, Vin	Concerns UI benefits provided to workers.		07/30/2020 - Introduced in the Senate, Referred to Senate Labor Committee History
Related Bills: AB 4441			
New York AB 1110 2021 - 2022 Assemb. Harry Bronson (D-NY-138)	A.1110: Relates to the payment of independent contractors		01/07/2021 - Referred To Labor History



Bill #	Summary	Ranking	Status
New York AB 1242 2021 - 2022 Assemb. Kevin Cahill (D-NY-103)	A.1242: Includes certain independent contractors in the state directory of new hires to aid in the administration of the child support enforcement program		01/07/2021 - Referred To Ways And Means History
Related Bills: SB 346			
New York AB 2079 2021 - 2022 Assemb. Catalina Cruz (D-NY-039)	A.2079: Relates to the resolution of certain claims by certain employees		01/14/2021 - Referred To Judiciary History
Related Bills: SB 766			
New York AB 2685 2021 - 2022 Assemb. Latoya Joyner (D-NY-077)	A.2685: Relates to dependent workers		01/20/2021 - Referred To Labor History
New York AB 4197 2021 - 2022 Assemb. Ken Blankenbush (R-NY-117)	A.4197: Relates to fees associated with agreements between municipalities and fiber optic utility companies		02/01/2021 - Referred To Corporations, Authorities And Commissions History
Related Bills: SB 1863			
New York SB 1863 2021 - 2022 Sen. Patty Ritchie (R-NY-048)	S.1863: Relates to fees associated with agreements between municipalities and fiber optic utility companies		01/16/2021 - Referred To Transportation History
New York SB 3720 2021 - 2022 Sen. Robert "Rob" Ort (R-NY-062)	S.3720: Relates to fees for the use and occupancy of the state right of way by fiber optic utilities; and directing the department of transportation to study the cost of administering state highway rights of way projects		01/30/2021 - Referred To Transportation History
New York SB 3910 2021 - 2022 Sen. Timothy "Tim" Kennedy (D-NY-063)	S.3910: Relates to agreements for fiber optic use and occupancy of state right of way		02/01/2021 - Referred To Transportation History



Bill #	Summary	Ranking	Status
North Dakota HB 1419 2021 Rep. Jason Dockter (R-ND-007)	A BILL for an Act to create and enact a new subsection to section 40-05-01 and a new section to chapter 40-22 of the North Dakota Century Code, relating to the authority of a county or city to levy an infrastructure fee in lieu of special assessments; and to amend and reenact sections 11-09.1-05, 11-11-55.1, 40-05.1-06, 40-12-02, and 40-23-21 of the North Dakota Century Code, relating to the authority of cities and counties to levy an infrastructure fee in lieu of special assessments and special assessment fund balances.		01/29/2021 - Hearing Scheduled: Political Subdivisions Committee 09:00 AM; Location: 327B History
Oklahoma SB 380 2021 - 2022 Sen. Micheal Bergstrom (R-OK-001)	S.B.380: Independent contractor classification; creating the Uniform Worker Classification Act. Effective date.		02/02/2021 - Second Reading referred to Business, Commerce and Tourism History
Oregon HB 2489 2021 Rep. Paul Holvey (D-OR-008)	Directs those agencies that administer certain state laws to use specific criteria to determine whether individual is employee or independent contractor and to cooperate in adopting rules to facilitate consistency in application of definition of independent contractor and provisions of Act. Creates rebuttable presumption that individual who performs services for remuneration for hiring entity is employee when employment status of individual is at issue.		01/19/2021 - Referred to Business and Labor. History
Utah HB 80 2021 Rep. Walt Brooks (R-UT-075)	Data Security Amendments		01/20/2021 - House to standing committee; House Business and Labor Committee History
Virginia HB 801 2020 - 2021 Karrie K. Delaney	Worker classification; penalties. Prohibits a contractor from classifying an individual who performs delivery services or construction labor services for the contractor as the contractor's independent contractor if he is an employee of the contractor.		02/11/2020 - Left in Labor and Commerce History
Virginia HB 984 2020 - 2021 Del. Karrie Delaney (D-VA)	Misclassification of workers; cause of action. Authorizes an individual who has not been properly classified as an employee to bring a civil action for damages against his employer for failing to properly classify the employee if the employer had knowledge of the individual's misclassification. The court may award damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance, or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the employee in bringing the action. The measure provides that an individual who performs services for a person for remuneration shall be presumed to be an employee unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines.		03/10/2020 - Approved by Governor-Chapter 203- (effective 7/1/20) History
Virginia HB 1199 2020 - 2021 Del. Kathy Tran (D-VA)	Employee misclassification; retaliatory actions prohibited; civil penalty. Prohibits an employer from discharging, disciplining, threatening, discriminating against, or penalizing an employee or independent contractor because the employee or independent contractor reported or plans to report that an employer or any officer or agent has failed to properly classify an individual as an employee and failed to pay required benefits or other contributions. The measure also prohibits such actions against an employee or independent contractor who is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action. These prohibitions apply only if an employee or independent contractor acts in good faith and upon a reasonable belief that the information is accurate. The measure authorizes the Commissioner of Labor and Industry to institute proceedings against an employer who has taken such prohibited retaliatory action. Available remedies include reinstatement of the employee and recovery of lost wages. An employer that violates these provisions is subject to a civil penalty equal to the employee's lost wages.		03/10/2020 - Approved by Governor-Chapter 204- (effective 7/1/20) History

Bill #	Summary	Ranking	Status
Virginia HB 1407 2020 - 2021 Del. Jeion Ward (D-VA)	Misclassification of employees as independent contractors; Department of Taxation to investigate and enforce; civil penalties. Prohibits an employer from classifying an individual as an independent contractor if he is an employee. An individual shall be considered an employee of the party that pays the remuneration for purposes of Titles 40.1 (Labor and Employment), 58.1 (Taxation), 60.2 (Unemployment Compensation), and 65.2 (Workers' Compensation) unless it is demonstrated that such individual is an independent contractor. The Department of Taxation shall determine whether an individual is an independent contractor by applying Internal Revenue Service guidelines. Violators are subject to civil penalties and debarment from public contracts. The bill has a delayed effective date of January 1, 2021.		04/06/2020 - Approved by Governor-Chapter 681; (effective 1/1/21) History
Virginia HB 1646 2020 - 2021 Del. Paul Krizek (D-VA)	Department of Professional and Occupational Regulation; Board for Contractors; misclassification of worker prohibited. Provides that the Board for Contractors (the Board) shall require a contractor to appropriately classify all workers as employees or independent contractors, pursuant to law. Any contractor who is found to have intentionally misclassified any worker is subject to sanction by the Board.		04/06/2020 - Approved by Governor-Chapter 685 History
Virginia HB 2134 2021 - 2022 Del. Amanda Batten (R-VA-096)	Employee classification: disaster; personal protective equipment. Prohibits the consideration, in any determination regarding whether an individual is an employee or independent contractor, for the purposes of a civil action for employment misclassification, unemployment compensation, and workers' compensation, of the provision of personal protective equipment by a hiring party to the individual in response to a disaster caused by a communicable disease of public health threat for which a state of emergency has been declared.		02/01/2021 - Read second time and engrossed History
Virginia HB 2296 2020 - 2021 Del. Roxann Robinson (R-VA-027)	Worker classification; independent contractors.		01/18/2021 - Presented and ordered printed 21102960D; Referred to Committee on Labor and Commerce History
Virginia SB 662 2020 - 2021 Sen. Jennifer Boysko (D-VA)	Employee misclassification; retaliatory actions prohibited; civil penalty. Prohibits an employer from discharging, disciplining, threatening, discriminating against, or penalizing an employee or independent contractor because the employee or independent contractor reported or plans to report that an employer or any officer or agent has failed to properly classify an individual as an employee and failed to pay required benefits or other contributions. The measure also prohibits such actions against an employee or independent contractor who is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action. These prohibitions apply only if an employee or independent contractor acts in good faith and upon a reasonable belief that the information is accurate. The measure authorizes the Commissioner of Labor and Industry to institute proceedings against an employer who has taken such prohibited retaliatory action. Available remedies include reinstatement of the employee and recovery of lost wages. An employer that violates these provisions is subject to a civil penalty equal to the employee's lost wages.		03/11/2020 - Approved by Governor-Chapter 271- (effective 7/1/20) History
Virginia SB 744 2020 - 2021 Sen. Jeremy McPike (D-VA)	Misclassification of employees as independent contractors; Department of Taxation to investigate and enforce; civil penalties. Prohibits an employer from classifying an individual as an independent contractor if he is an employee. An individual shall be considered an employee of the party that pays the remuneration for purposes of Titles 40.1 (Labor and Employment), 58.1 (Taxation), 60.2 (Unemployment Compensation), and 65.2 (Workers' Compensation) unless and until it is shown that such individual is an independent contractor under Internal Revenue Service guidelines. Violators are subject to civil penalties and debarment from public contracts. The bill has a delayed effective date of January 1, 2021.		04/06/2020 - Approved by Governor-Chapter 682; (effective 1/1/21) History
Virginia SB 894 2020 - 2021 Sen. Richard Saslaw (D-VA)	Misclassification of workers; cause of action. Authorizes an individual who has not been properly classified as an employee to bring a civil action for damages against his employer for failing to properly classify the employee if the employer had knowledge of the individual's misclassification. The court may award damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance, or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the employee in bringing the action. The measure provides that an individual who performs services for a person for remuneration shall be presumed to be an employee unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines.		03/18/2020 - Approved by Governor-Chapter 381; (effective 7/1/20) History

Bill #	Summary	Ranking	Status
Virginia SB 1323 2021 - 2022 Sen. Siobhan Dunnavant (R-VA-012)	Worker classification; independent contractors.		02/01/2021 - Committee amendments; Passed by indefinitely in Judiciary with letter (10-Y 5- N) History

