

# California AB-5

Collateral Risk Network  
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# Where Are We Going?

- Discuss California's AB-5 – the new “gig worker law” in California, signed by Governor Newsom earlier this month.
- Classification of appraisers on AMC appraiser panels as independent contractors.
- Similar problem to the prior wave of class litigation by employee appraisers for overtime (on the basis that they were not properly treated as exempt employees) – same law firms likely to pursue the claims and soliciting plaintiffs.
- Federal court had ruled in a Landsafe case that appraisers were not properly treated as exempt and this ruling spawned multiple new claims.

# Appraisers as Independent Contractors

The pure AMC model, of course, is based on utilizing a panel of independent contractor appraisers to perform appraisals ordered by clients.

- No single standard for determining whether an appraiser is properly treated as an independent contractor.
- Varies by state versus federal, and also by purpose.
- Nevertheless, a general theme that runs through most tests – it is the degree of the firm’s control over the worker.
- IRS - a worker generally will be considered an employee when: “the person for whom services are performed [the appraisal firm] has the right to control and direct the individual who performs the services [the appraiser], not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.”

# Appraisers as Independent Contractors

A few key factors – but none 100% determinative:

- Is the appraiser required to be present on the firm's premises?
- Is the appraiser required to work certain hours or days?
- Is the appraiser required by the firm to devote substantially full time to the firm?
- Is the appraiser permitted to accept and be paid for work independently of the firm, and does the appraiser actually take on independent work?
- Are other appraisers in the firm (other than the firm's owners) treated as employees?

These are not generally problems for the pure AMC model.

# But Then Came the *Dynamex* Decision in California

- California historically followed a test pretty similar to most states' tests. It is set forth in a case called *Borello* and is called the “economic realities” test.
- In April 2018, the California Supreme Court adopted a harsh version of the “ABC test” for determining whether a worker is an employee or contractor for purposes of California “Industrial Wage Orders.” *Dynamex Operations West, Inc. v. Superior Court*.

# Independent Contractor Status

To meet the burden, an employer must establish all three of the following:

*(A) that the worker is free from the control and direction of the hiring firm in connection with the performance of the work, both under the contract for the performance of the work and in fact; and*

*(B) that the worker performs work that is outside the usual course of the firm'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.*

## Now, We Have California AB-5

- **Codifies ABC test in *Dynamex* for all purposes under California employment law.**
- ***Dynamex* only related to overtime, break time, wage issues (what we call Wage Orders in California).**
- **AB-5 makes the ABC test apply also to an employer's other obligations - most relevant to AMCs are Labor Code section 2802, unemployment insurance and potential application of PAGA.**
- **Has a number of specific exceptions – examples “real estate licensees” and “referral companies.” But these do not apply to appraisers or AMCs (in relation to appraisers).**

# Relevant Current Law - 2802

## California Labor Code section 2802?

**(a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. . . *(think: E&O, mileage, computer, MLS, cell phone and liability)***

**(c) For purposes of this section, the term “necessary expenditures or losses” shall include all reasonable costs, including, but not limited to, attorney’s fees incurred by the employee enforcing the rights granted by this section.**

# Relevant Law - PAGA

## What's PAGA?

**The California Private Attorneys General Act.**

**PAGA “authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations.”**

**It essentially enables California employees to become bounty hunters to enforce state employment laws.**

**If the employee succeeds, PAGA permits the employee to keep to keep 25 percent of any civil penalties collected, with 75 percent going to the state (Cal. Lab. Code § 2699(f)).**

**The civil penalties threatened in PAGA actions can be extreme. PAGA provides default civil penalties of \$100 for every employee for every pay period for the first violation, and \$200 for every violation thereafter.**

## California AB-5

- **Two primary positions that AMC's (and appraisers) will have against reclassification:**
  1. **An AMC's business is not "performing appraisals" – this is the equivalent to Uber's contention that "Uber is not a transportation company; it's a technology platform for drivers." (But note – a hybrid AMC/hybrid firm will have extra difficulty making this argument.)**
  2. **Application of the "business-to-business" exception in AB-5.**

# California AB-5

- **What is the “usual course” of an AMC’s business?**
- **Is the performance of appraisal services by appraisers part of the usual course of business?**

# California AB-5

The *Dynamex* opinion provides a simple example for understanding how Part B works:

*When a retail store hires an outside plumber to repair a leak in a bathroom on the premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business . . . . On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation . . . .*

# California AB-5

- **Appraisers working for AMCs fall somewhere in the middle of that example.**
- **This is an issue that may be fought over.**
- **We can find helpful language in materials describing the AMC business model under the federal final rule “Minimum Requirements for Appraisal Management Companies.”**

# Dodd-Frank and Final AMC Rule

**“ . . . the Agencies believe that the fundamental reasons to distinguish between AMCs and appraisal firms are that the business models of AMCs and appraisal firms are different . . . This conclusion is consistent with the fact that AMCs provide appraisal management services to third parties, including retaining appraisers to perform appraisals, but AMCs do not perform appraisals. By contrast, appraisal firms perform appraisals using one or more of the firm's employees or partners.”**

**-- Summary to Final Rule “Minimum Requirements for Appraisal Management Companies.”**

# Definition of an AMC in California's AMC Law

**(1) “Appraisal management company” means any person or entity that satisfies all of the following conditions:**

**(A) Provides appraisal management services to creditors or to secondary mortgage market participants, including affiliates.**

**(B) Provides those services in connection with valuing a consumer’s principal dwelling as security for a consumer credit transaction or incorporating such transactions into securitizations.**

**(C) Within a given 12 calendar month period oversees an appraiser panel of more than 15 state-certified or state-licensed appraisers in a state or 25 or more state- certified or state-licensed appraisers in two or more states, as described in Section 11345.5.**

# California AMC Law

**(f) “Appraiser panel” means a network, list, or roster of licensed or certified appraisers approved by an appraisal management company to perform appraisals as independent contractors for the appraisal management company. . . . An appraiser is an independent contractor for purposes of this part if the appraiser is treated as an independent contractor by the appraisal management company for purposes of federal income taxation.**

**-- Definition of “appraiser panel” under California AMC law**

# The Other Side

**But plaintiff's lawyers will dig up material like this (comments submitted during rulemaking):**

**Notably, AMCs and appraisal firms provide common services to the valuation industry, regardless of whether the appraisers are employees or independent contractors. These services include but are not limited to recruiting, selecting, and retaining appraisers, contracting with appraisers to perform appraisal assignments, managing the appraisal order process, and providing quality control services for the completed appraisals. These services track the definition of "appraisal management services" set forth in the Proposed Rule (§34.214(d)).**

“As appraisal firms provide the same services as an AMC, [XXXXXXX believes . . . creating a distinction based on the employment status of the appraiser does not further the goal of consumer protection and ultimately creates an uneven playing field for companies providing identical services.

# California AB-5

NAAMC believes the definition of an Appraisal Management Company (“AMC”) was arbitrary and promoted by those parties whose source of federally-regulated residential appraisal business was severely cut by unintended consequences of the Home Valuation Code of Conduct (“HVCC”) in 2009 and further promulgated by the Appraiser Independence Requirements (“AIR”) and then made into law by Dodd-Frank.

Those regulations were imposed directly on those appraisal companies whose business model was to provide appraisal management services in local, regional or national foot prints with the decision to work with independent appraiser partners instead of the Appraisal Company/Firm employee model (“Firm”). The business structure for an AMC or a Firm is exactly the same. The owner supplies the actual work and company infrastructure while the independent appraiser/employee appraiser provides the actual appraisal services. The only difference is the independent appraisers who voluntarily choose to work with AMC’s are 1099 independent contractors while the firm appraisers are employees. There are many appraisal firms whose reach is not only entire state but in some cases, multi-state.

# California AB-5

- Even courts disagree on the meaning of “usual course of business.”
- Some courts look at how the business describes itself — that could be a problem for unprepared AMCs. I see many present AMC websites that say something like this: “we offer appraisals and valuation products and services to our clients” and then the AMCs typically have a price-sheet for their clients to order each type of appraisal service or product.
- Other courts think that “usual course” gets at whether the service is a frequent or major part of the overall business conducted by the company — AMCs could have a problem with that interpretation too.

# California AB-5

## The “business-to-business” exception:

If a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation (“business service provider”) contracts to provide services to another such business (“contracting business”), the determination of employee or independent contractor status of the business services provider shall be governed by *Borello*, if the contracting business demonstrates that all of the following criteria are satisfied:

(A) The business service provider is free from the control and direction of the contracting business entity . . .

(B) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.

# California AB-5

- (C) The contract with the business service provider is in writing.**
- (D) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.**
- (E) . . .**
- (F) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.**
- (G) The business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.**

# California AB-5

- (H) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.**
- (I) The business service provider . . . provides its own tools, vehicles, and equipment to perform the services.**
- (J) The business service provider can negotiate its own rates.**
- (K) . . . the business service provider can set its own hours and location of work.**
- (L) The business service provider is not performing the type of work for which a license from the Contractor's State License Board is required. . . .**
- (2) This subdivision does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.**

# California AB-5

**AMCs that intend to try to comply with AB-5, while continuing to utilize appraisers on a panel of independent contractor appraisers, need to:**

**Consider which of the positions they are going to take as far as application of AB-5 to their operation.**

- a. Can the AMC plausibly take a position that they are not in the business of producing/selling appraisals?**
- b. Can the AMC restructure its agreements with appraisers and business practices to fit into the business-to-business exception?**

# California AB-5 – Common Questions

- Do lenders need to worry about the law if they have appraiser panels?
- What about agents/brokers providing BPOs or evaluations? (Look at the exception for “real estate licensees”)
- Property data inspector?
- Proprietary bifurcated valuations hosted by the AMC?
- Is it good enough to have a great contractor agreement? “Can you just give me a paragraph for our agreement?”
- “When do we have to comply?”
- Our AMC is located outside California, does this apply to us? (Yes, in relation to your California appraisers.)

# Thank You

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