Peter Christensen
CHRISTENSEN LAW FIRM
www.valuationlegal.com
P.O. Box 5768
Santa Barbara, CA 93150
805-689-7807

October 2019

VALUATION LEGAL NEWSLETTER

Law and regulation affecting appraisal firms and management companies

About this Issue of the Valuation Legal Newsletter

This issue addresses **California's new "gig worker" law – Assembly Bill 5 (AB 5)**. The law poses serious challenges and risks for AMCs and appraisal firms who utilize appraisers as independent contractors in the state.

I began addressing the changing legal landscape concerning appraisers as contractors for AMCs and appraisal firms last year, when the *Dynamex* decision discussed below occurred. Since then, I have been working with AMCs and firms to adjust their contractor agreements and operations and to minimize their risk relating to claims about improper classification. Now that AB 5 has passed and will become law on January 1, 2020, all AMCs and firms with contractor appraisers in California really do need to evaluate their agreements and practices with regard to independent contractor appraisers.

The first article below lays out the law of AB 5 as it applies to AMCs and appraisal firms. The second article discusses the primary legal risk of failing to adapt. At this point, however, having a plan regarding AB 5 is not just about decreasing regulatory and litigation risk; it's also an issue that lender clients are beginning to ask their AMCs and appraisal firms about.

California's New "Gig Worker" Law and Its Impact on AMCs and Appraisal Firms

What does AB 5 do?

The primary relevance of AB 5 is that it codifies the California Supreme Court's landmark opinion in *Dynamex Operations West, Inc. v. Superior Court*. In that 2018 decision, the Court held that for purposes of overtime, wage and other requirements under California's Industrial Wage Orders, a business classifying a worker as an independent contractor rather than as an employee bears the burden of establishing that the classification is proper under the so-called "ABC test." To meet this test, the firm must establish all three of the following factors to justify treating workers as contractors:

> *(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.*

Meeting any of the three parts of the ABC test could be a challenge for some AMCs and appraisal firms, but among the three factors, the hardest one that both AMCs and true firms will have to contend with is part (B) relating to whether an appraiser's work falls outside the usual course of business of the AMC or firm. Frankly, because a true appraisal firm's business is providing appraisals, rather than only managing the process of having appraisals performed by third party

About Peter Christensen

My law practice is focused on valuation services and firms, including matters involving professional liability, employment, regulation, insurance and transactions. After practicing with national firms for a decade, this has been my special niche in the law for almost 15 years.

My book ***Risk Management for Real Estate Appraisers and Appraisal Firms*** is published by the Appraisal Institute.

appraisers as an AMC does, it's not realistic for appraisal firms to argue successfully that the work of a contractor appraiser isn't the firm's usual business. Likewise, an AMC that maintains a staff appraiser operation and is what might be called a "hybrid" AMC/appraisal firm will also have a difficult position to defend — not only if it classifies "staff appraisers" as contractors but also in the classification of its panel appraisers. Such firms and hybrids will have to try to fit their contractor appraisers into the "business-to-business" exception mentioned below.

Even pure AMCs, however, face challenges in continuing to utilize appraisers in California as independent contractors. Essentially, AMCs will either need to: (i) succeed with arguing under Part B of the ABC test that the performance of appraisals by appraisers is outside the usual course of their business because "AMCs only manage the process" (I take a closer look at this contention in an article available in the **AB 5 Center** on www.valuationlegal.com), or (ii) establish one of the exceptions in the law. With regard to exceptions, there is one for "real estate licensees" that might appear promising at first glance, but appraisers are not defined in the California Business and Professions Code as "real estate licensees." The definition is limited to agents and brokers. The other potentially applicable exception is a "business-to-business" exception that may apply when one business is providing services to another business, as opposed to an individual worker providing services. This "safe harbor" (really more of a rough anchorage) will require significant work by AMCs and firms seeking its protection. They will need to rewrite their appraiser contractor agreements and modify some common practices.

Considering appraiser contractors under AB 5's "business-to-business" exception

Here are a few of the key items that need to be satisfied by AMCs and firms to fit contractor appraisers into the "business-to-business" exception:

- The AMC or firm must contract with an actual "business" (sole-proprietor, corporation, LLC, partnership, etc.) to perform the appraisal service, rather than contracting with individual "workers" (*i.e.*, individual appraisers).

- The appraiser business must have any business licenses or tax clearances that may be required in the jurisdiction where the appraisal work is performed.

- The AMC or firm must be able to show that the appraiser business is providing its services directly to the AMC/firm rather than to customers of the AMC/firm – this presents a challenge because under appraisal standards the "client" of the appraiser is usually defined as a lender (when the appraisal assignment is for a loan).

- The AMC or firm must be able to show that the appraiser business supplies all its own "tools" and "equipment" to perform the services (AMCs will need to consider whether any of their new cloud/software-based appraisal products cross this line).

How AB 5 creates more risk for AMCs and appraisal firms than the *Dynamex* decision (under which the ABC test already has existed for more than a year)

AB 5 creates more risk for AMCs and firms because it expands application of the ABC test beyond what are called the Industrial Wage Orders – the main practical effect of the *Dynamex* decision was that reclassified workers would be entitled to overtime under the Wage Orders. Under AB 5, the ABC test will now apply for all purposes under the California Labor Code and also for purposes of unemployment insurance. This means that a reclassified worker would be entitled potentially to recover the reimbursement of costs and expenses that is required for California employees under California Labor Code section 2802. This is a real risk for AMCs because it provides attractive financial bait for attorneys to file putative class actions when a disgruntled appraiser is willing to serve as a named plaintiff. The reason is that, while a reclassified appraiser performing occasional assignments for a single AMC probably wouldn't have worked material overtime hours for that AMC or have records of the time worked, the appraiser would certainly be able to show recoverable expenses for such items as gas, mileage, insurance, MLS fees, technology fees, etc.

The most likely ways that reclassification claims will occur under AB 5

It should be noted that most appraisers who work as independent contractors probably don't want to be employees of the AMCs and firms from which they receive assignments. There are real economic advantages to appraisers in maintaining themselves as independent business owners – namely, favorable tax deductions. Accordingly, I think a majority of appraisers and AMCs will likely be on the same side in wanting to

continue contractor status. All is fine as long as both parties stay happy. The legal claims about misclassification predictably will come when appraisers feel unfairly treated by an AMC or firm, when appraisers lose business, or when appraisers fall into economic difficulty. An appraiser sued for professional liability might also contend in a severe case that he or she is actually an employee of an AMC or firm in an effort to establish a duty to indemnify the appraiser as an employer.

Because of the high stakes, AMCs and firms with contractor appraisers in California need to start working on plans to deal with the new law and its risks.

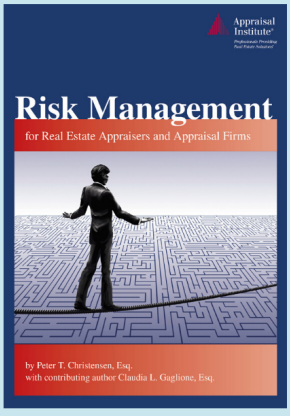
Detailed information is available on www.valuationlegal.com

More information about AB 5 and its specific application to AMCs and appraisal firms can be found in the **AB 5 Center** of www.valuationlegal.com. The materials available there include:

- AB 5 text highlighted to show the primary parts relevant to appraiser contractors and AMCs.
- Key cases and additional statutes.
- FAQs about AB 5 for appraisers and AMCs.
- The latest articles about application of AB 5 to appraiser contractors and AMCs.
- My presentations to the Real Estate Valuation Advocacy Association (REVAA) and the Collateral Risk Network (CRN).

Appraisers in CA, OR, WA and HI can register for my 4-hour online CE class "**Appraiser Liability 101**" on www.valuationlegal.com.

My book ***Risk Management for Real Estate Appraisers and Appraisal Firms*** is also available on the site or from the Appraisal Institute.



A Recent Case Demonstrating the Liability Risks to AMCs from Panelist Reclassification

A large part of the risk posed by AB 5 and the potential reclassification of appraiser contractors as employees stems from the threat of class-based litigation filed by aggrieved appraisers on behalf of themselves and other appraisers engaged as contractors by the AMC. Under California law (Labor Code section 2802), a California employee is entitled to reimbursement of expenses incurred in the course of employment for the benefit of the employer. Accordingly, an action alleging misclassification by an AMC of appraiser panelists as contractors will seek to recover expenses for such things as mileage, gas, software, portal fees, insurance, MLS and data. The action may also seek overtime on behalf of contractors who claim they worked more than eight hours in a day or more than 40 hours in a week for an AMC. Finally, the action likely would seek to recover penalties under California's Private Attorney General Act for technical labor law violations stemming from the alleged misclassification. (These laws are available in the **AB 5 Center** of www.valuationlegal.com.)

Both AMCs and large appraisal firms over the last 7 years have been afflicted by numerous class actions filed by staff employee appraisers seeking overtime wages and other remedies because they were not properly classified as exempt employees. Reclassification actions by contractor appraisers under AB 5 would be the next wave of litigation by the same law firms – unfortunately, they know where to seek plaintiff appraisers for their actions.

No significant cases seeking reclassification of appraiser contractors have yet been filed against an AMC (significant cases have been filed against appraisal firms). In a case that went to trial in California in 2017, however, a "field services" vendor management company was found liable to field service vendors it had classified as contractors. The case is *Bowerman v. Field Asset Services.* The federal district court entered a judgment that Field Asset Services should have treated these vendors as employees and that it was thus liable to them for unpaid overtime and unpaid business expenses.

To prove the key point that the company's vendor panelists should be classified as employees, rather than contractors, plaintiff's counsel offered evidence that the company "tells vendors where to go, when to go, what to do, when to get it done and how much and when they will be paid for their efforts." The evidence included:

- *To join the company's panel, vendors signed an agreement which, although referring to vendors as contractors, set forth detailed requirements for accepting assignments, scheduling property access, timely performance, photo requirements and status updating.*
- *Panelists were not given a meaningful opportunity to negotiate the agreement.*
- *Field Asset Services performed background checks.*
- *Panelists were required to use Field Asset Services' proprietary software to upload their status reports, photos and invoices.*
- *Panelists were required to respond to assignment requests within 24 hours and complete assignments within a stated time period, sometimes just three days.*
- *Declining too many assignments or cherry picking the best could result in fewer assignments being offered.*
- *Field Asset Services "score carded" panelists on their acceptance/declination of assignments, status communications, timeliness of completion and quality. A low rating could result in a warning, reduction of work or ineligibility.*
- *Field Asset Services tracked its panelists' performance and recorded warnings, counseling and eligibility suspensions in "vendor profiles."*

At trial, Field Asset Services' panelists testified that they worked long hours, often 10 hours per day six days a week. Of course, since the panelists were classified as independent contractors, they did not receive overtime. Nor did Field Asset Services reimburse them for expenses such as mileage, insurance, equipment, cell phones, internet use or computers.

What happened? After four years of litigation, the court ruled on summary judgment that any vendor who derived more than 70% of his or her income from Field Asset Services should be classified as an employee and was thus entitled to overtime and payment of expenses. The essential reasoning was that Field Asset Services had the right to so closely control the work of its contractors (and also exercised that right) and the contractors were so dependent on Field Asset Services that the contractors were employees under California law.

With liability established, the issue was then how much did Field Asset Services owe its reclassified contractors? The damages claimed by the named plaintiff and 10 class members went to trial. The jury awarded a total of $2,060,237 to those 11 individuals for unpaid overtime, unpaid expenses, penalties and interest. The award to the named plaintiff was a striking example: the jury determined that he worked 4,845 hours of overtime from 2010 through 2016 for which he should recover $98,615 in overtime payments (on top of the payments he actually received for doing the work) and that he should be awarded $168,746 for his unpaid expenses ($95,247 for mileage alone). It's estimated that there are 100+ remaining class members potentially entitled to the same types of damages.

The lessons from *Bowerman*

The *Bowerman* case demonstrates the very high stakes involved when a class-based contractor reclassification action is filed. That should be one big takeaway for AMCs. The other takeaway should be this realization: the *Bowerman* case went to trial under the old standard for determining who is a contractor versus employee. The new test under AB 5 is the ABC test – a much harder test to pass for a company. Given the risk and the new law, AMCs clearly need to get to work.

The full decision in *Bowerman* is available in the **AB 5 Center** of www.valuationlegal.com along with other relevant cases and materials.

Peter's Upcoming AMC-Related Presentations

My upcoming presentations for AMCs and appraisal firms (more information on www.valuationlegal.com):

- Appraiser Employment Law webinar with the Appraisal Institute, December 10, 2019.
- Collateral Risk Network, Compliance Event, Sarasota, FL, January 21-22, 2020.