WHO IS AN EMPLOYEE?

For purposes of the CUIC, an employee may be one of the following:

- A worker who is an employee based on the standard that applies under Labor Code section 2750.3 (e.g., the ABC test, the older Borello test, or another applicable test); or
- An individual who is identified specifically in the CUIC, such as corporate officers.

An employee may perform services on a permanent, temporary, or less than full-time basis. The law does not exclude services from employment that are commonly referred to as day labor, part-time help, casual labor, temporary help, probationary, or outside labor.

WHO IS AN EMPLOYER?

Section 675 of the CUIC provides that a business becomes a subject employer when it employs one or more employees and pays wages in excess of $100 during any calendar quarter. Wages are compensation for personal services performed, including, but not limited to, cash payments, commissions, bonuses, and the reasonable cash value of nonmonetary payments for services, such as meals and lodging.

An employer must register with the Employment Development Department (EDD) within 15 days of becoming a subject employer. Employers are responsible for reporting wages paid to their employees and paying Unemployment Insurance (UI) and Employment Training Tax (ETT) on those wages, as well as withholding and remitting State Disability Insurance* (SDI) and Personal Income Tax (PIT) due on wages paid.

* Includes Paid Family Leave (PFL).
The California Supreme Court in *Dynamex* provided the following examples of Condition A being applied:

- An employer failed to establish that work-at-home knitters and sewers who made the clothing were sufficiently free from the company's control where the employer provided the workers with the same patterns. The court reasoned that "[t]he degree of control and direction over the production (...) is no different when the sweater is knitted at home at midnight than if it were produced between nine and five in a factory." (*Fleece on Earth v. Dep't of Emple. & Training* (Vt. 2007) 181 Vt. 458, 923 A.2d 594.)

- A construction company proved that a worker who specialized in historic reconstruction was sufficiently free of the company's control where the worker set his own schedule, worked without supervision, purchased all materials using his own business credit card, and had declined an offer of employment proffered by the company (*Great N. Constr., Inc. v. Dept. of Labor* (Vt. 2016) 204 Vt. 1, 161 A.3d 1207).

In analyzing Condition B of the ABC test, the California Supreme Court in *Dynamex* explained:

- Contracted workers who provide services in a role comparable to that of existing employees will likely be viewed as working in the usual course of the hiring entity's business.

The California Supreme Court in *Dynamex* provided the following examples of Condition B being applied:

- Condition B is satisfied (i.e., services are not part of the hiring entity's usual course of business):
  - When a retail store hires an outside plumber to repair a leak in a bathroom on its premises.
  - When a retail store hires an outside electrician to install a new electrical line.

- Condition B is not satisfied (i.e., services are part of the hiring entity's usual course of business):
  - 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.
  - When a bakery hires cake decorators to work on a regular basis on its custom-designed cakes.

In analyzing Condition C of the ABC test, the California Supreme Court in *Dynamex* and subsequent appellate court decisions explained:

- The hiring entity must prove the independent business operation is actually in existence at the time the work is performed. The fact that the business operation could come into existence in the future is not sufficient.

- An individual who independently has made the decision to go into business generally takes the usual steps to establish and promote that independent business.

Examples of this include:

- Incorporation, licensure, advertisements.
- Routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like.

- Condition C is not necessarily satisfied:
  - Where the hiring entity unilaterally assigns the worker the label “independent contractor.”
  - Where the hiring entity requires the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor.
  - If an individual's work relies on a single employer. For example, Condition C was not satisfied where a taxi driver was required to hold a municipal permit that may only be used while that driver is employed by a specific taxi company (*Garcia v. Border Transportation Group* (2018) 28 Cal. App.5th 558, 575).

**EXCEPTIONS: CIRCUMSTANCES WHERE THE ABC TEST IS NOT APPLICABLE**

While the ABC test is the applicable test for most workers, for some jobs and industries Labor Code section 2750.3 applies the *Borello* multifactor test, which is explained below. For some occupations, the *Borello* test applies without further requirements (e.g., certain licensed professionals). However, for other occupations and industries, the *Borello* test applies instead of the ABC test only after the hiring entity satisfies other requirements first (e.g., certain professional services contractors; certain individuals working under construction subcontracts; certain service providers who are referred to customers through referral agencies). Additionally, for certain real estate licensees and repossession agencies, standards under the *California Business and Professions Code* (leginfo.legislature.ca.gov/faces/codes.xhtml) will continue to apply.

The exceptions from the ABC test may involve some rules and criteria that are not set forth here. Employers and workers should seek independent advice and counsel if they have questions about the applicability of any exception to their particular case. For additional information about and a full list of the ABC test exceptions, please visit the Employment Status Portal (labor.ca.gov/employmentstatus).
THE BORELLO TEST

The California Supreme Court established the Borello test in
S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations
(1989) 48 Cal.3d 341. The test uses multiple factors to
determine whether a worker is an employee, including
whether the potential employer has all necessary control
over the manner and means of accomplishing the result
desired. Such control may be indirect and need not be
actually exercised or detailed. The control factor is not
dispositive. In other words, a worker cannot be deemed
an independent contractor based on a lack of control
alone. Instead, this factor must be considered along with
other factors, which include:

1. Whether the worker performing 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, such
as in the equipment or materials required by their
task;
5. Whether the service provided requires a special skill;
6. The kind of occupation, and whether the work is
usually done under the direction of the employer or
by a specialist without supervision;
7. The worker's opportunity for profit or loss depending
on their managerial skill;
8. The length of time for which the services are to be
performed;
9. The degree of permanence of the working
relationship;
10. The method of payment, whether by time or by the
job;
11. Whether the worker hires their own employees;
12. Whether the employer has a right to fire at will or
whether a termination gives rise to an action for
breach of contract; and
13. Whether or not the worker and the potential employer
believe they are creating an employer-employee
relationship (this may be relevant, but the legal
determination of employment status is not based on
whether the parties believe they have an employer-
employee relationship).

Under the Borello test, like with the ABC test, a worker
is presumed to be an employee. The hiring entity has
the burden of proving that an independent contractor
relationship exists. But unlike the ABC test, no single
factor under the Borello test determines whether a worker
is an employee or an independent contractor. Rather,
courts consider all potentially relevant factors, on a case-
by-case basis, in light of the nature of the work and the
arrangement between the parties.

WHO IS AN EMPLOYEE/EMPLOYER BY
SPECIFIC STATUTE?

A worker not considered to be an employee under the
ABC, Borello, or other applicable test may nevertheless be
a statutory employee by law for purposes of UI, ETT, and
SDI under circumstances that include, but are not limited
to, the following:

- An agent-driver or commission-driver engaged in
distributing meat products, vegetable products, fruit
products, bakery products, beverages (other than
milk), or laundry or dry cleaning services for his or her
principal. See Note below.

- A traveling or city salesperson, other than an agent-
driver or commission-driver, engaged upon a full-
time basis in the solicitation on behalf of, and the
transmission to, his or her principal (except for
sideline sales activities on behalf of some other
person) of orders from wholesalers, retailers,
contractors, or operators of hotels, restaurants, or
other similar establishments for merchandise for resale
or supplies for use in their business operations. See
Note below.

- A home worker performing services according to
the specifications furnished by the person for whom
the services are performed on materials or goods
furnished by such person which are required to be
returned to such person or a person designated by him
or her. See Note below.

Note: For the statutory provisions listed to apply, the
contract of hire must contemplate that substantially
all the services are to be performed personally by the
worker. In addition, an individual performing services
in the three occupational categories listed would not be
considered a statutory employee if the individual has a
substantial investment in facilities used in connection
with the performance of such services, other than facilities
for transportation, or if the services are in the nature of
a single transaction not part of a continuing relationship
with the employing unit for which the services are
performed.

- An author engaged to create a work of authorship that
was specially ordered or commissioned by another
party. The parties must expressly agree in writing that
the work shall be considered a work made for hire
and that the ordering or commissioning party obtains
ownership of all the rights comprised in the copyright
in the work.

- Any member of a limited liability company that
is treated as a corporation for federal income tax
purposes.
• An unlicensed construction worker engaged to perform services for which a contractor’s license is required (i.e., a contractor, licensed or unlicensed, who hires unlicensed construction workers or subcontractors is the employer of those workers or subcontractors).

SERVICES EXCLUDED BY STATUTE FROM EMPLOYMENT

Services of certain employees are specifically excluded by law from being subject to UI, ETT, and SDI. Examples of such employees include, but are not limited to, the following:

• Family members, but restricted to:
  1. A child under 18 years of age in the employ of his or her biological or adoptive parent or parents;
  2. An adult in the employ of his or her biological or adopted child or children; or
  3. An individual in the employ of his or her spouse or registered domestic partner as defined in section 297 of the Family Code (leginfo.legislature.ca.gov/faces/codes.xhtml).

This exclusion can apply only to sole proprietorships and partnerships where the worker has one of the above referenced relationships with all partners. The wages paid to such workers are subject to PIT withholding and reportable as PIT wages.

• Students under the age of 22 enrolled full-time in an academic institution and performing services for credit in a qualified work experience program. Wages paid to such workers are subject to PIT withholding and reportable as PIT wages.

• Salesperson and broker services.

ADDITIONAL INFORMATION

For further assistance, please contact the Taxpayer Assistance Center at 1-888-745-3886 or visit the nearest Employment Tax Office listed in the California Employer’s Guide (DE 44) (PDF, 2.4 MB) (edd.ca.gov/pdf_pub_ctr/de44.pdf) and on the EDD (edd.ca.gov) website. Additional information is also available through the EDD’s no-fee payroll tax seminars (seminars.edd.ca.gov/payroll_tax_seminars).

The EDD is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Requests for services, aids, and/or alternate formats need to be made by calling 1-888-745-3886 (voice) or TTY 1-800-547-9565.