

## CONSTRUCTION INDUSTRY

### WHAT'S NEW?

Effective January 1, 2020, section 621(b) of the [California Unemployment Insurance Code \(CUIC\)](#) ([leginfo.legislature.ca.gov/faces/codes.xhtml](#)) was amended to apply a new standard for classifying workers as independent contractors rather than employees for purposes of the CUIC. Under the new standard (commonly referred to as the “ABC test”), an individual providing labor or services for remuneration is presumed to be an employee rather than an independent contractor, unless the hiring entity can demonstrate that three conditions are satisfied (see Step 3 below).

The ABC test has replaced the standard set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*). However, numerous exceptions to the ABC test were established in sections 2776 through 2784 of the [Labor Code \(LC\)](#) ([leginfo.legislature.ca.gov/faces/codes.xhtml](#)), leaving *Borello* as the standard under certain circumstances. In the context of the construction industry and the construction trucking services industry, section 2781 of the LC sets forth the criteria that must be satisfied in order to apply the *Borello* standard instead of the ABC test. (See Step 2 below.)

At the same time, however, sections 621.5 and 13004.5 of the CUIC (in conjunction with section 2750.5 of the LC) may still impose an employment relationship between construction contractors and unlicensed subcontractors or workers, regardless of the outcome under section 621(b) of the CUIC and section 2781 of the LC. (See Step 1 below.) Therefore, as explained below, the first step is to determine whether the workers are employees under sections 621.5 and 13004.5 of the CUIC.

### DEFINITIONS

The terms “construction industry” and “contractor” are not defined in the CUIC or the LC. However, section 7026 of the [California Business and Professions Code \(BPC\)](#) ([leginfo.legislature.ca.gov/faces/codes.xhtml](#)), which governs construction contractor licensing, defines a “contractor” as “any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or

improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, and whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise.”

For purposes of section 2781 of the LC (see Step 2 below), “construction trucking services” means “hauling and trucking services provided in the construction industry pursuant to a contract with a licensed contractor utilizing vehicles that require a commercial driver’s license to operate or have a gross vehicle weight rating of 26,001 or more pounds.”

### DETERMINING WHETHER WORKERS AND SUBCONTRACTORS ARE EMPLOYEES

#### Step 1: Is there an employment relationship under sections 621.5 and 13004.5 of the CUIC?

Under sections 621.5 and 13004.5 of the CUIC (in conjunction with section 2750.5 of the LC), a contractor, either licensed or unlicensed, who engages a worker or subcontractor to perform services for which a contractor’s license is required, is the employer of that worker or subcontractor, unless the hiring contractor can demonstrate that all of the following criteria are satisfied:

1. The worker has the right to control the manner in which services are performed.
2. The worker is customarily engaged in an independently established business.
3. The worker’s independent contractor status is bona fide and not a subterfuge to avoid employment status.
4. The worker holds a valid contractor’s license for the type of service performed.

Workers or subcontractors may be employees under sections 621.5 and 13004.5 of the CUIC (in conjunction with section 2750.5 of the LC) even if they would

otherwise be independent contractors under either the ABC test or the *Borello* standard, pursuant to section 621(b) of the CUIIC and section 2781 of the LC (Steps 2 and 3 below). If a worker is an employee under the above analysis, the inquiry ends and the worker must be treated as an employee. If an employment relationship is not established under sections 621.5 and 13004.5 of the CUIIC (in conjunction with section 2750.5 of the LC), then proceed to Steps 2 and 3 to determine whether an employment relationship exists under section 621(b) of the CUIIC (ABC test) or the *Borello* standard pursuant to section 2781 of the LC.

### **Step 2: Does the ABC test exception apply under section 2781 of the LC?**

In certain circumstances, section 2781 of the LC requires the *Borello* standard rather than the ABC test (section 621[b] of the CUIIC) to be used in determining employment status in the construction industry or construction trucking services industry. Except as otherwise specified, all of the following criteria must be satisfied to apply *Borello* instead of the ABC test:

1. The subcontract is in writing.
2. The subcontractor is licensed by the [Contractors State License Board \(CSLB\)](http://cslb.ca.gov/) (cslb.ca.gov/) for the work being performed.

**Note: For construction trucking services**, a CSLB license is not required, but the subcontractor must meet the four additional conditions below:

- a) The subcontractor is a business entity formed as one of the following: sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.
  - b) The subcontractor is registered with the Department of Industrial Relations as a public works contractor regardless of whether the subcontract involves public work.
  - c) The subcontractor utilized its own employees to perform the services or is a sole proprietor who operates their own truck to perform the services and holds a valid motor carrier permit issued by the Department of Motor Vehicles.
  - d) The subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.
3. The subcontractor has a business license or business tax registration, if required.
  4. The subcontractor has a separate business location from the contractor.

5. The subcontractor has the authority to hire and fire people who provide or assist in providing the services.
6. The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, indemnity obligations, performance bonds, or warranties relating to the work being performed.
7. The subcontractor has a separate business offering the same services provided to the contractor.

If all the criteria have been satisfied, then the *Borello* standard will apply in Step 3. If the criteria have not been satisfied, then the ABC test will apply instead.

### **Step 3: Apply either the ABC test or the *Borello* standard to determine employment status.**

If the **ABC test** is applicable (see Step 2), then workers or subcontractors are presumed to be employees rather than independent contractors, unless the hiring entity can demonstrate that all three of the following criteria are satisfied under section 621(b) of the CUIIC:

- A. The individual 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 individual performs work that is outside the usual course of the hiring entity's business.
- C. The individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

If the ***Borello* standard** applies instead of the ABC test (see Step 2), then workers or subcontractors are presumed to be employees, unless the hiring entity can demonstrate that the workers are independent contractors under the *Borello* test. The test relies upon multiple factors to make a determination, including whether the hiring entity has all necessary control over the manner and means of accomplishing the result desired, although such control not need be direct, actually exercised or detailed. This factor, which is not dispositive, must be considered along with other relevant factors.

For additional information on the ABC test and the *Borello* standard, please refer to [Information Sheet: Employment \(DE 231\) \(PDF\)](http://edd.ca.gov/pdf_pub_ctr/de231.pdf) (edd.ca.gov/pdf\_pub\_ctr/de231.pdf).

## OWNER-BUILDER RESPONSIBILITIES

An owner-builder is a person who owns the property where the work is performed and acts as their own general contractor. Owner-builders either perform the work themselves or engage employees or licensed subcontractors. Under certain circumstances, an owner-builder is exempt from the contractor licensing requirements of the BPC (see section 7044 of the BPC) and thus sections 621.5 and 13004.5 of the CUIC (Step 1 above) would not apply. However, an owner-builder who meets the requirements of section 7044 of the BPC may nonetheless be considered an employer under the ABC test or *Borello* (see Steps 2 and 3 above), unless certain conditions are met under section 640 of the CUIC.

## EXAMPLES

1. A general contractor who holds a valid California contractor's license hires an out-of-state subcontractor to perform services in California for which a license is required. The subcontractor has a license issued by another state but is not licensed in California. In this instance, the subcontractor and all of his workers are statutory employees of the general contractor under sections 621.5 and 13004.5 of the CUIC because the subcontractor does not hold a valid California contractor's license.
2. A licensed roofing contractor hires an unlicensed subcontractor who would not be an employee under the ABC test or *Borello* standard (Steps 2 and 3 above). However, since the subcontractor does not hold a contractor's license to perform roofing services, the subcontractor is a statutory employee of the roofing contractor under sections 621.5 and 13004.5 of the CUIC (Step 1 above).
3. A licensed general contractor hires an unlicensed subcontractor that is formed as a business (e.g., partnership, corporation, LLC, etc.) to install carpets. All workers, including partners, officers, or members, are statutory employees of the general contractor under sections 621.5 and 13004.5 of the CUIC because the subcontracted business does not hold a contractor's license for carpet installation. Each subcontractor must be separately licensed and satisfy all other requirements in order to be an independent contractor under sections 621.5 and 13004.5 of the CUIC.
4. An owner of residential rental property hires unlicensed construction workers to perform construction work on his/her own buildings. Based on certain conditions, the owner is not always required to be licensed by the CSLB. If the owner is required to be licensed, any unlicensed workers hired by the owner would be statutory employees under sections 621.5 and 13004.5 of the CUIC. If the owner is not required to be licensed, the status of the unlicensed workers would be determined by the ABC test under section 621(b) of the CUIC for all services performed after January 1, 2020.

## 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 \(DE 44\) \(PDF\)](https://edd.ca.gov/pdf_pub_ctr/de44.pdf) (edd.ca.gov/pdf\_pub\_ctr/de44.pdf) and on the [Employment Development Department \(EDD\)](https://edd.ca.gov) (edd.ca.gov) website. Additional information is also available through the EDD's no-fee [Payroll Tax Seminars](https://seminars.edd.ca.gov/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.

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