

I.C. Chaos in California

By Donald C. Collins

Whoops. California recently amended its controversial independent contractor law, AB 5. The amendment, AB 2257, makes things even more confusing for officials.

AB 2257 exempts sports officials from AB 5's "ABC" test. Under the ABC test, a worker is presumed to be an employee unless he or she meets all of the following factors: (a) the worker is free from the employer's control; (b) the worker performs work that is outside of the usual scope of the employer's business; and (c) the worker is in an independent business. This ABC test comes from a 2018 California Supreme Court case called *Dynamex*. AB 5 enshrines *Dynamex* into law.

At first glance, it would appear to be a good thing to exempt officials from AB 5's ABC test. After all, the test is strict and it is likely that sports officials would not be independent contractors under the test. However, AB 5 simply isn't structured as an either/or proposition. Occupations exempted from AB 5 don't automatically become independent contractors. Rather, they are exempted from the *Dynamex* test, and subject to the California Supreme Court's old *Borello* test. Most employers would be thrilled to gain relief from the *Dynamex* test, which is awfully strict. But for the employers of sports officials, the switch from *Dynamex* to *Borello* creates chaos.

The *Borello* test is a multifactor test. The most important factor is whether the employer has the right to control the means by which the worker performs. If the employer contracts for an outcome, but doesn't have the right to control the means by which the worker performs, the worker will generally be an independent contractor although other factors in the test could tip the scale toward the worker being an employee.

Virtually every published decision that applies either the right-to-control test or a multi-factor test similar to *Borello* has found amateur sports officials to be independent contractors.

However, a lot of law is made

by agencies. Workers' compensation and unemployment agencies have frequently found amateur sports officials to be employees, leading to large tax assessments against schools, leagues and officials associations.

These agencies aren't exactly rogues. Their agents are clerks — they don't read published legal cases. Agents use checklists, and analyze hundreds of occupations. They occasionally rule against officials associations, schools and leagues even where the published law favors an independent contractor determination. The associations, schools and leagues can still win, but they have to appeal the agency decision to a court and bear the time and expense of fighting it out.

Agency problems under the *Borello* test were so bad in the 1990s the state legislature passed Labor Code § 3352(A)(14) and 22 California Code of Regulations § 4304-10 to make it clear that amateur sports officials were independent contractors for workers' compensation and unemployment purposes. However, AB 2257 puts this statutory and regulatory construct at risk.

AB 2257 means California has a new workers' compensation law that applies *Borello*. However, California Labor Code § 3352(A)(14) is an old workers' compensation law that says officials are independent contractors, and don't have to apply *Borello*. AB 2257 and Labor Code § 3352(A)(14) contradict each other, and laws that conflict create chaos.

The chaos doesn't stop with the Labor Code. The chaos also means California's worker compensation agency could apply *Borello* to determine officials are employees while the unemployment agency is bound by a regulation that makes officials independent contractors.

Who knows how it will all turn out? There's no clarity when chaos reigns. *Donald C. Collins is executive director of the San Francisco Section of the California Interscholastic Federation. He is a longtime basketball official and lawyer. This material is for informational purposes only and is not legal advice.* □

Partner No-Show Might Mean No Game

In many sports, there is a minimum number of officials required to work a game. But what happens if you show up and your partner is a no-show?

Working a game alone may be prohibited by state association policy and doing so could expose both the working official and the hiring school to legal liability. An injured party would still have to prove that the lack of that second official was a substantial factor in leading to the injury, but the injured party would have one leg up in the process through the failure to have the appropriate number of officials working the game.

In any state that does not mandate a minimum number of officials to work a contest, the outcome is probably the same. The injured party still could prove that going forward with the game was a negligent act, by both the working official and the school, through evidence that other states or associations required such a minimum number for that particular sport. The injured party also could submit evidence in such a state that the game was worked without the "normal" number of officials despite the absence of a mandatory minimum. Thus, working the game without the normal number of officials is probably as dangerous for the official and the school as working the game without the mandatory number of officials.

Team Short Players?

What if you've got enough officials, but not enough players? An official must know how many players a team must have to begin a game, and how few players a team can have and still continue. Failure to apply a rule and allow a game to begin without enough players won't generally result in legal liability, but if the wrong things occur in the game, the official could become legally liable, as well as become ensnared in an administrative and public relations nightmare.

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