



California Nurse-Midwives Association
AB 2257: Changes to California Law for Independent Contractors
Guidance for CNMs
March 2021

Brief Background

AB 2257 was recently signed into law by the Governor. This law provides a potential workaround for AB 5, which prohibits hospitals, birth centers, and home birth practices from classifying certified nurse-midwives (CNMs) as independent contractors.

AB 5: History of These Laws and Their Impact on APRNs and Midwives

AB 5, which was signed into law in 2019, codified a 3-part test established in 2018 by the California Supreme Court (called the “**ABC test**”) for determining whether an entity may classify individuals it engages to provide services as employees or independent contractors. Under the ABC test, classifying individuals, including CNMs, as independent contractors became substantially more difficult for healthcare facilities—including hospitals, birth centers, and home birth practices. Because of the substantially higher cost associated with classifying individuals as employees arising out of taxes and payment of benefits, many CNMs working as independent contractors lost their jobs. Those who did not are worried that they may be operating outside of the law.

Under the ABC test, to be classified as an independent contractor, the individual must meet all of the following requirements:

- A. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the person’s contract and in fact;
- B. The person performs work that is outside the scope of the hiring entity’s business; and
- C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

AB 5 exempted certain specific professionals, including physicians and lawyers, from the burdensome ABC test, but the law created no such carve-out for advanced practice nurses or nurses in general.

AB 5 also contained a business-to-business (b-to-b) exemption, but not one that would benefit most advanced practice nurses or midwives. The b-to-b exemption applies only to contractual relationships between a contracting business (e.g. a hospital or birth center), and a “business service provider” that is a sole proprietorship, partnership, limited liability company (LLC), limited liability partnership (LLP), or corporation. Among the many additional requirements to meet the b-to-b exemption is that the business service providers must **provide services directly to the contracting business, rather than to the customers of that business.** The “customers” of hospitals, birth centers, and home birth practices are their patients. Because such contracting agencies typically engage midwives, nurses, and advance practice nurses to provide services directly to such businesses’ patients, the relationship between the business and such professionals cannot satisfy this requirement and thus cannot be classified as an independent contractor relationship under the b-to-b exemption..

AB 2257

AB 2257 modified AB 5 to make the b-to-b exemption available to more business service providers, including midwives in certain cases. A contracting business may now classify its business service providers that provide services directly to the contracting business’s customers (patients) as independent contractors under the b-to-b exemption *“if the business service provider’s employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.”*

Guidance for CNMs

1. ***Contract with a hospital, birth center, or home birth practice as a business entity as a sole proprietorship or corporation.*** These two business structures are available to CNMs as business entities that meet the b-to-b exemption. However, based on committee reports and discussions between the legal representation for the California Association of Nurse Anesthetists, the Legislature probably did not intend for the b-to-b exemption to extend to CRNAs as sole proprietors. Rather, the more likely intent was to require APRNs such as CRNAs to be employees of a business service provider that claims the b-to-b exemption.

This issue has not been litigated as of this writing, and it is possible that a court could disagree. It is not clear whether this was the intent for other advanced practice nursing professions or for midwifery. Notwithstanding the legislative intent, the plain meaning of Section 2776 of the Labor Code is that an individual acting as sole proprietor may contract with another business or corporation as long as they meet the 12 criteria provided in that provision, which are listed below.

2. CNMs should consult with their own tax and business advisors to discuss and determine the best business structure and tax consequences. The most advantageous structures will likely include:

- (1) a single CNM practicing as a sole proprietor, with appropriate business licensing and tax filings for such an entity.
- (2) a single CNM or multiple CNMs serving as employee(s) or shareholders of a professional nursing corporation.
- (3) a single CNM or multiple CNMs serving as employee(s) or shareholders of a professional medical corporation that is majority-owned by licensed physicians.

CNMs can simultaneously serve as employees and shareholders of professional nursing and medical corporations. CNMs should consult their tax and business advisors to determine the structure that works best for their practice type and that fits within their personal and financial circumstances. CNMs who opt for incorporating or joining a corporation should also obtain their tax advisor's recommendation regarding corporate tax registrations and S-Corporation designation.

3. Ensure that you are complying with all 12 additional requirements for the b-to-b exemption under Section 2776 of the Labor Code, which are:

- (1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- (2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. ***This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.***
- (3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.

- (4) 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.
- (5) The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business.
- (6) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.
- (7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.
- (8) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.
- (9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.
- (10) The business service provider can negotiate its own rates.
- (11) Consistent with the nature of the work, the business service provider can set its own hours and location of work.
- (12) The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

The most important of these is number (2) because it enables a sole proprietorship or professional corporation (the business service provider) to provide services directly to the patient instead of the contracting business. Whenever possible, name badges, contracts, and billings should reflect the name of the business service provider. Additionally, the sole proprietorship or corporation should attempt to enter into multiple contracts with contracting businesses in order to remain in compliance with the law.

Requirement number (9) requires the business service provider to provide its own tools and equipment, not including proprietary materials that the contracting business provides that are necessary to perform the services under the contract. Proprietary materials may include items that the business developed, intending them not to be used outside the business, such as manuals, processes, or tangible chemical, biological or physical materials furnished by the contracting business that are necessary to perform the services.

While not required, the contract should use specific wording from the Labor Code wherever possible. For example, it would be prudent to state that the business service provider is and shall remain “free from the control and direction of the contracting business entity in connection with the performance of the work.” And both parties should ensure that the CNM indeed remains free from such control and direction. And that The contract should also state that the business service provider may “contract with other businesses to provide the same or similar services” and may “maintain a clientele without restrictions from” the hiring entity.

4. Birth centers and home birth CNMs may engage one or more independent contractors to provide services they themselves do not provide, such as (but not limited to) a doula, lactation consultant, or health educator. As long as such independent contractors meet all of the requirements of the “ABC Test” above with respect to the birth center or home birth practice, then a b-to-b exemption is not required, and the birth center or home birth practice can directly contract with this independent contractor to provide services to their patients.