



THE CALIFORNIAN DREAM ALSO BELONGS TO THE PRECARIOUS

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The State of California is known for its gorgeous landscapes, the Golden State Warriors and its entrepreneurial, innovative and progressive spirit. Silicon Valley is the heart of the largest technology companies and several startups. And it is in California that we may find some of the best American universities, like Stanford or Berkeley.

The Golden State is an incubator of dreams and good ideas, which tend to make a difference.

The recent approval in this State of the Bill AB5 is also a milestone in the configuration of employment. The AB5 has the potential to mark the future on a global scale.

The qualification as an employee is one of the most striking topics today. Worldwide, labor laws use to guarantee workers a floor of rights that protect them – minimum wages, limitation of working hours, right to paid holidays, parental leave, protection against accidents at work, prohibition against unfair dismissals arbitrary, as well as sickness assistance.

The protection given to the employee is significant, leading to the inherent operating costs for companies.

For this reason, the 21st century has been marked by an attempt to escape the employment contract by several companies, which choose to hire independent contractors instead. This option, which provides less protection for those who work, affects the sustainability of Social Security and is also questionable in terms of concurrence, as it puts companies that offer good working conditions side by side with others that escape this regime in search of lower costs and competitive unfair advantages.

The issue is particularly impressive regarding the use of collaborative platforms and in the so-called gig economy, in which companies position themselves as mere technological intermediaries between the end customer and the independent contractor, who is no longer qualified as a worker.

Bill AB5 aims to combat this phenomenon.

Based on the case of Dynamex Inc., vs. Charles Lee, the law defined what the employer has to prove in order to dismiss a presumption of employment contract and demonstrate that the provider is really independent. What matters, is to consider the substance of things and the way work is actually done.

To do this, the company will have to comply with the “ABC” test, that is, prove that: (A) The provider is free from the control and direction of the hiring entity in connection with the performance of the work; (B) The person performs work that is outside the usual course of the hiring entity’s business; (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.

If the company fails to prove these three points, it does not pass the test and the provider will be qualified as an employee and not as a service an independent contractor, even if there is a written contract saying the contrary.

That was the solution reached in that case, in which the transport company Dynamex had chosen to stop having workers and to hire only “independent” drivers. As the company was unable to pass that test, the drivers were qualified as employees, despite the contracts saying they were independent.



Thus, Bill AB5 threatens the business models of companies such as Uber, Cabify and others, which center their activity based on independent contractors.

The "ABC" test promises to revolutionize worldwide the way courts come to recognize the existence of employment contracts. In addition to the legal tests that are already been used by the Department of Labor and the National Labor Relations Board, this test becomes the new gauge for the courts to decide.

The idea is clear: entrepreneurship is good and makes the world move, but the defense of employment is also an investment in quality, in the future of the community and in the people who work.

The Californian dream is a possible dream: it combines modernity and innovation along with the protection of employment and the community.

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