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Say Goodbye to Independent Contractors: The New "ABC" Test of Employee Status

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The circumstances under which California businesses may classify workers as independent contractors rather than employees under California wage laws have been greatly narrowed by a decision the California Supreme Court issued April 30, 2018. The landmark decision in the case known as *Dynamex* presumes that all workers are employees, sets out a new three-part "ABC" test businesses must satisfy in order to classify workers as independent contractors, and, as one expects in California, places the burden on the business, not the worker, to prove that any particular worker is properly classified as an independent contractor. The decision has immediate ramifications for businesses throughout California. The decision is also likely to influence the development of the law in jurisdictions outside California.

For decades prior to *Dynamex*, the common law test in California of whether a worker was an employee or independent contractor consisted of a multi-factor test, under a case called *Borello* that announced the most important factor of which was the employer's "right to control" the manner and means by which the worker performed her duties.

At least insofar as the California Industrial Welfare Commission Wage Orders are concerned, the Supreme Court's decision in *Dynamex* discards the

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long-standing *Borello* "control" test and replaces it with the newly articulated "ABC" test. Given the Supreme Court's rationale for the decision in *Dynamex*, the "ABC" test will likely influence how workers are classified in disputes outside the scope of the California wage orders, as well.

In *Dynamex Operations West, Inc. v. Superior Court of Los Angeles,* the plaintiffs, two delivery drivers, filed a putative class action alleging that Dynamex Operations West, Inc., a nationwide delivery company, improperly classified drivers as independent contractors. The issue, as framed by the Supreme Court, was "the standard [to be applied], under California law, in determining whether workers should be classified as employees or independent contractors *for purposes of California wage orders* . . ." (Emphasis in original.)

In answering the issue posed, and by way of a hefty 82-page decision, the Supreme Court articulated the new "ABC" test. Under the test, the business bears the burden of proving that the worker satisfies all three of the following factors:

(A) The worker is *free from control* and direction of the hiring entity in connection with the performance of the work, both under the contract for performance of the work and in fact;

(B) The worker performs work that is *outside the course of the hiring entity's business*; and

(C) The worker is customarily engaged in an independently established trade, occupation, or business.

A business's failure to prove any one part of the "ABC" test will result in the worker being classified as an employee under the applicable California wage order. By shifting the burden to the business, the Supreme Court created a presumption that workers are employees. Further, the circumstances of the working relationship will decide the question;

businesses may not avoid the "ABC" test by way of a contract by which the parties agree the worker is an independent contractor.

As an example of how the new test will work, assume a bridal store enters into an independent contractor agreement with a seamstress to alter dresses for customers, with the seamstress working from her home, not the store. Here, the store is at risk of failing to satisfy at least parts (A) and (B) of the test. Under part (A), the worker is likely *not free of the shop's control*, as the store likely requires the seamstress to alter dresses as customers request, deliver altered dresses on time per store requirements, and alter dresses to quality standards set by the store. Under part (B), the seamstress is likely to be *performing work within the course of the store's business*, as making alterations is often part and parcel of selling wedding gowns. Therefore, despite the store's independent contractor agreement with the worker, and absent other circumstances, the store would likely fail in proving that the worker met the new standard for qualifying as an independent contractor, and the seamstress would be presumed to be an employee.

The new "ABC" test will have immediate consequences, in particular, on businesses within the "gig" economy. As illustrated by Uber and Lyft, businesses in the "gig" economy often broadly categorize many workers as independent contractors, although such workers often perform work that is arguably central to the service provided by the business. The new "ABC" test is likely to serve as grounds to challenge "gig" businesses from continuing to so broadly classify workers as independent contractors.

By its *terms*, the Supreme Court's decision in *Dynamex* is limited to disputes under the California wage orders – claims for meal and rest breaks not provided, overtime wages not paid, seating not provided as required, etc. However, the Supreme Court's reasoning in *Dynamex* was driven,

in large part, by the mandate it found to "broadly" interpret employment-related statutes and regulations in light of their remedial purpose; that is, the rationale necessarily compels courts to liberally classify workers as employees in order to extend various legal protections to them. That rationale gives us good reason to expect the new test to seep over time into how workers are classified in other contexts.

One example is determining who qualifies as an employee and, therefore, may bring a tort claim under California law for wrongful termination in violation of public policy (*Tameny* claims), a claim that may not be brought by independent contractors. The "ABC" test will also likely influence the development of the law regarding who may bring claims for innumerable California Labor Code violations and, potentially, claims under the California Fair Employment and Housing Act.

Regardless of future developments, however, the "ABC" test is the law effective immediately for purposes of the California wage orders. All California businesses treating any workers as independent contractors are strongly advised to promptly reassess their classification of such workers in light of the "ABC" test and *Dynamex*. In the event of any uncertainties or concerns, businesses should consult experienced counsel.