



Employment Law and Litigation

Easy—Or Challenging—as ABC? California Supreme Court Rewrites Independent Contractor Test for Wage Order Claims

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On April 30, 2018, the California Supreme Court issued its long-awaited decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (<http://s3.amazonaws.com/cdn.orrick.com/files/S222732.PDF>). The Court announced a significant departure from the *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989) test, previously used by California courts and state agencies for nearly three decades for determining whether a worker is an independent contractor under the Industrial Welfare Commission (“IWC”) wage orders. In its place, the Court adopted the so-called “ABC” test for determining whether an individual is considered an employee under the wage orders, which govern many

aspects of wages and working conditions in covered industries.

Background

Dynamex is a nationwide same-day courier and delivery company that offers services to the general public in addition to a large number of business customers. Prior to 2004, Dynamex drivers were classified as employees; in 2004, the company uniformly re-classified its drivers as independent contractors. Dynamex drivers sued, alleging they were misclassified as independent contractors who performed essentially the same tasks in the same manner as when they were classified as employees. The drivers alleged claims under the applicable wage order, direct claims under the Labor Code, and an unfair competition claim under Business and Professions Code section 17200.

The Ruling

A trial court certified a class action, and on appeal, the intermediate appellate court issued a very aggressive ruling with an extremely broad construction of who was an employee for purposes of the state’s wage orders. Dynamex appealed that ruling to the California Supreme Court. In a 7-0 ruling, the Supreme Court held that the test to be used to determine who is an employee for purposes of the wage orders is the so-called “ABC” test. Under this three-factor test, a worker is properly considered an independent contractor to whom a wage order does not apply only where the hiring company establishes:

- (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

The Court briefly explained each of these prongs:

- Prong “A” is similar to the common law test for employment, and evaluates the type and degree of control a business typically exercises over employees.
- Prong “B” part of the test focuses on whether the individual can reasonably be viewed as working in the hiring company's business.
- Prong “C” asks whether the individual independently made the decision to go into business for himself or herself, such as through incorporation, licensure, advertisements, or routinely offering to provide services as an independent business. On this point, the Court held that the fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.

This is a brand new test in California, replacing the long-standing and familiar *Borello* test. While that test had multiple factors, was very flexible, and permitted companies to make various arguments in favor of independent contractor status, the new ABC test, by contrast, limits the arguments available to the hiring company and squarely places the burden of justifying the contractor relationship on that entity.

Our Analysis

Dynamex will undoubtedly have important implications for California companies. Under this test, and given the allocation of the burden of proof, the number of individuals who are considered employees in California for purposes of the applicable wage orders will almost certainly increase. Businesses in California are well-advised to monitor whether *Dynamex* remains cabined to the wage order context, and to evaluate how the *Dynamex* standard aligns with or deviates from other tests of “employee” status that may govern other types of claims, including the *Borello* test, the common law test, and the federal Fair Labor Standards Act test.