INDEPENDENT CONTRACTOR OR EMPLOYEE

The California Supreme Court, on April 30, 2018 in Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County, adopted a standard, called the "ABC" test, to distinguish employees from independent contractors. The text in bold is verbatim from the decision.

Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity 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.*** Examples of such freedom may include: the worker is able to set his/her own schedule; work without supervision; purchases all materials and supplies and pays for those materials him/herself; has declined an offer of employment by the company because he/she wanted control over his/her own activities; collects his/her own income from the client; has his/her own business license; books her/his own appointments, etc.
   AND
B. ***That the worker performs work that is outside the usual course of the hiring entity's business.*** The court set forth two examples. If a retail store hires an outside plumber to do plumbing work, the services of the plumber are not part of the store's usual course of business. If a clothing manufacturer hires an at home seamstress to make dresses from cloth provided by the company, the worker would not be classified as an independent contractor. The worker would be a part of the hiring company's usual business operation.
   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 held that the term "independent contractor" has been understood to refer to an individual who *independently* has made the decision to go into business for him/herself. That individual takes the burdens and benefits of self-employment, in other words has taken steps to obtain a business license, has [perhaps] formed an entity, advertised independently, and offered services to the general public or other potential customers. In short, the court said that the hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation, or business.

The hiring entity's failure to prove ALL of the above tests will result in the finding that the worker is to be classified as an employee. Employers have the burden of proof in establishing workers are independent contractors.

Employers must be careful in making the determination as there are many wage and hour penalties for unpaid wages, unpaid overtime and missed meal and rest breaks in addition to large civil penalties under the new Labor Code 226.8 with penalties from $5,000 to $25,000 for each violation of misclassifying an employee as an independent contractor. Penalties and interest may also apply to failure to withhold and pay payroll taxes, such as Social Security, Medicare, State Disability Tax, and Federal and State Unemployment Tax, as well as failure to procure workers' compensation insurance.

Owners of businesses who have independent contractors should immediately conduct an audit of their use of contractors given the new standards and seek legal advice about their specific situations. It is likely that many current contractors may not qualify as independent contractors under the new CA Supreme Court test.

The entire CA Supreme Court decision can be read here:
http://www.courts.ca.gov/opinions/documents/S222732.PDF