

NEW INDEPENDENT CONTRACTOR TEST IN CALIFORNIA June 2018

A recent decision of the Supreme Court of California brings new changes for employers in California. Employers will now, in many instances, be operating under the “ABC test” when classifying workers as employees or independent contractors. Although the decision was specifically limited to the standard to be applied for purposes of California wage orders, it may find application in other situations as well.

In *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, two delivery drivers sued Dynamex, a nationwide package and document delivery company, alleging that Dynamex was misclassifying its delivery drivers as independent contractors rather than employees.

To analyze this issue the Court departed from the *Borello* multifactor test, which primarily focused on an employer’s “right to control” and had been widely accepted as the appropriate test to analyze the employee versus independent contractor question. Under the newly adopted ABC test, a worker is properly considered an independent contractor only if the hiring entity establishes:

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

(C) 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.

California statutes and orders contain a number of different definitions of an employee. In this decision, the Court held that one of those definitions – “to suffer or permit to work” – can be relied on when determining whether a worker is an employee.

Part A: Whether the worker is free from control and direction of the hiring entity in the performance of the work

“[A] worker who is subject, either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over employees” would be treated as an employee under part A of the ABC test. The business need not control the precise manner or details of the work in order for the worker to be found to be an employee and not an independent contractor. While the court did not provide much guidance with respect to the meaning of part A, it did note that the suffer or permit to work standard is broader and more inclusive than the common law test (encompassed in the *Borello* decision). Therefore, if a worker would be classified as an employee under the common law test, that designation would clearly satisfy the broader suffer or permit to work standard.

Part B: Whether the worker performs work that is outside the usual course of the hiring entity’s business

The Court illustrated this prong by contrasting situations when a worker is performing work that

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is inside the usual course of business with situations where a worker is outside the usual course of business.

Inside:

- A clothing manufacturing company hires a work-at-home seamstress to make dresses from patterns and fabric given to her by the company and subsequently sold by the company.
- A bakery hires a cake decorator to create custom-designed cakes for the bakery on a regular basis.

Outside:

- A retail store hires a local electrician to install new electrical wiring or a plumber to repair a leak in a bathroom.

When a worker's conduct more closely mirrors conduct of an employee than that of an independent contractor, this prong is not satisfied.

Part C: Whether 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.

This prong asks whether the worker has independently made the decision to go into business for himself or herself. The court points to common indicators of independence, such as

whether the individual has established or promoted their independent business through:

- Incorporation
- Licensure
- Advertisements
- Routine offerings to provide the services of the business to the public or to a number of potential clients.

Importance to California Employers

The *Dynamex* decision reaffirms that it is the employer's burden to establish that it has properly classified workers as independent contractors.

While this decision is limited to standards under California law for purposes of analyzing obligations of California wage orders, the Court's reasoning could be applied in other situations.

Moving forward, to safely classify a worker as an independent contractor in a situation governed by a wage order, California employers must be able to prove that the worker satisfies all three parts of the ABC test. In other situations, employers should exercise caution when departing from the ABC requirements in making their independent contractor classifications.

This article is a summary of recent legal developments and is provided for informational and educational purposes only. It is not intended as legal advice or to create an attorney-client relationship. For more information or assistance contact:

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