Client Alert

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Ninth Circuit: Dynamex Decision On Independent Contractor vs. Employee Applies Retroactively

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Key Points

- In *Vazquez v. Jan-Pro Franchising Int'l, Inc*., the 9th Circuit held that a landmark California Supreme Court decision regarding independent contractors and employees applies retroactively.
- The 9th Circuit held that the California Supreme Court's decision in *Dynamex Ops. West Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) was subject to the default rule that judicial decisions apply retroactively, and that retroactive application of *Dynamex* did not violate due process.
- *Vazquez* does not bind state courts, and defendants in independent contractor misclassification lawsuits may still argue that *Dynamex* does not apply in some circumstances (e.g., if a claim does not arise under the wage orders or if the defendant is an alleged joint employer), but defendants should also be prepared to argue the merits of the *Dynamex* test.

On May 2, 2019, in *Vazquez v. Jan-Pro Franchising Int'l, Inc*., the 9th Circuit held that a landmark decision by the California Supreme Court regarding independent contractors and employees applies retroactively. The California Supreme Court decision, *Dynamex Ops. West Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), established a broad new test for determining whether an alleged independent contractor should be considered an employee under the California wage orders. Commonly referred to as the "ABC" test, *Dynamex* considers a worker to be an employee of the "hiring entity" unless 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; (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." *Id*. at 916-17.

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Because Dynamex upset decades of precedent relying on the flexible, multifactor "*Borello*" test, litigants have argued that the ABC test should apply only prospectively. In *Vazquez*, the 9th Circuit rejected that argument, becoming the first appellate court to hold that the ABC test applied retroactively.

The 9th Circuit rejected two independent arguments for applying *Dynamex* only prospectively. First, noting the default rule that judicial decisions have retroactive effect, it held that Dynamex did not fall into an exception under California law for decisions that "'change[] a settled rule on which the parties below have relied.'" Vazquez, slip op. at 23 (quoting *Williams & Fickett v. City of Fresno*, 395 P.3d 247, 262 (Cal. 2017)). The Court found persuasive that the California Supreme Court had summarily denied the defendant's petition in *Dynamex* for clarification that the ABC test was prospective only, which "strongly suggested that the usual retroactive application, rather than the exception, should apply to its newly announced rule." Id. at 24. Relying on dicta from the California Court of Appeal, the 9th Circuit also opined that retroactive application of *Dynamex* "'represented no greater surprise than tort decisions that routinely apply retroactively.'" *Id*. at 25 (quoting *Garcia v. Border Transp. Grp., LLC*, 28 Cal. App. 5th 558, 572 n.12 (2018)).

Second, the Court held that applying *Dynamex* retroactively did not violate due process. It observed that due process challenges to legislation "adjusting the burdens and benefits of economic life" are subject to rational basis review, and concluded that challenges to judicial rules must be given even greater deference. Slip. op. at 27. Accordingly, the Court held that applying *Dynamex* retroactively served the remedial purposes of the wage orders, and therefore was "neither arbitrary nor irrational." *Id*. at 27-28.

In the wake of *Vazquez*, defendants in independent contractor misclassification lawsuits should be aware that there are still arguments against application of the ABC test in some circumstances. For example, there is authority holding that *Dynamex* does not apply to "non-wage-order claims" (*Garcia*, 28 Cal. App. 5th at 571) or to claims against alleged joint employers (*Curry v. Equilon Enters., LLC*, 23 Cal. App. 5th 289, 314 (2018)). *Vazquez* also binds only district courts in the 9th Circuit, so state court defendants may still argue that *Dynamex* applies only prospectively. However, while the retroactivity argument may still be available in some cases, defendants arguing retroactivity should be prepared to argue the merits of the ABC test.

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