

## Ninth Circuit Withdraws Opinion on Dynamex Retroactivity

July 24, 2019

### Key Points

- The Ninth Circuit has withdrawn its May 2, 2019, opinion in *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, in which it held that the California Supreme Court's *Dynamex* decision regarding independent contractors and employees applies retroactively.
- The Ninth Circuit will certify the retroactivity question to the California Supreme Court.
- Until the California Supreme Court rules, alleged employers may still argue that *Dynamex* should apply only prospectively.

On July 22, 2019, in *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, the Ninth Circuit granted the defendant's petition for panel rehearing and withdrew its May 2, 2019, opinion, in which it held that the California Supreme Court's landmark decision in *Dynamex Ops. West Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) applies retroactively. *Dynamex* established a new test—commonly known as the “ABC” test—for determining whether an alleged independent contractor should be considered an employee under the California wage orders.

Having withdrawn the May 2, 2019, opinion, the Ninth Circuit will now certify the question of retroactivity to the California Supreme Court. If the California Supreme Court grants the Ninth Circuit's request, the retroactivity question may remain unsettled for well over a year. In the meantime, alleged employers in federal court may still argue that *Dynamex* should apply only prospectively, either because *Dynamex* changed a settled rule upon which the parties have relied, or because applying it retroactively would violate due process. See *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 923 F.3d 575, 586-90 (9th Cir. 2019).

Click [here](#) to read Akin Gump's alert regarding the Ninth Circuit's prior *Vazquez* decision.

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