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Labor and Employment Alert

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Key Points

- In *Dynamex Operations West, Inc. v. Superior Court*, the California Supreme Court adopted a new standard for determining whether workers should be classified as employees or as independent contractors for purposes of the California wage orders.
- The court rejected the application of the multifactor test that has been used by California courts for decades in favor of a new standard that presumptively considers all workers to be employees, unless an entity establishes that a worker satisfies three independent conditions.
- Employers should reevaluate their classifications under this new, worker-friendly standard.

California Adopts New test for Independent Contractor Status

On April 30, 2018, in *Dynamex Operations West, Inc. v. Superior Court*, Opinion No. S222732, the California Supreme Court adopted a new standard for determining whether workers should be classified as employees or as independent contractors for purposes of the California wage orders. Rejecting the employer's argument to utilize the flexible, multifactor test that California courts have applied for years, the court instead adopted a worker-friendly standard that presumptively considers all workers to be employees, unless an entity establishes that a worker satisfies three independent conditions.

Dynamex is a courier and delivery service that operates a number of business centers in California. Dynamex's drivers filed this lawsuit, alleging that Dynamex improperly classified them as independent contractors, which resulted in violations of a California wage order and various sections of the Labor Code. This case reached California's high court on Dynamex's appeal of the trial court's order certifying a class and denying Dynamex's motion to decertify the class.

California's wage orders set forth three definitions of the term "to employ." Dynamex argued that only one of these definitions—to exercise control over the employee's wages, hours or working conditions—is appropriate for determining a worker's employment status. Dynamex urged the court to analyze whether it exercised "control" using the multifactor test established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), which California courts have customarily applied in similar situations. The court rejected Dynamex's argument, finding that the multifactor test is unpredictable and poses a number of disadvantages in the wage and hour context.

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Stepping away from the "wide-ranging and flexible" multifactor test, the court held that courts can instead rely on the other definitions of "to employ" in the wage orders, including "to suffer or permit to work." Recognizing that a main purpose of the wage orders is to provide workers with "at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living," the court concluded that the "suffer or permit to work" standard must be interpreted and applied broadly. As such, the court determined that the appropriate test to use to interpret this standard is the "simpler, more structured" "ABC test" that is used in certain other jurisdictions. *See, e.g., Hargrove v. Sleepy's*, *LLC*, 106 A.3d 449, 465 (N.J. 2015) (holding that the ABC test is the appropriate test for determining employment status); Mass. G.L., ch. 149, § 148B (Massachusetts' version of the ABC test).

The ABC test presumes that all workers are employees, unless an entity can establish all three of the following conditions: (A) that the worker is free from the entity's control and direction; (B) that the worker performs work that is outside the usual course of the entity's business; and (C) that the worker is engaged in an independently established trade, occupation or business that is "of the same nature" as the type of work that the worker performs for the entity. Regarding the second part, the court clarified, for example, that a plumber hired by a retail store to fix its sink meets this test, but a seamstress hired by a retail store to make dresses at home that will thereafter be sold by the store would not. The court then noted that a court "is free to consider the separate parts of the ABC standard in whatever order it chooses," since a court may have an easier time answering the latter two parts of the test.

Applying this standard, the court determined that there was sufficient commonality of interest to support class certification. The court found that whether the work performed by the certified class of drivers is outside the usual course of Dynamex's business is a question that can be resolved on a classwide basis. The court held that, "because each part of the ABC test may be independently determinative of the employee or independent contractor question, our conclusion that there is a sufficient commonality of interest under part B of the ABC test is sufficient in itself to support the trial court's class certification order."

The *Dynamex* decision presents several important takeaways. First, the court's holding is limited to causes of action that are based on alleged violations of the California wage orders. As such, the multifactor *Borello* test will continue to be used in causes of action not covered by wage orders, such as claims for reimbursement of business-related expenses under California Labor Code section 2802. The court therefore recognized that a court might find a worker to be an independent contractor for claims not covered by the wage orders, but an employee for claims governed by the ABC test. Second, the court recognized that the only individuals who should be considered independent contractors under the court's new standard are those workers who "would not reasonably have been viewed as working *in the hiring business*," such as a plumber or electrician. The court's statements in this regard appear to invite an extremely narrow view of when independent contractor relationships are appropriate. Further, this element of the defense could make opposing class certification difficult in cases involving a group of workers in the same "business." As a result, California employers should reevaluate their classification of

workers carefully to determine whether they can satisfy the “suffer or permit to work” standard as articulated in *Dynamex.*

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