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Knowing Your ABCs: California Supreme Court Sets Test for Determining Independent Contractor Status

May 2, 2018

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In *Dynamex Operations W., Inc. v. Superior Court*, No. S222732, 2018 WL 1999120 (Cal. Apr. 30, 2018), the California Supreme Court was tasked with deciding the standard for determining whether a worker is an employee or an independent contractor. The Court adopted an expansive view of what constitutes an employee, holding that, under California's wage orders, the term "employ" has three alternative definitions: (1) to exercise control over the wages, hours, or working conditions; (2) to suffer or permit to work; or (3) to engage, thereby creating a common law employment relationship. The Court analyzed the second of these alternative definitions and established a test for determining when a hiring entity "employs" a worker under the "suffer or permit to work" definition.

Relying in large part on the Court's view of the legislative purpose and history behind California's wage orders, the Court departed from the multi-factor "control" test set forth in its decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, and adopted a variation of the so-called "ABC" test already embraced in a number of other jurisdictions. Under this new ABC test set forth in *Dynamex*, a worker is ***presumed*** to be an employee unless the hiring entity establishes ***all*** of the following three conditions:

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.

The prong of this three-part standard that is causing the most immediate alarm for hiring entities is B, which requires the worker to perform work outside of the hiring entity's usual course of business in order

to be considered an independent contractor. This prong may be particularly challenging for companies in the "gig economy," who often classify as independent contractors individuals who arguably perform work within the usual course of the company's business. Companies for which employees and independent contractors perform similar work may also have difficulty meeting this standard, thus leaving contractor classifications open to challenge.

The monetary consequences of misclassifying employees as independent contractors can be dire. We recommend that businesses take a fresh look at whether their independent contractors are properly classified under California's new "ABC Test," as articulated in *Dynamex*.

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