



The Dynamex Decision Seminar

How it Affects Your Project and Your Business

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Independent Contractor Pop Quiz



Is She an Independent Contractor?

- A retail store hires an outside plumber to repair a leak in a bathroom on its premises – is she an independent contractor?



Is He an Independent Contractor?

- A bakery hires a cake decorator to work on a regular basis on its custom-designed cakes – is he an independent contractor?



Is He an Independent Contractor?

- A timber management company in the business of contracting for the purchasing and harvesting of trees and the sale and delivery of cut timber to customers uses a worker to cut and harvest the timber – is he an independent contractor?



Are They Independent Contractors?

- A resort hires live entertainers to entertain its guests
– are the entertainers independent contractors?



Dynamex Blew Up the Prior IC Test

- Prior test – California Supreme Court *Borello* multi-factor balancing test that focused on whether the entity had the right to direct the manner and means by which the worker performed the services.
- On April 30, 2018, the California Supreme Court adopted a very expansive definition of “employee” placing the burden of proof on the hiring entity and adopting the ABC test.



Background on *Dynamex*

- Dynamex is a nationwide same-day courier and delivery company that offers on-demand, same-day pickup and delivery services to businesses and the public.
- In 2004, Dynamex converted all of its drivers to independent contractors as a cost savings measure.



Background on *Dynamex (Cont.)*

- Trial court originally denied class certification but that order was reversed by the Court of Appeal and the trial court ultimately certified a class action. Dynamex filed a writ petition in the Court of Appeal arguing the definitions of employee used do not apply in the independent contractor classification analysis. Court of Appeal rejected these arguments. California Supreme Court granted review to clarify the appropriate standard for determining employee or contractor status in the wage order context.
- Court framed its decision broadly by characterizing the misclassification of independent contractors as harmful and unfair to workers, honest competitors and the public as a whole.



The Court's Justifications

- “...individual workers generally possess less bargaining power...”
- “...workers’ fundamental need to earn income for their families’ survival may lead them to accept work for substandard wages or working conditions.”
- “...accord them a modicum of dignity and self-respect...”
- “...ensuring that such responsible are not hurt by unfair competition from competitor businesses that utilize substandard employment practices...”
- “...public will often be left to assume responsibility for the ill effects to workers and their families...”



The ABC Test – Presumption

- There is a rebuttable presumption that all workers are employees.



The ABC Test – The Three Prongs

- To classify a worker as an independent contractor, the hiring entity must establish ***all three*** prongs are met:
 - A. The worker must be free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract and in fact;
 - B. The worker must perform work that is outside the usual course of the hiring entity's business; and
 - C. The worker must be customarily engaged in an independently established trade, occupation or business of the same nature as the work performed by the worker for the hiring entity.
- The ABC test is already applied in Massachusetts and, with modifications, in many other jurisdictions.



Prong A – Control

- The worker must be free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract and in fact.
- 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 for purposes of the ABC test.
- The business need not control the precise manner or details of the work in order for an individual to be considered an employee under the test.



Prong B – Usual Course of Business

- The worker must perform work that is outside the usual course of the hiring entity’s business.
- Key question – What is the company’s usual course of business and how narrowly can it be defined?
 - “Usual course” has been defined in different ways by different jurisdictions.
 - California Supreme Court defined it as all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor.



One Suggestion from the Court in Response to Prong B

- “...if a business concludes that it improves the morale and/or productivity... to afford [employees] the freedom to set their own hours or to accept or decline a particular assignment...”



Prong C – Independently Established Business

- Is the worker customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity?
- Facts to consider – has the individual taken steps to establish and promote an independent business?
 - Incorporation?
 - Licensure?
 - Advertisements?
 - Routine offerings to provide the services of the independent business to the public or to a number of potential customers?



Prong C – Independently Established Business (*Cont.*)

- The Court specifically emphasized that the company not precluding the worker from engaging in a separate business was not enough to satisfy this prong.
- The proper inquiry is whether the worker actually *has* an independent business, occupation or profession, not whether he *could have* one.
- How can a company establish this?



Applying the ABC Test in *Dynamex*

- The Court held that class certification was appropriate:
 - There was sufficient commonality of interest with regard to prong B and the question of whether the work provided by the delivery drivers within the certified class is outside the usual course of the hiring entity's business to permit plaintiffs' claim of misclassification to be resolved on a class basis because Dynamex's entire business is that of a delivery service. The Court held that this alone is enough to support class certification order but also found sufficient commonality of interest under prong C.



What Does This New Test Mean to Companies?

- Expect litigation if your company uses independent contractors and they are at all in the grey area.



Industries Likely to Be Hit the Hardest

- Gig-economy companies
- Trucking companies
- Entertainment industry
- Logistics companies
- Hairstylists / barbers / makeup artists / tattoo artists / massage therapists



Limits on *Dynamex*

- Courts have held that the ABC test does not apply to other California laws outside of the IWC Wage Order.
- What about claims under the jurisdiction of the Employment Development Department or workers' compensation or unemployment matters?



Open Questions After *Dynamex*

- Is prong A's requirement that the worker be free from the control and direction of the hiring entity in connection with the performance of the work the same as the right to control under *Borello*, similar to it, or different?
- If different, in what way?



Open Questions After *Dynamex* (Cont.)

- Is prong B of the ABC test the same, similar or different from one of the secondary factors in *Borello* – whether the work was part of the “hiring party’s” regular business?
- If different, in what way?



Open Questions After *Dynamex* (Cont.)

- With respect to prong C, the Court quoted favorably from *Borello* but it also cited favorably to prong C cases from Connecticut, North Dakota, Utah, Vermont, Virginia and Massachusetts.
- Does the Court's citation to cases arising under these states mean that any decisions from those jurisdictions regarding prong C may be relied upon?



Does *Dynamex* Apply Retroactively?

- A petition for re-hearing was filed solely on this issue but the Court denied the petition.
- On July 22nd the Ninth Circuit withdrew a decision that confirmed the ABC Test applied retroactively and asked the state Supreme Court to weigh in and offer its opinion on whether the *Dynamex* decision and the ABC test apply retroactively.



What Has Happened Since?

- Lyft and Postmates have already been hit with putative class actions based on alleged misclassification after the *Dynamex* decision.
- A former driver for GrubHub filed a motion for reconsideration of the Court's determination that he is an independent contractor asking the California Federal Court to decide whether his case should be reviewed in light of the *Dynamex* decision.
- In August 2018, a California judge ruled that Imperial Showgirls dancers suing the club in a wage and hour suit should be classified as employees under the ABC test. The Court applied the *Dynamex* ruling to Labor Code and PAGA claims.



Is the Legislature getting involved?

- The California Legislature is considering Assembly Bill 5 which would codify the *Dynamex* decision but provide a number of categories of exceptions that would still be subject to *Borello* including:
 - Physicians and surgeons
 - Licensed insurance brokers
 - Securities broker-dealer or investment advisers or their agents
 - Real estate agents
 - Hairstylists and barbers (provided other factors are also met) and
 - Certain professionals (provided other factors are also met)
- AB 5 is currently in the suspense file of the Senate Appropriations Committee but is set to be heard again on August 30th.



Potential Damages for Misclassification

- Wage and hour – Overtime, meal breaks, rest breaks, wage statements, waiting time penalties
- EDD fines and assessments
- IRS fines and assessments
- I-9 violations
- Entitlement of misclassified individuals to coverage under the company's employee benefit plans
- Penalties for violation of state workers' compensation insurance laws and liability or unpaid premiums
- Penalties for willful misclassification



How to Minimize Risk

- Re-evaluate all individuals currently classified as independent contractors under the new ABC test.
- Impose arbitration agreements on independent contractors with class action waivers to minimize risk of class action.



General Contractor Liability for Subcontractors

- For contracts entered into on or after January 1, 2018, general contractors are liable for their subcontractors' employees' unpaid wages if the subcontractor fails to pay wages due.
- General contractors also now have the right to request from their subcontractors their employees' wage statements and payroll records.
- Takeaway for general contractors – Make sure you are doing business with reputable subcontractors.



Independent Contractor Pop Quiz... Again



Is She an Independent Contractor?

- A museum hires an art instructor to teach art classes at the museum – is she an independent contractor?



Is He an Independent Contractor?

- A general construction company hires an individual to do historic restoration work to a property it was working on – is the individual an independent contractor?



Are They Independent Contractors?

- A beer bar hires band musicians and entertainers to perform at the bar – are the musicians and entertainers independent contractors?



Are They Independent Contractors?

- A vacuum provider uses door-to-door sales representatives to sell its vacuums – are such representatives independent contractors?



Is She an Independent Contractor?

- A law firm hires an outside electrician to install a new electrical line – is she an independent contractor?



Questions?



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