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New Employment Laws Affecting California Employers

Effective April 30, 2018

1 – Employee or Independent Contractor? New "ABC Test" Replaces Multi-Facts Tests (Immediate Action Require). Effective April 30, 2018, determining whether a worker has been correctly classified as an independent contractor will be determined by a new "ABC Test."

On April 30, 2018, the California Supreme Court with its decision in *Dynamex Operations West, Inc. v. Superior Court*, No. S222732, made it significantly more challenging for California employers to hire individuals as independent contractors.

Relevant Facts. Dynamex is a nationwide delivery service operating in California. In 2004, Dynamex converted its drivers from employees to independent contractors. The drivers continued to perform the same job duties, however they now had to provide their own vehicles, pay all related operating expenses, maintain their own liability and workers compensation insurance, and pay all of their own taxes.

The Plaintiff, Charles Lee, worked for Dynamex as a driver for 15-days in 2005. Three (3) months later, he filed a class action lawsuit alleging various labor code violations on behalf of himself and other similarly situated drivers.

In opposition to class certification, Dynamex argued that S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 controlled the Dynamex – Driver relationship, and that a "right to control the manner and means of accomplishing the results" that balanced with the other nine (9) additional factors test should be applied. Dynamex argued that, Lee and all other drivers had been correctly classified as independent contractors, and that the class should not be certified.

The Trial Court agreed, denying class certification. Plaintiffs appealed. The Court of Appeals reversed the Trial Court granting class certification. Dynamex appealed.

The State Supreme Court affirmed class certification, finding that the class should include drivers, and provided a new "ABC Test" to determine whether a worker has been misclassified. The new test is based upon the Industrial Welfare Commission's Wage Order and the California specific definition of "employee" and "employer" contained in the Wage Orders. The Wage Orders define employees and employers as those who "suffer or permit to work." As it relies upon the Wage Orders (which cover all California employees), Dynamex effectively replaces all other tests to determine



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whether a California based worker has been correctly classified as an independent contractor.¹

The "ABC Test" The ABC Test starts with a rebuttable presumption, that all workers are employees unless each of the "ABC" elements are satisfied. The "ABC" elements are:

"A. Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?"

"B. Does the worker perform work that is outside the usual course of the hiring entity's business?"

"C. 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?"

Impact: For California employers, Dynamex will likely significantly change how they hire. As all workers are presumed employees as they "suffer work" and their employer "permit(s) (them to) work. When working with independent contractors, employers must ensure that each "ABC" factor remains satisfied throughout the relationship.

It is noteworthy that while the Dynamex workers each had general business and workers compensation insurance (evidence of "C" of the "ABC Test"), presumably a separate federal Employer Identification Number "EIN", and bank accounts it is not enough to establish an independent contractor relationship. In its analysis, the Supreme Court distinguished plumbers and electricians who provide short term independent contractor services, from work-at-home seamstresses or cake decorators who, using materials and supplies provided by their employer, form an integral part of the employer's business. The Dynamex Court did not, however, determine whether incorporation as either a stock or limited liability company was enough, within itself, to create an independent contractor relationship.

Dynamex will undoubtedly result in a dramatic increase in misclassification claims by both current and former independent contractors. Claims will likely include allegations of unpaid overtime, minimum wage violations, meal and rest breaks, paystub violations, Workers' compensation insurance, and may also include claims for Unfair Competition for violation of Business and Profession 17200, and Private Attorneys General Act ("PAGA"), or class action claims brought on behalf of other similarly situated workers.

Claims for unpaid wages, meal and rest breaks, and paystub violations can be brought before the California Department of Industrial Relations, Department of Labor Standards Enforcement, which after an administrative hearing can award monetary

¹ The multi-factor approach is also used by the EDD (See Form DE38 – apply an eight-factor test), and the IRS (See IRS' Behavioral, Financial, Type of Relationship test replacing its 20-factor test).



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penalties against employers, which are enforceable judgments. Appeals are *de novo* before the Superior Court, but require posting of a bond equal to the amount awarded at the time of appeal. Appeals must also be brought within ten (10) days of the award.

As of January 1, 2018, the Labor Commission may expand any worker complaint and investigate claims of employer retaliation or discrimination.² Where an investigation finds it likely that retaliation has occurred, the Labor Commission, is empowered to petition the Superior Court for a temporary injunction to stop the unlawful retaliatory or discriminatory conduct. The standard which must be met for such injunctive relief has also been lowered. Temporary injunctive relief, such as reinstatement, will be granted upon a showing that "reasonable cause exists to believe a violation has occurred." See Labor Code §§ 98.7, 98.74, 1102.61, 1102.62. In addition, the Labor Commissioner may issue citations directing specific relief to persons determined to be responsible for violations, and subject employers who willfully refuse to comply with civil penalties. *Id.*

The California Employment Development Department (EDD) is also empowered to conduct payroll tax audits of businesses operating in California to ensure workers receive benefit coverage. During an audit, it is the business's burden to demonstrate by way of appropriate documentation that every worker going back three (3) years has not been misclassified. Proof often requires that employers demonstrate that the individual operates a separate business. Following Dynamex, this will require more than the worker having his/her own general business and workers compensation insurance, an EIN number, and bank accounts. Appeals of the audit are made before the California Unemployment Insurance Appeals Board.

Recommended action: It is strongly recommended that all California business review their existing independent contractor agreements and relationships to ensure compliance with Dynamex. Individuals working in the new Gig Economy should not be hired as independent contractors, but should be brought on as employees, albeit temporary ones. Alternatively, individuals should be encouraged to form corporations (either stock corporations with an S-Election or Limited Liability Companies) and written contracts for services entered into with the new company.

Should you have questions about the new "ABC Test" or classification of independent contractor, or any other workplace law, please contact me at doug@dmwadelaw.com.

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² A list of laws that prohibit retaliation and discrimination which are enforced by the Labor Commission can be found at: <https://www.dir.ca.gov/dlse/HowToFileLinkCodeSections.htm>.