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California Supreme Court Creates New Worker Classification Test

On Monday, April 30, 2018, the California Supreme Court issued its long-awaited ruling in *Dynamex Operations West v. Superior Court*. The new ruling adopts a new worker classification test and makes it easier for independent contractors to be found to be employees under California Industrial Welfare Commission (IWC) wage orders, which impose obligations relating to minimum wages, maximum hours, overtime, and a number of very basic working conditions such as minimally required meal and rest breaks. Whether it will impact compliance issues beyond the Wage Orders remains to be seen. This decision will impact employers who rely on independent contractors to conduct their business.

For nearly three decades, California employers relied on the test enunciated by the California Supreme Court in *Borello* to determine the proper classification of its workers. The *Borello* test examined the total circumstances of the relationship between the principal and the person performing services. The most important factor was whether the principal had the right "to control the manner and means of accomplishing the desired result." Other factors that aided this analysis were: (1) whether the person performing services was engaged in an occupation or business distinct from that of the principal, (2) whether the work is part of the regular business of the principal, (3) whether the principal or the worker supplies instruments, tools, and the place for the person doing the work, (4) skill required in the particular occupation, (5) type of occupation, and whether the work was usually done under the direction of the principal or by a specialist without supervision, (6) length of time for which the services are to be performed, (7) whether payment is by the time worked or by the job, (8) whether the parties believed they were creating an employer-employee relationship. That *Borello* did not yield a bright-line test was an understatement, however, it afforded employers an opportunity to defend against misclassification claims

through the application of its specific set of circumstances against these numerous factors. It also created a zone in which entrepreneurial workers could create their own sole proprietorships if they so desired.

Employers may now face an uphill battle defending against misclassification claims in light of *Dynamex*. Moreover, the desires of the worker appear to no longer be a consideration. The *Dynamex* case stemmed from a lawsuit by drivers against Dynamex, a package delivery company. The lawsuit alleged that Dynamex misclassified its drivers as independent contractors, and, therefore, violated the applicable IWC wage order and various sections of the Labor Code, including Section 2802 pertaining to the reimbursement of business expenses. In its review of the Court of Appeal's ruling on the trial court's decision on class certification, the Court affirmed the Court of Appeal's holding that the trial court properly concluded that the "suffer or permit to work" definition of "employ" contained in the IWC wage orders may be relied upon in evaluating whether a worker is an employee, or instead, an independent contractor for purposes of the obligations imposed by wage orders. The Court disagreed, however, with the way the "suffer or permit to work" test was applied; however, since the outcome would not have changed, the decision was upheld. The Court's ruling effectively now makes anyone whom a business "engage[s], suffer[s] or permit[s] to work" presumptively an employee and sets aside the *Borello* test's applicability to interpreting the IWC wage orders.

Under the test set forth in *Dynamex*, also known as the now California version of the "ABC" test which is used by other jurisdictions in various forms, the hiring entity must establish *each* of the following factors to show that a worker is properly considered an independent contractor to whom the IWC wage orders do not apply: (A) that the worker is free from 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, *and* (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. Although the Court's assignment of the burden of proof appears to be dicta, defendant-employers should still take heed. It is also important to reiterate that the *Dynamex* ruling only applies to the IWC wage orders.

This new test will have repercussions for business in California and will present an uphill battle for business in establishing proper classification of independent contractors to whom the IWC's wage orders do not apply. In particular, factor (B) will be a significant limitation. The ruling's expansive reach is intentional. The Court made it clear that the wage orders' "suffer or permit to work" definition must be interpreted broadly to treat as "employees" all workers who would ordinarily be viewed as working in the hiring business. This means that ride-sharing businesses, for example, may now have to start treating drivers as employees rather than independent contractors, and may have to pay drivers minimum wages and overtime and provide them with meal and rest breaks, among other requirements. Entities in the warehouse and logistics industry and their customers may also feel the impact. California employers who classify workers as independent contractors should consider reviewing their relationships with such workers to determine whether they are independent contractors under this new test and to assess the potential risk.

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