

## **Alert | Labor & Employment**



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### **We May Not Have Until January to Sort Out AB5: Update on *Dynamex* Retroactivity**

In the California Supreme Court's 82-page opinion in *Dynamex Operations West v. Superior Court*, 4 Cal.5th 903 (2018), generally not well-received by businesses, the court developed a new test for determining who is and is not covered by California's Wage Orders. In so doing, it adopted a California variant on an ABC test. That test has conjunctive requirements. To overcome the presumption of employee status, the business must prove:

- A. that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the 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.

Conspicuously absent from the test and opinion is concern for the desires of the person providing the services, or for the person or entity receiving them or their contract. Also conspicuously absent is guidance on whether the decision is a retroactive expression of existing law, or prospective only.

With A.B. 5, the California Legislature expanded the scope of *Dynamex* and its ABC test across most of the Labor Code and a portion of the unemployment code, with some exceptions. If the service is within an exception, the test articulated by the Supreme Court's earlier *S.G. Borello and Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*) applies. The governor signed the bill into law, and A.B.5 becomes effective Jan. 1, 2020. Stats. 2019, ch. 296, § 1.

However, the question of *Dynamex*'s retroactivity remained. Originally, the Ninth Circuit, where California is of course located, decided that *Dynamex* was retroactive. *Vazquez v. Jan-Pro Franchising Int'l*, 923 F.3d 575 (9th Cir. 2019). Then the court withdrew that opinion and referred the question of retroactivity to the California Supreme Court. *Vazquez v. Jan-Pro Franchising Int'l*, 930 F.3d 1107 (9th Cir. 2019).

That brings us to the California Second District Court of Appeal's Oct. 8, 2019, decision in *Gonzales v. San Gabriel Transit, Inc.* *Gonzales* was brought as a garden variety wage and hour class action claiming various classifications of drivers who agreed to be and were treated as independent contractors were in fact employees. On that premise, the complaint alleged multiple statutory violations and some Wage Order violations. Applying the then-current standard and test under *Borello*, the trial court denied class certification. The appeal of that ruling was in progress when the *Dynamex* decision was issued. Noting that normally, rulings on class certification are entitled to the deferential "abuse of discretion" standard, the court of appeal reversed because the trial court did not have the benefit of the *Dynamex* decision, which the court found was retroactive. In summarizing its own ruling, the court said:

We conclude that: (1) the ABC test adopted in *Dynamex* is retroactively applicable to pending litigation on wage and hour claims; (2) the ABC test applies with equal force to Labor Code claims that seek to enforce the fundamental protections afforded by wage order provisions; and (3) statutory claims alleging misclassification not directly premised on wage order protections, and which do not fall within the generic category of "wage and hour laws," are appropriately analyzed under what has commonly been known as the "*Borello*" test . . . (citation and footnote omitted).

On remand, the trial court was directed to (1) evaluate which alleged Labor Code claims enforce wage order requirements, and which do not; (2) as to the Labor Code claims that enforce wage order requirements, apply the *Dynamex* ABC test to determine whether a class can be certified; (3) as to the Labor Code claims that do not enforce wage order requirements, apply the *Borello* test; (4) as to the derivative claim under Business and Professions Code section 17200, apply the ABC or *Borello* test as appropriate for the underlying alleged unlawful business practice; and (5) in the event the court determines class certification is appropriate for any claims, complete the analysis by determining whether proceeding as a class action would be superior to alternative methods of adjudication. Although court of appeal decisions are not binding on courts in other district courts of appeal, the second DCA is in Los Angeles, where a lot of wage and hour cases are filed.

The California Supreme Court will have the final say on retroactivity. The main import for businesses with state-wide California operations utilizing consultants, independent contractors, and other forms of non-employee service providers is that *Gonzales* signals that planning for AB 5 should probably be accelerated.

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