

Alert | Labor & Employment



January 2020

AB 5 Update: The California Supreme Court Will Likely Decide if *Dynamex* Is Retro in 2020

On Jan. 15, 2020, the California Supreme Court granted, and then deferred further action on, the appeal of a lower appellate court's opinion in *Gonzales v. San Gabriel Transit, Inc.* pending its disposition of *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, which takes up the common issue of whether the *Dynamex* decision applies retroactively.

Last year, the governor of California signed Assembly Bill 5 (AB 5) into law, which codified and clarified the California Supreme Court case *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. The ABC test established in *Dynamex* dramatically changed the standard for determining whether workers in California should be classified as employees or as independent contractors. Under the ABC test, a hiring entity must prove that a worker is in fact an independent contractor by demonstrating: (A) 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) the worker performs work that is outside the usual course of the hiring entity's business, and (C) 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. *San Gabriel Transit, Inc.* is one of several AB 5-related cases before state and federal courts in California that have workers, employers, and trade associations hotter than 1.21 gigawatts. While lawsuits filed by "gig economy" drivers, truck drivers ([CTA preliminary injunction granted in USDC-Southern District](#)) and freelance journalists ([American Society of Journalists and Authors, Inc. and National Press Photographers Association lawsuit filed in USDC- Central District](#)) present an existential threat to AB 5 in the long run, the California Supreme Court will likely decide the retroactivity issue in

Jan-Pro Franchising Int'l and *San Gabriel Transit, Inc.* this year. The impact of the rulings in both cases will extend up and down the Golden State, and employers, especially franchisors (See GT Alert, [AB 5 Update](#), Sept. 24, 2019), and their counsel should be prepared.

In the coming months, the California Supreme Court will decide whether the *Dynamex* decision, and thereby AB 5, applies retroactively. If the high court does not depart from “the usual rule of retroactive application” (see *Gonzales v. San Gabriel Transit, Inc.*, B282377, at *27 (Cal. Ct. App. Oct. 8, 2019)), then California and out-of-state employers that previously provided work to independent contractors, who are now employees under the new law, may be exposed to liability for past unpaid wages and other employment law violations. Then, if the retroactivity issue in *Jan-Pro Franchising Int'l* is resolved in favor of employees, the next challenge employers should brace for is *San Gabriel Transit, Inc.*, which will determine, among other issues, whether the *Dynamex* ABC test also applies to Labor Code claims that enforce wage order requirements. The start of the new decade may have jolted California employers with the shock of a lightning bolt striking a clock tower, but those weathering the storm of *Dynamex*'s impact should expect clearer skies and greater clarity come the end of the year.

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