

Alert | Labor & Employment



January 2021

CA Supreme Court Confirms *Dynamex* Applies Retroactively

On Jan. 14, 2021, the California Supreme Court issued its long-awaited [ruling](#) on whether the “ABC test” articulated in its 2018 *Dynamex Operations West Inc. v. Superior Court of Los Angeles* decision applies retroactively. At stake is the status of thousands of workers classified as independent contractors prior to *Dynamex*. Would these workers’ classifications be assessed according to the rules then in-effect, or pursuant to the later-adopted “ABC test” set forth in *Dynamex*?

Finding that *Dynamex* addressed an issue of first impression and did not alter a settled rule of law, the California Supreme Court answered resoundingly, “yes” – *Dynamex* applies retroactively.

As a reminder, the California Supreme Court’s decision in *Dynamex* monumentally altered the employment landscape in California by imposing the presumption of employment and placing the burden on the hiring entity to establish an independent contractor relationship. To demonstrate an independent contractor relationship, all three prongs of *Dynamex*’s ABC test must be satisfied: (A) 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; (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 that involved in the work performed. This strict ABC test contrasts with the multi-factor balancing test previously articulated in *S.G. Borello & Sons v. Department of Industrial Relations* that historically favored independent contractor relationships.

Following *Dynamex*, courts split on whether the ruling was retroactive. In 2019, the U.S. Court of Appeals for the Ninth Circuit in *Vazquez v. Jan-Pro Franchising Int'l, Inc.* held that *Dynamex* applies retroactively, only to subsequently withdraw its opinion and certify the question of retroactivity to the California Supreme Court.

And, the Supreme Court in *Vazquez* explained that judicial interpretations of legislative measures are generally given retroactive effect, even when the statutory language in question had been previously interpreted differently by a lower appellate court. Accordingly, absent a justified exception, the *Dynamex* decision – premised on a novel interpretation of the California Industrial Wage Commission wage orders – applies retroactively. The court rejected the contention that hiring entities' previous reliance on the *Borello* decision justified an exception to retroactive application – drawing a distinction between the California Labor Code language considered in *Borello* and the wage order language analyzed in *Dynamex*. It further explained that fairness and the policy considerations of worker protection espoused by the wage orders weighed heavily in favor of retroactive application.

Vazquez settles that the employee/independent contractor relationship with respect to the wage orders will be analyzed under the ABC test, even if the conduct in question occurred prior to the *Dynamex* decision. This decision immediately impacts all pending classification litigation, and could lead to additional litigation regarding allegations of past misclassification previously thought to comply with *Borello* and other appellate authorities.

Authors

This GT Alert was prepared by:

- [Ashley M. Farrell Pickett](#) | +1 310.586.7708 | farrellpicketta@gtlaw.com
- [Lindsay E. Hutner](#) | +1 415.655.1312 | hutnerl@gtlaw.com
- [Bryan W. Patton](#) | +1 310.586.7808 | pattonbw@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.[~] Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa.^ Tokyo.* Warsaw.^ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. »Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimbengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.*