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CA Supreme Court Confirms Dynamex Applies Retroactively

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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.

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