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California Supreme Court Appears to Buck Decades of Authority Regarding Independent Contractors

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In Dynamex Operations West, Inc. v. Superior Court, the California Supreme Court shifted its focus regarding how to determine if workers are properly classified as employees or independent contractors under California's wage orders. Some would argue the new test is an abrupt change from the multi-factor analysis California courts have articulated for decades, the primary focus of which was whether the hiring entity had the right to control the manner and means that work is performed.

The new (to California) "ABC" test may place a significant burden on businesses to justify independent contractor classifications. Under this test, workers are *presumed* to be employees for purposes of the California wage orders unless the hiring entity establishes each of the following: (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; (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. If the hiring entity fails to establish any of the "ABC" factors, the worker will be considered an employee subject to the protections of the wage orders.

"Suffer or Permit to Work" Standard

For decades, *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989) has been the seminal California decision on the subject of worker classification. *Borello* applied a multi-factor test, including considering the hiring entity's right to control the details of the work, as well as other factors. The plaintiffs in *Dynamex* argued that, in addition to the *Borello* test, additional tests based on language in the wage orders and discussed in *Martinez v. Combs*, 49 Cal. 4th 35, 64 (2010) also apply to worker classification determinations under the wage orders. *Dynamex*, on the other hand, argued that *Borello* was the only applicable test and that the additional "tests" discussed in Martinez were inapplicable because *Martinez* addressed questions of joint employment, not worker classification.

The *Dynamex* court held that, rather than setting forth an exclusive test, *Borello* stands for the

general proposition that the worker classification analysis should focus on the intended scope and purposes of the particular statutory provision at issue in the particular case. The court then turned to the language and purpose of the wage order at issue in *Dynamex*. As described in *Martinez*, the wage order considers three alternative definitions of "to employ": (1) to exercise control over the wages, hours or working conditions, (2) to suffer or permit to work, or (3) to engage, thereby creating a common law employment relationship. The *Dynamex* appeal related to the applicability of the first two definitions. The court declined to address whether the "exercise control over wages, hours or working conditions" definition is intended to apply outside the joint employer context. However, the court agreed with plaintiffs that the "suffer or permit to work" standard applies beyond the joint employer context. The court noted that the wage order does not suggest that the language applies in a limited context and further described that the "suffer or permit" terminology derives from statutes prohibiting child labor situations (e.g., a child hired by his father or children hired by coal miners) which, according to the court, means the phrase was clearly intended to apply beyond the joint employer context. Given this history and the remedial purpose of the wage orders, the court held that the broader "suffer or permit to work" standard applies to the question of whether a worker should be considered an employee or independent contractor under the wage orders.

"ABC" Test

The court conceded, however, that a literal interpretation of the "suffer or permit to work" standard would be ineffective because it would encompass "genuine independent contractors" who could not reasonably be considered employees under the wage orders. The court considered various tests which could guide interpretation of the "suffer or permit to work" language and ultimately adopted the "ABC" test which it held was "appropriate and most consistent" with the history and purpose of the "suffer or permit" standard in the wage orders. Under the "ABC" test, workers are presumed employees under the "suffer or permit to work" standard in the wage orders *unless* the hiring entity establishes that: (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; *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.

Recommended Steps

While we will continue to see how this shift in focus will play out, the new "ABC" standard may place a heavy burden on companies with independent contractors in California. Companies with such contractors should contact legal counsel to review the relationship with such contractors under the "ABC" test. Factor B, in particular, may be troublesome for any entity that uses independent contractors for its main service or product (such as delivery drivers hired by a delivery service company, cake decorators for a bakery, or at-home seamstresses for a clothing manufacturer).

Although the *Dynamex* court only considered the relevant test for wage order claims, worker classification issues are relevant in many other contexts, such as tax, workers' compensation, and wage-and-hour claims derived from a source other than the wage orders. Stay tuned regarding how the *Dynamex* decision will impact worker classification determinations outside of the wage order context.

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