Published on *The National Law Review* https://natlawreview.com

CA Supreme Court Decision Calls for Reevaluation of Worker Classifications

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Businesses with employees in California may need to reevaluate whether their workers are independent contractors or employees in light of a recent decision by the California Supreme Court.

The decision, which is sure to impact the continuing debate concerning the legal status of "gig economy" workers, endorsed a more restrictive test for determining whether workers properly can be classified as independent contractors. Notably, the decision comes on the heels of several victories for companies that classified certain segments of their workforces as independent contractors, including one federal court decision that relied almost exclusively on the prior test replaced by this new decision.

In *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, the California Supreme Court addressed whether a putative class of delivery drivers qualified as employees under a state wage order—a mechanism that sets the minimum wage and other conditions for select industries within the state.

For decades, California courts analyzed this question under what is known as the "*Borello* test." The test required a court first to consider nine factors in determining whether the alleged employer has the "right to control the manner and means of accomplishing the result desired."

In February, a federal court sitting in California used the *Borello* test to determine that a group of Grubhub workers were independent contractors and not, as they had claimed, employees. Then, in April, the test was cited—though not relied upon—in a federal decision concerning Uber drivers located in Pennsylvania, finding that the workers were contractors, not employees.

The new decision marks a departure from the analytical framework of these prior cases, directing California courts to apply a more restrictive test, which likely will result in many more workers being classified as employees. Reclassification means that employers must pay employees minimum wage and overtime and must withhold federal taxes and unemployment insurance, as well as provide

worker's compensation insurance.

Following *Dynamex*, courts will find a worker to be an independent contractor if (A) the worker is free from the control and direction of the purported employer in connection with the performance of the work, both under the contract for the performance and in fact; (B) the worker performs work that is outside the usual course of the company'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 company. Under this test—which is used in other jurisdictions and is often known as the "ABC test"—the burden rests on the employer seeking to oppose employee status.

The court's decision was explicitly aimed at expanding the scope of the wage orders, both in light of the history of the orders themselves and economic developments like the growth of the "gig economy." The court was critical of employers attempting to gain what it described as an improper advantage over competitors by misclassifying employees as independent contractors.

All organizations that use independent contractors—often operating in a different state than the employer—should take note of the decision. No matter what a contract between the employer and the worker says, courts, in particular those in California, have shown a willingness to deem the worker an employee. Now, without the multifactor *Borello* test, companies should assume this will occur with increasing frequency. Therefore, they must take care to create and administer independent contractor relationships with this test in mind.

National Law Review, Volume VIII, Number 135