Legal Update Article

California Supreme Court Broadens Definition of Employee in Independent Contractor Analysis

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Diverging from decades-old precedent, the California Supreme Court has broadened the definition of "employee" in the context of the State's Industrial Work Commission (IWC) wage orders when undertaking the employee-versus-independent contractor analysis. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, 2018 Cal. LEXIS 3152 (Cal. Apr. 30, 2018).

Under the new standard, to establish that an individual is in fact an independent contractor, an employer must prove that:

- The worker is free from control and direction of the hirer in connection with performing the work, both under contract and in fact;
- The worker performs work outside the usual course of the hiring entity's business; and
- The worker customarily engages in an independently established trade, occupation, or business of the same nature as the work performed for the hirer.

Control-of-Work Test

In expanding the definition of employee, the Supreme Court examined at length, but ultimately deemed as non-exclusive, the nearly 30-year-old analysis established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations,* 796 P.2d 399 (Cal. 1989), which it acknowledged was "the seminal California decision on the subject."

In *Borello,* the Supreme Court had adopted, in the context of a workers' compensation claim, the common law "control-of-work" test. The test asks "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."

The Court in *Borello* further identified several non-exclusive factors that inform the analysis, including:

- The right of the employer to discharge the individual without cause;
- Whether the individual is engaged in a distinct occupation or business;
- Whether, in the location at issue, the work is usually done without supervision by the employer;
- The skill required in the particular occupation;
- Whether the employer or the individual supplies the necessary equipment, tools, and place of work;
- The length of time for which the services are to be performed;
- Whether payment is made by the job or by the time spent;
- Whether the work is a part of the employer's regular business; and
- The apparent intent of the parties as to whether an employer-employee or independent contractor relationship exists.

ABC Test

Noting that the pertinent state wage order (covering matters such as minimum wages, maximum hours, and meal and rest breaks) defines the term "employ" as "to engage, suffer, or permit to work," the Supreme Court concluded in *Dynamex* that, in light of the history and remedial purpose of the wage order, the more appropriate analysis for determining whether an employer-employee relationship exists is the "ABC Test" adopted by some other state courts.

Under the ABC test, a worker is presumed to be an employee unless the worker:

(A) Is free from control and direction of the hirer in connection with performing the work, both under contract and in fact;

(B) Performs work outside the usual course of the hiring entity's business; and

(C) Customarily engages in an independently established trade, occupation, or business of the same nature as the work performed for the hirer.

While recognizing the importance of the factors set forth in *Borello,* the Court concluded that *Borello*'s highly nuanced, multi-factor test "makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision." The result of such circumstances "often leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly, on a day-to-day basis." Moreover, the Court explained, application of a more complex, multi-factor test "affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying the working conditions of individual workers within such categories."

In adopting the simpler ABC test, the Court noted that, by being presumptively classified as employees, workers would have the benefits and protections of the wage order available to them, while companies would be protected against competitors who attempt to save costs by circumventing the wage orders' obligations.

Next Steps

California employers who have entered into work arrangements with individuals other than those who traditionally have been deemed independent contractors (*e.g.,* electricians, plumbers, and HVAC professionals) should promptly and carefully review the status of those workers, particularly if the employer previously classified such individuals as employees.

The standard announced by the Supreme Court presumes that workers are employees subject to the requirements of the IWC wage orders. The Court makes clear that the employer has the burden of proving all three elements of the ABC test to establish independent contractor status.

Dynamex is certain to significantly affect companies in the Bay Area, Silicon Valley, and throughout California that rely on workforce configurations using independent contractors.

If you have any questions about *Dynamex,* the employee-versus-independent contractor analysis, or any other wage and hour issue, please consult the Jackson Lewis attorney with whom you regularly work.

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