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California Legislature Embraces the Dynamex Standard for Evaluating Independent Contractor Arrangements

The California legislature is considering a bill that would codify in the Labor Code and Unemployment Insurance Code the California Supreme Court's decision in *Dynamex* – which adopted a standard that made it significantly more difficult for employers to classify workers as independent contractors, ignoring the realities of the modern workplace and gig economy. Assembly Bill 5 was introduced back in December 2018, and has passed the Assembly and is making its way through the Senate.

As this blog previously noted, last year the Supreme Court in *Dynamex* interpreted the definition of "employee" under the California Wage Orders as placing the burden on the hiring entity seeking to characterize a worker as an independent contractor to establish each of these three factors: (A) that the worker is free from the control and direction of the hiring entity in performing the work; (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. This is known as the "ABC test."

For years prior to the *Dynamex* decision, the California courts and agencies followed the multi-factor test from *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* in evaluating independent contractor questions. The *Borello* test considers multiple factors such as the right to control, whether the parties believed they were creating an employer-employee relationship, the right to discharge, the distinctiveness of the services provided, the method of payment, and the length of time that services were provided, among others. Not all of these factors have to be met to establish independent contractor status.

Yet, *Dynamex* rejected the *Borello* test and instead adopted the ABC test for determining whether an individual is an employee or independent contractor for purposes of the Wage Orders. The distinction is significant since the Wage Orders impose numerous obligations on employers relating to minimum and overtime wages, reporting time pay, uniforms and meal and rest periods, among other areas. *Dynamex* makes it more difficult for employers to classify workers as independent contractors, particularly where the individual's services are similar to those of the hiring entity because of the second part of the ABC test, which requires that the individual's work be outside the usual course of the hiring entity's business. As presently written, Assembly Bill 5 adopts *Dynamex* but carves out a limited exception by continuing to apply the *Borello* multi-factor test to certain types of

professional workers, such direct sales salespersons and those performing "contracts for professional services" (*i.e.*, where the worker is licensed by the state or has an advanced degree).

Dynamex's impact will likely be enduring. Independent of these legislative actions, the Ninth Circuit Court of Appeals in *Vasquez v. Jan-Pro Franchising International, Inc.* has recently ruled that *Dynamex*'s ABC test applies retroactively, meaning that the standard must be used in evaluating any work practices predating the decision. In addition, the California Labor Commissioner has issued an opinion letter dated May 3, 2019 recognizing that the ABC test applies not only to obligations under the Wage Orders, but also to related Labor Code provisions. If Assembly Bill 5 becomes law, any legal exposure will only increase as the ABC test will apply as well to unemployment benefits claims and other wage and hour claims under the Labor Code.

In light of potential wage and hour exposure, it is advisable that businesses review any current independent contractor arrangements against the ABC test. The stakes are high in California where wage and hour class actions are commonplace.