



May 2018 **"PROTECT YOURSELF"**

New Test for Independent Contractors

Most Workers Should Now be Classified as Employees ...

A new California High Court mandate!

April 30, 2018.The California Supreme Court reversed a long standing precedent that provided employers with some flexibility in classifying employees as independent contractors versus employees. Previously, there was some flexibility when determining whether workers should be classified as employees or independent contractors for purposes of California wage orders, and the imposed obligations relating to the minimum wages, maximum hours, and basic working conditions (such as required meal and rest breaks).

Case: Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County, Dynamex offers "on-demand" pickup and delivery services to the public and large business customers. The lawsuit involved two individual Dynamex delivery drivers, suing on behalf of a class of allegedly similarly situated drivers. The workers filed a complaint against Dynamex alleging that the company had misclassified its delivery drivers as independent contractors rather than employees.

The Court's ruling effectively adopted the criteria described as the **"ABC test."** The "ABC" test is utilized in some jurisdictions and contexts to distinguish employees from independent contractors. This standard's objective is to create a simpler, clearer test for determining whether the worker is an employee or an independent contractor.

Under the ABC test, the worker is an employee unless the hiring entity (company) establishes each of three factors:

- a. that the worker is free from control and direction over performance of the work,
- b. that the work provided is outside the usual course of the business for which the work is performed
- c. that the worker is customarily engaged in an independently established trade, occupation or business.

Prior to this ruling, California courts used a multi-factored approach, looking at the employer's control over workers and considers several secondary factors in analyzing a worker's classification. **The ABC test is far stricter than the prior test.** In July 2015, the U.S. Department of Labor issued an Administrator's Interpretation which concluded that, based on the ABC test, "most workers are employees"

The new ruling presumes that a worker hired by an entity is an employee and places the burden on the employer to establish that the worker is an independent contractor.

If the employer fails to show that the worker satisfies each of the three criteria, the worker should be treated as an employee, not an independent contractor. According to the Court, "The hiring entity's failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order."

Dynamex drivers were held to be employees even though they provided their own vehicles, paid for all of their transportation expenses among other things. The Court reasoned:

(i) that Dynamex could not establish that the drivers performed work outside the usual course of the business as set forth in part (B) above. Dynamex's business was that of a delivery service, unlike other businesses in which the delivery of products is outside the usual course of it's business.

(ii) Dynamex obtained the customers for it's deliveries, sets the rate that the customers would be charged, notified the drivers where to pick up and deliver the packages, and tracked the deliveries.

The Court clarified that a hiring entity cannot satisfy part (B) of the test by showing that the worker performs work “physically outside of the employer’s place of business.”

The Court’s ruling raises doubts about existing independent contractor relationships in California, exposes companies to liability, and raises the specter of new wage-hour class actions. Companies with independent contractors in California should immediately reevaluate their independent contractor relationships, adjust as necessary to comply with current law, and evaluate how to ameliorate exposure for **prior decisions** to classify workers as independent contractors.

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