The Dynamex Fallout: Independent Contractor Classifications Endangered

California Employers Should Heed Recent State Supreme Court Ruling

Are independent contractors a thing of the past in California?

If your business uses independent contractors for any core component of the business, the answer is, for all practical purposes: “yes.”

In a unanimous ruling, the California Supreme Court in *Dynamex Operations West v. Superior Court* rejected the decades-old *Borello* test for determining whether workers should be classified as employees or independent contractors, in favor of a new standard that heavily favors workers being classified as employees under the California Wage Orders. The Court adopted a broad “ABC Test,” which makes it dramatically more difficult — if not impossible — to classify workers as independent contractors.

Dynamex is a nationwide same-day courier and delivery service that offers on-demand, same-day pickup and delivery services to businesses and the public. It previously classified its California drivers as employees, but as a cost savings measure, converted its drivers to independent contractors prior to the dispute. One of those drivers filed a class action lawsuit alleging various wage and hour claims, including claims under the Wage Orders. The California Supreme Court granted review to review the appropriate test for determining whether a worker is an independent contractor or an employee under the Wage Orders.

The Supreme Court adopted an “ABC Test” that starts with the assumption that a worker is an employee, placing the burden on the employer to establish that the worker is an independent contractor by satisfying *all parts* of the following three part test:

A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such 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 for the hiring entity.

The “B” prong of this test is the factor that is most concerning for most employers. Workers who perform work for an entity that is within the usual course of the entity’s business will fall within the definition of “employee,” at least for the purpose of the Wage Orders. This is true even if the worker only works periodically, has other employment or has a contract for a short, fixed duration.

The Court gave the following example of the application of this new test: A seamstress hired by a clothing manufacturer to make dresses from cloth and pattern supplied by the company is an employee, as is a decorator contracted to regularly design cakes for a bakery. On the other hand, an outside plumber hired to fix a leak in a bathroom on a one-time basis is still an independent contractor.

This new test only applies to classification as an employee for purposes of the Wage Orders. However, the Wage Orders set standards for employment, including minimum wage, overtime, meal and rest breaks, exempt status, record-keeping requirements and basic working conditions. Accordingly, this new test will apply to a number of employment claims, including minimum wage, overtime and meal and rest breaks.

Based on the Court’s decision, there is no indication that it changed the tests to determine employee status under other employment statutes related to taxes, unemployment, entitlement to benefits, including workers’ compensation insurance, or other state and federal laws relating to wages, hours and working conditions. It seems for now, the common law employment test or the Borello test — which are arguably more favorable for employers — would still apply to most claims brought under those other statutes.

This means that a contractor could be a contractor with respect to some laws, but an employee with respect to other laws. However, from a practical perspective, if there is a determination the worker should be an employee under the Wage Orders “ABC Test,” the worker will likely be treated as an employee for all purposes. It is not clear how an employer would treat a worker as an employee for some purposes and not for others: How does an employer pay someone who is both a contractor and an employee? Who withholds and pays taxes? Would benefits be provided?

While the “ABC Test” provides clearer guidelines as to who may be classified
as an independent contractor, many employers may find that their current independent contractor relationships cannot satisfy this demanding new test. In addition, employers that reclassify workers as “employees” may face significant difficulty in complying with the Wage Orders without radically restructuring their businesses. For example, motor carriers who engage owner-operators to deliver freight, and are therefore off-site for nearly the entire day, may have difficulty ensuring compliance with the meal and rest break requirements of a particular Wage Order.

Additionally, the clearer guidelines in the “ABC Test” may make it easier for potential class actions to obtain class certification, raising the specter of a significant uptick in class action suits against employers under the new test.

The ruling has the potential to effect any employer that relies on independent contractors. Therefore, businesses that use independent contractors should immediately reassess their relationship with these workers, in light of the “ABC Test.”

Although the Court’s ruling has the greatest impact on private employers, it may also have an impact on public agencies as well. Limited provisions within the Wage Orders are applicable to public agencies, including the minimum wage provisions. Therefore, public employers who use independent contractors should assess the work performed by their independent contractors, and consider under all applicable laws if they are properly classified as independent contractors.

If you have any questions about this decision or how it may impact your business or agency, please contact the authors of this Legal Alert listed to the right in the firm’s Business and Labor & Employment practice groups, or your BB&K attorney.

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