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Preparing for Dynamex*: California Supreme Court Set to Decide Legal Standard for Determining Independent Contractor Status*

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The California Supreme Court will soon issue its much-anticipated ruling in *Dynamex Operations West, Inc. v. Superior Court*, No. S222732. The court will decide whether it will alter its decades-old test for determining if a worker is an employee or an independent contractor. Since more independent contractors operate in California than ever before, with new and existing companies structuring their workforce to use this flexible staffing model, companies will need to consider *Dynamex's* impact should the court modify the standard.

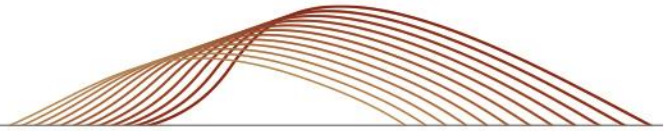
For the Past 29 Years …

Since 1989, California courts have used a common law, multi-factor analysis for determining whether a worker should be classified as an independent contractor or an employee. Under this analysis, first described by the California Supreme Court in *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal. 3d 342 (1989), the primary consideration in determining if an employment relationship exists is whether or not the company has the right to control the manner and means by which the worker performs the work. The analysis also considers various secondary factors, including the degree of skill required to perform the work, the method of payment, and the nature of the company's regular business.

Dynamex Operations West v. Superior Court

In *Dynamex*, a group of California delivery drivers sued their company, claiming that they were misclassified as independent contractors. They brought various wage-and-hour claims under the California Labor Code. The trial court granted the drivers' motion for class certification.

The defendant then filed a petition for a writ of mandate, arguing the trial court had based its certification decision on an improperly adopted definition of "employee" in Industrial Welfare Commission ("IWC") wage orders to ascertain the status of class members, and had failed to use the common law *Borello* test for distinguishing between employees and independent contractors. The Court of Appeal accepted review and ultimately decided that the IWC wage order definition of "employer" and "employee" should be used to evaluate the drivers' claims that pertain to subjects covered by an IWC wage order (e.g., minimum wage), and that claims outside the ambit of an IWC wage order (e.g., reimbursement for certain business expenses) should be decided using the common law *Borello* test. *Dynamex Operations West, Inc. v. Superior Court*, 230 Cal. App. 4th 718 (2014).



The IWC wage orders define "employee" as "any person employed by an employer." "Employer" is defined as anyone "who directly or indirectly . . . employs *or* exercises control over the wages, hours, or working conditions of any person." The term "employ" means to "engage, suffer, or permit to work." In evaluating the contrasting standards, the *Dynamex* Court of Appeal described the common law *Borello* test as an "employer-focused approach" and the IWC wage order as an "employee-centric test gauged to mitigate the potential for employee abuse in the workplace."

The defendant in *Dynamex* sought review by the California Supreme Court, and, in January 2015, the Supreme Court agreed to hear the case. Surprisingly, almost two years later, following substantive briefing by the parties and *amici curiae*, the court invited the parties to file supplemental briefs addressing the following question:

> Is the pertinent wage order's suffer-or-permit-to-work definition of "employ" properly construed as embodying a test similar to the "ABC" test that the New Jersey Supreme Court . . . held should be used under the New Jersey Wage and Hour Law, which also defines "employ" to include "to suffer or to permit to work"?

The New Jersey "ABC" test presumes the worker is an employee. To rebut this presumption, the employer must prove the worker (A) is free from the employer's control and direction; (B) performs a service that is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; *and* (C) customarily engages in an independently established trade, occupation, profession, or business.

The California Supreme Court heard oral argument in *Dynamex* on February 6, 2018, and the court is expected to release its decision by May 7, 2018.

Better to Act than React—Preparing for *Dynamex*

It is not clear whether or not the California Supreme Court will modify the test for determining if a worker is an employee or independent contractor. Regardless, companies that rely on independent contractors as part of their workforce may want to consider taking some steps now to assess their potential risk. For example, consider identifying your population of workers (including workers who may not have been contracted through a formal screening process), evaluating your contractor agreements based on the factors under review in *Dynamex*, and implementing arbitration agreements containing a class-action waiver for such workers.

Stay Tuned

The California Supreme Court will issue its *Dynamex* decision in the upcoming weeks. Upon release, we will post a summary of the decision and issue a follow-up Client Alert with a detailed analysis of the court's ruling.

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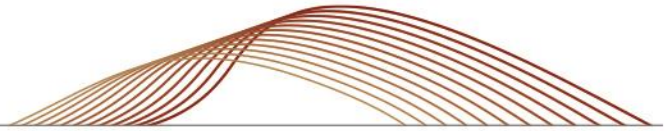

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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