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# Hiring "Independent Contractors" Just Became Even Riskier in California

By Wendy Lane and Karina B. Sterman

The California Supreme Court has unanimously ruled in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* that all workers are employees unless proven otherwise. Notably, the Court has made it much more difficult to prove that a worker is an independent contractor.

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**The Old Standard**

For nearly 30 years, courts have applied a "multifactor, all the circumstances standard" in which the primary concern for independent contractor classification was whether the hiring company had the right to control the "manner and means" by which the worker performed the work. Other factors considered included the degree of skill required to perform the work, the ability for the worker to profit, the nature of the hiring company's regular business, and whether the worker supplies his or her own equipment.

**The New Standard**

Now, in the *Dynamex* decision, the Court considered whether delivery drivers, who were classified by their hiring company as independent contractors, were entitled to California Wage Order protections such as minimum wage, overtime, and meal and rest periods. In doing so, the Court ruled that a worker cannot be classified as an independent contractor unless all three prongs of the following "ABC Test" have been satisfied:

(A) 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) the worker performs work that is outside the usual course of the hiring entity's business; and
(C) 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.

Part (A) of the test is unsurprising as it is akin to the common law control standard that prevents a hiring company from designating a worker as a contractor if the company exercises the same control over the worker that it would typically exercise over employees. However, parts (B) and (C) of the test could

significantly hamper California's numerous independent contractor relationships in a variety of industries and bring the burgeoning "gig economy" to a halt.

In addressing part (B), which requires that the worker perform work outside the usual course of the hiring entity's business, the Court provided specific examples:

- a plumber temporarily hired by a retail store to repair a leak would be an independent contractor because she is doing work outside the usual course of business;
- an electrician hired by a retail store to install an electrical line would be an independent contractor because he is doing work outside the usual course of business;
- a seamstress who works at home to make dresses for a clothing manufacturer from cloth and patterns supplied by the hiring company is an employee because her services are within the clothing manufacturer's usual business;
- a cake decorator who works for a bakery on a regular basis to provide custom-designed cakes is an employee because his services are within the usual course of the bakery's business.

With respect to part (C) of the test, which requires a showing that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work he or she is performing for the hiring company, the Court made clear that the hiring company must prove more than the fact that it has not prohibited or prevented a worker from engaging in his or her own business. The Court suggested that this part of the test might be satisfied if the worker has generally taken the steps to establish and promote his or her independent business, such as through incorporation, licensure, advertisements, and routine offerings to provide the services of the independent business to the public or other customers.

**Business Take-Aways**

As we have previously advised, independent contractor misclassification carries serious statutory penalties of $5,000 to $15,000 in California for each "willful" violation. Moreover, hiring companies can be subject to time-consuming and expensive audits and be held liable for back wages, penalties, fines, and the assessment of back taxes in the event workers are found by state and/or federal agencies to have been misclassified.

As such, all businesses should reevaluate their independent contractor classifications under the new ABC Test, including but not limited to:

- evaluate your contractor agreements with any contractors based on the factors established in *Dynamex;*
- *remember that the ABC Test will be applied even if there is a mutually negotiated agreement for independent contractor classification status;*
- evaluate your population of workers and the nature of the work they are performing as it relates to the core services or products of your company;
- require your contractors to show that they are independently taking the actions to run and promote their independent businesses;
- consider implementing arbitration agreements containing a class-action waiver; and
- strategize with counsel to determine various means of mitigating risk in case of possible existing misclassifications.

It is important to note that the ABC Test will be applied to determine if California Wage Order protections apply. However, it is not yet clear whether California agencies or courts will apply the ABC Test for other

purposes such as tax withholdings, worker's compensation insurance, and unemployment insurance. Businesses must use caution when entering into and/or continuing independent contractor relationships.

Greenberg Glusker's employment department is here to answer your questions.

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