Are Your Independent Contractors Really Employees? California Supreme Court Adopts Strict New Classification Test

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On April 30, 2018, the California Supreme Court unanimously rejected the common law test for independent contractors used in California for the last three decades and, for purposes of California's wage orders (which impose obligations relating to minimum wages, maximum work hours, and meal and rest breaks, among other things), adopted the so-called "ABC test." Under the ABC test, workers are presumed to be employees, and employers may classify workers as independent contractors only if they prove all three elements of the test.

In *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* (No. S222732), the California Supreme Court held that employers must meet the requirements of the ABC test to establish a worker is an independent contractor and thus not entitled to the protections of the Industrial Welfare Commission's (IWC) wage orders. This holding overturns decades of precedent, which relied upon the common law test for independent contractors derived from the 1989 California Supreme Court case of *S.G. Borello & Sons Inc. v. Department of Industrial Relations*. Under the *Borello* test, courts focused on the employer's effective control over workers whom the employer had classified as independent contractors and also considered numerous secondary factors.

Under the new ABC test, which is used in other jurisdictions such as New Jersey, Massachusetts and Connecticut, workers are now presumed to be employees unless employers establish all of the following:

A. The worker is free from the control and direction of the hiring entity 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 that involved in the work performed.

The California Supreme Court noted that, as an example, a plumber who had been hired by a retail store to repair a bathroom leak would not be considered performing work that is part of the store's usual business and would properly be considered an independent contractor. However, when a bakery hires cake decorators, "the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees."

The ruling leaves open the question of whether the *Borello* test will continue to apply to cases not involving the IWC wage orders.

The court did not comment on the practical effect its ruling is likely to have on the many employers that have classified service providers who perform work that is part of the employers' usual course of business as independent contractors. The ABC test likely will profoundly change how such service providers are engaged, retained and classified.

In light of the new ruling, it is critical that employers review their worker classifications to determine whether any workers should be

reclassified from independent contractors to employees. Employers who misclassify workers as independent contractors face stiff civil penalties under the California Labor Code. Our lawyers have deep counseling and litigation experience on these issues. If you would like to discuss these issues further or have questions about this alert, please contact one of the lawyers listed here.

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