California Supreme Court Turns Independent Contractor Law on its Head Making it as Easy as "ABC"

05.22.2018 | By Veronica M. Gray

In *Dynamex Operations v. Superior Court*, the California Supreme Court made a significant change in independent contractor law, adopting an ABC test for determining whether an individual is an employee under the Wage Orders.[1] Although other states use the ABC test, its wording varies from jurisdiction to jurisdiction. Here, the Court adopted a version that tracks Massachusetts' ABC test. The net effect is that it makes it significantly more difficult for California employers to show workers qualify as independent contractors. Employers should now re-assess their workers' classification and decide whether they should reclassify their workers as employees.[2]

In *Dynamex*, the Court held that, for purposes of California Wage Order claims[3], the definition of employment identified in California's Wage Orders governs, and articulated a new standard for what it means for an employer to suffer or permit an individual to work. The new test presumes that *any* worker hired to perform services is an employee of the hiring business. Under the new standard, the burden is on the employer disputing employee status to prove *all* of the following elements (referred to as the ABC test):

(A) the worker is free from the control and direction of the hirer in connection with performing the work, both under contract and in fact. As the Court explained, a business does not need to control the precise manner or details of the work in order to be found to have maintained control and direction;

(B) the worker performs work outside the usual course of the hiring entity's business. For example, a plumber providing plumbing services to a bakery is outside the usual course of the bakery's business; but a cake decorator hired to decorate the bakery's cakes is not outside the usual course of business; and

(C) the worker customarily engages in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. This element focuses on whether the worker independently made the decision to go into business for himself or herself.

Unlike in the past, where the courts balanced multiple factors to assess contractor status, under *Dynamex*, the hiring entity's failure to prove any one of the three prerequisites will be sufficient in itself to establish that the worker is an employee.

The Supreme Court justified its decision largely on policy grounds, stating that the ABC test was more fair to workers who wanted the fundamental protections of California's Wage Orders, and that using a less employee-friendly standard could create a race to the bottom where businesses implement substandard wages and unhealthy conditions by trying to avoid the protections of the Wage Orders.

The Supreme Court also noted that the phrase suffer or permit could not be interpreted literally such that it would include workers such as plumbers or electricians, who have traditionally been viewed as genuine independent contractors who work in their own independent business.

What Dynamex Means for Employers

Dynamex creates a presumption of an employee-employer relationship that must be disproven by the employer. Employers who classify any of their workers as independent contractors should review the relationship utilizing the ABC test to determine whether the worker has been properly classified. For gig economy employers, such as Uber and Lyft, who classify most of their workers as independent contractors, the *Dynamex* decision could have far reaching implications.

Dynamex ushers in new challenges to independent contractor classifications, and will most likely generate class or PAGA actions, with significant exposure for damages and penalties. Notably, independent contractors do not sign class arbitration waivers, meaning that even those employers who have protected themselves from class actions through these waivers may be left unprotected. Notwithstanding, *Dynamex* did not prohibit independent contractor relationships and, under the right circumstances, independent contractor business models can continue to survive in California.

How Nossaman Can Help

If your business utilizes independent contractors, now is the time to reassess those relationships in light of *Dynamex*. Nossaman can assist employers in reviewing and auditing these relationships and employers' current wage and hour policies and procedures to ensure compliance. Nossaman provides client-focused, high caliber legal services that exceed our clients' expectations while staying within their legal budgets. Our employment attorneys provide litigation, counseling, advice, and training services to private and public companies and public entities throughout California, as well as meeting their out-of-state-needs. We stay on top of emerging employment issues such as e-discovery, privacy rights, cybersecurity, data breach, and workplace violence and are well prepared to counsel our clients on how to address and control related issues.

[1] The Wage Orders specifically exempt, *inter alia*, employees directly employed by the state or any political subdivision except as provided in Sections 1, 2, 4, 10, and 20 thereof. If a public agency decides to reclassify independent contractors as employees, consideration should be given as to how these workers might be treated by CalPERS (or a '37 Act retirement system). The change could be treated as fully retroactive for

retirement plan purposes, with employer and employee contributions due from both. Public agencies should consult with counsel before reclassifying their independent contractors as employees.

[2] *Dynamex* only addresses California law under the Wage Orders. It does not impact the federal standard for addressing whether a worker is an independent contractor or employee.

[3] A Wage Order Claim involves those issues governed by the applicable Wage Orders, such as minimum wage and overtime claims. Notably, the Court limited its holding to apply only to claims alleging violations of California's Wage Orders and did not decide whether the ABC test would apply to claims alleging violations of the California Labor Code (e.g. an expense reimbursement claim), or whether a different test would apply. However, employers should keep in mind that most California lawsuits alleging independent contractor misclassification will predominantly allege violations of the applicable wage order.