

California Changes the Gig Economy Game For Independent Contractor Status

by Briana Al Taqatqa

The California Supreme Court issued a ruling yesterday that will affect workers and businesses in the Golden State's "Gig Economy." The decision changes the standard to determine whether workers are classified as independent contractors or employees for wage and hour purposes. The same standard may be adopted for other types of employment law claims. Hundreds of thousands of California employers that engage independent contractors must reevaluate those classifications under the new standard embraced by the state's high court yesterday.

In *Dynamex Operations West Inc., v. The Superior Court of Los Angeles County*, two delivery drivers filed a class action lawsuit claiming violations under the wage order governing this nationwide package and document delivery company. They asserted that Dynamex misclassified its delivery drivers as independent contractors rather than employees. The drivers claimed that Dynamex's alleged misclassification of its drivers as independent contractors led to Dynamex's violation of Industrial Welfare Commission wage order No. 9, the state wage order governing the transportation industry¹, as well as various sections of the Labor Code, and that Dynamex had engaged in unfair and unlawful business practices under Business and Professions Code section 17200.

The California Supreme Court eliminated the multifactor test it adopted in 1989 in *S.G. Borello & Sons Inc. v. Department of Industrial Relations*. Under *Borello*, besides the "right to control," workers were classified as employees if they depended on the employer as a matter of economic reality." The Court determined that the worker-protective public policies underlying the wage orders demanded a more stringent and streamlined test to determine which classifies anyone an employer who "engage[s], suffer[s], or permit[s]" to work as an employee."

The new standard presumes workers are employees, unless the employer can establish:

1. "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;

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2. That the worker performs work that is outside the usual course of the hiring entity's business; and
3. 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 decision applies to claims arising under state IWC orders, which sets the standards for minimum wage and overtime payments required for all workers classified as employees, but not for independent contractors. However, the court's reasoning in *Dynamex* may be used to analyze other state laws such as payment of work expenses (an issue excluded from the decision for technical reasons), discrimination and harassment, workers' compensation and unemployment benefits.

The court commended the simplicity of this "ABC" test in guiding both employees and employers toward compliance with wage and hour laws. "We find merit in the concerns ... regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors."

The Court applied the new test to the underlying case, noting that Dynamex's entire business was package delivery, therefore the delivery drivers were performing work within the usual course of its business under part B of the new test. Because each part of the ABC test may determine the employee or independent contractor question, the Court held that there is a sufficient commonality of interest under part B of the ABC test is sufficient in itself to support a class certification order.

All companies engaging independent contractors in California should review those classifications under the new test to determine whether they are properly designated.

The decision is at: <http://www.courts.ca.gov/opinions/documents/S222732.PDF>.

¹ Employers engaging employees in California must comply with the wage orders that apply to them based on industry or type of work.

<https://www.dir.ca.gov/iwc/wageorderindustries.htm>