

California Supreme Court Finds that *Dynamex* Decision Regarding the Standard for Worker Classification Applies Retroactively

by Gabrielle Wirth and Melonie S. Jordan

Employers have continued to feel the impact of the 2018 California Supreme Court decision in *Dynamex Operations West Inc. v. Superior Court of Los Angeles County*, 4 Cal.5th 903 (2018). Today, the California Supreme Court in *Vasquez v. Jan-Pro Franchising International, Inc.*, held that its decision in *Dynamex* applies retroactively to all non-final cases that predate the *Dynamex* decision.

In *Dynamex*, the California Supreme Court moved away from the previous test used to determine whether workers were independent contractors or employees in California for purposes of the wage orders. In *Dynamex*, the California Supreme Court held that a worker can properly be found to be an independent contractor to whom a wage order does not apply only if the hiring entity establishes the following three elements (commonly referred to as the “ABC” test):

- (A) The person 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 the work and in fact; and
- (B) The person performs work that is outside the usual course of the hiring entity’s business; and
- (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The prior test, known as the “*Borello*” test, focused primarily on the right of the employer to control the activities of the worker. The use of the ABC test results imposes more stringent requirements on hiring entities seeking to establish that workers are properly classified as independent contractors rather than employees.

Dynamex, however, left many unanswered questions. For example, after *Dynamex*, it would have been theoretically possible for a worker to be both an employee for purposes of the wage orders and a contractor for purposes of workers’ compensation or other provisions of the Labor Code. In addition, were hiring entities bound by the ABC test,

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even for cases that pre-dated the *Dynamex* decision?

Amid this uncertainty, the standard adopted in *Dynamex* was codified in 2019. On September 18, 2019, Governor Gavin Newsom signed into law Assembly Bill 5, which attempted to clarify when workers should be considered “employees” under the California Labor Code and the California Unemployment Insurance Code, thereby entitling them to the protections afforded by those laws. Dorsey’s earlier FAQ on AB 5 is linked [here](#). The bill codified the three-prong ABC standard set out in *Dynamex*, which significantly narrowed the circumstances under which a worker can properly be classified as an independent contractor. Most of the provisions of AB 5 became effective on January 1, 2020.

Most recently, AB 2257 was enacted effective September 4, 2020. It provides new exemptions from the ABC test for additional types of workers, including music industry professionals; performing artists; freelance writers and photographers; individuals who provide underwriting inspections, premium audits, risk management or loss-control work for insurance or financial services industries; and performance artists. It also addresses guidelines on the “business-to-business” exception of AB 5 by stating that a business that is contracted to provide services to another business is an independent contractor if it meets the factors established in the California Supreme Court’s decision in *S.G. Borello & Sons, Inc.*, which is less restrictive than the ABC test. Now, almost 75 professions or types of workers have been exempted from the ABC test.

Today, the California Supreme Court answered the outstanding question as to whether *Dynamex* applied retroactively and held that it *does* apply retroactively:

“In concluding that the standard set forth in *Dynamex* applies retroactively — that is, to all cases not yet final as of the date our decision in *Dynamex* became final — we rely primarily on the fact that *Dynamex* addressed an issue of first impression. It did not change a settled rule on which the parties below had relied. No decision of this court prior to *Dynamex* had determined how the “suffer or permit to work” definition in California’s wage orders should be applied in distinguishing employees from independent contractors. Particularly because we had not previously issued a definitive ruling on the issue addressed in *Dynamex*, we see no reason to depart from the general rule that judicial decisions are given retroactive effect.”

The Supreme Court reasoned that prior to *Dynamex*, there were a variety of standards adopted in legislative enactments, administrative regulations, and lower court decisions as a means for differentiating between workers who are employees and those that are independent contractors. *Dynamex*, then, was based on a determination concerning how the term “suffer or permit to work” in California Wage Orders should be interpreted for purposes of distinguishing between employees and independent contractors. The Supreme Court stated that “Because *Dynamex* was an authoritative judicial decision interpreting a legislative measure, such a decision applies retroactively to all nonfinal cases that predate the effective date of the *Dynamex* decision.”

Today’s decision in *Vasquez* cements the ABC test’s retroactive applicability. Absent an

applicable exemption from the ABC test, the ABC test is the standard by which California courts will analyze wage and hour cases concerning employee classification, even if they were filed prior to *Dynamex*. If you have independent contractors within your workforce, contact your Dorsey employment attorney for guidance.

The *Vasquez* decision is available at:

<https://www.courts.ca.gov/opinions/documents/S258191.PDF>.