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THE CALIFORNIA SUPREME COURT MAKES IT HARDER TO CLASSIFY WORKERS AS INDEPENDENT CONTRACTORS

May 3, 2018

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On April 30, 2018, the California Supreme Court issued an extremely important decision for all businesses in California that classify any of their workers as independent contractors. In *Dynamex Operations West, Inc. v. Superior Court*, No. S222732, the Court adopted a new and exceptionally broad legal standard for determining whether workers should be considered employees or independent contractors for purposes of California's Industrial Welfare Commission ("IWC") wage orders that govern wage and hour issues such as employee overtime, meals and rest periods. Workers in California now are presumed to be employees unless a business successfully establishes that the worker meets all three of the following elements: (A) the worker is free from its control and direction; and (B) the worker performs work that is outside the usual course of its business; and (C) the worker customarily engages in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Under the above test (known as the "ABC test"), the Supreme Court explained that a worker can properly be viewed as an independent contractor only if the worker is a "traditional independent contractor." The Court gave examples of an outside plumber or electrician "who would *not* be reasonably viewed as working *in the hiring entity's business*." (Emphasis in original). Rather, an independent contractor must be working "in his or her own independent business."

Finally, the Supreme Court found that sufficient commonality of interest existed to support certification of the proposed class of delivery drivers where the plaintiffs satisfied the commonality element for just one part of the ABC test. As a result, the *Dynamex* case can be expected to weaken businesses' arguments against certifying putative class actions involving alleged misclassification of independent contractors.

The New Legal Standard For the Employee/Independent Contractor Distinction

For nearly three decades, California courts and the Division of Labor Standards Enforcement ("DLSE") have used a multifactor test from the Supreme Court's ruling in *S.G. Borello & Sons Inc. v. Department of Industrial Relations* (known as the *Borello* test). The *Borello* test emphasized

control over the work performed and considered several secondary factors in analyzing a worker's classification (*e.g.*, whether the service rendered required a special skill, the degree of permanence of the working relationship and whether the service rendered is an integral part of the alleged employer's business).

However, on Monday, the Supreme Court instead adopted the exceptionally broad "suffer or permit to work" standard from the wage order's definition of "to employ" for the employee/independent contractor distinction with respect to obligations arising out of the wage order. In reaching this decision, the Supreme Court looked to the history and purpose of the wage order. It found that since the

> . . . intended expansive reach of the suffer or permit to work standard as reflected by its history, along with the more general principle that wage orders are the type of remedial legislation that must be liberally construed in a manner that serves its remedial purposes . . . the suffer or permit to work standard must be interpreted and applied broadly to include within the covered "employee" category *all* individual workers who can reasonably be viewed as "*working in the hiring entity's business.*"

(Emphasis in original).

The Court held that the ABC test utilized by other jurisdictions is "a simpler, more structured test for distinguishing between employees and independent contractors," and more consistent with the history and purpose of the "suffer and permit to work" standard in California's wage orders. The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker (A) is free from its control and direction; and (B) performs work that is outside the usual course of its business; and (C) customarily engages in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Failing to prove any one of these three factors alone suffices to establish that a worker is an employee for purposes of the wage orders.

***Application of the Court's New Standard to the Dynamex* Facts**

In the underlying case, two delivery drivers filed a class action complaint against Dynamex, alleging that it misclassified its delivery drivers as independent contractors rather than employees, and thus violated certain provisions of the applicable wage order governing the transportation industry (e.g., overtime), as well as various sections of the Labor Code. The trial court granted the drivers' motion for class certification and denied a subsequent motion by Dynamex to decertify the class.

Dynamex filed a petition for review, arguing the trial court had based its certification decision on an improperly adopted definition of "employee" in the wage orders to ascertain the proper classification of class members, and had failed to use the common law *Borello* test for distinguishing between employees and independent contractors. The Court of Appeal accepted

review and ultimately decided that the wage order's definition of "to employ" should be used to evaluate the drivers' claims that are governed by a wage order (*e.g.*, overtime and meal and rest periods), and that claims not governed by a wage order (*e.g.*, expense reimbursement) should be decided using the common law *Borello* test.

In applying the suffer or permit to work standard to *Dynamex*, the California Supreme Court found a sufficient commonality of interest to support certification of the proposed class of drivers and upheld certification. In regard to part B of the ABC test, the Court held that it was "quite clear that there [wa]s a sufficient commonality of interest with regard to the question of whether the work provided by the delivery drivers within the certified class was outside the usual course of the hiring entity's business to permit plaintiffs' claim of misclassification to be resolved on a class basis . . . . Dynamex's entire business is that of a delivery service." It also noted that "Dynamex obtains the customers for its deliveries, sets the rate that the customers will be charged, notifies the drivers where to pick up and deliver the packages, tracks the packages, and requires the drivers to utilize its tracking and recordkeeping system." Because each part of the ABC test may be independently determinative of the employee or independent contractor question, the Court concluded that finding a commonality of interest under part B of the ABC test alone sufficed to support certification.

However, in dicta, the Court also discussed whether sufficient commonality of interest existed under part C of the ABC test. With regard to part C, the Court also found sufficient commonality as to whether the drivers in the certified class were customarily engaged in an independently established trade, because the class definition excluded drivers who performed delivery services for another delivery service or for the driver's own personal customers and drivers who had employees of their own.

While the Court's decision certainly has implications for the growing gig economy, it will likely extend to nearly every employment sector. In the recent highly-publicized *Lawson v. GrubHub* trial, where delivery drivers were found under the *Borello* test to be independent contractors, the result possibly would have been different had the federal court applied the ABC test instead.

All California businesses that use independent contractors should evaluate their contractor arrangements based on the ABC test adopted in *Dynamex* and determine whether changes need to be made. Employers would be well advised to seek employment counsel before they reclassify independent contractors to employee status.

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If you have any questions about this case or how it may affect your business or contractor classifications, please contact any of GBG's attorneys.

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