



The “ABC” Test— Not as Easy as 1...2...3 for California Businesses

By Sue M. Bendavid and Amy I. Huberman

IN A RECENT LANDMARK 82-PAGE decision, the California Supreme Court made it much more difficult for California employers to classify workers as independent contractors.

In *Dynamex Operations, Inc. v. Superior Court*,¹ the court considered who was an employee for purposes of the wage orders adopted by California’s Industrial Welfare Commission (IWC). The *Dynamex* court adopted the so-called “ABC” test—already used in several other states—and rejected the “multi-factor” balancing test previously adopted by the court in *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations*.²

Under *Borello*, the court looked at a six-part balancing test to assess whether a worker was an employee or an independent contractor. The primary factor was the extent to which the employer had the right to control the putative employee.

Other factors included the alleged employee’s opportunity for profit or loss

depending on his managerial skill, as well as his investment in equipment or materials required for his task, or his employment of helpers; whether the service rendered requires 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.”³

In adopting the ABC test, the court shifted the focus and placed the burden squarely on the hiring entity to establish workers are properly classified. Under the ABC test, a worker is considered an employee to whom an IWC wage order applies unless the hiring entity establishes all of the following requirements, with the onus on the alleged employer to establish each element of a three-prong test.⁴

- First, 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.

- Second, the worker performs work that is outside the usual course of the hiring entity’s business.
- Third, 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.⁵

Case Background

Dynamex is a nationwide same-day courier and delivery service that operates a number of business centers in California. The company adopted a new policy and contractual agreement which classified all drivers as independent contractors rather than employees. As independent contractors, drivers were required to provide their own vehicles and pay their own transportation expenses, including fuel, tolls, vehicle maintenance, and liability insurance, as well as all taxes and workers’ compensation insurance costs.

Plaintiff Charles Lee entered into an agreement with *Dynamex* to provide



Sue M. Bendavid is Chair of the Employment Practice Group at Lewitt Hackman in Encino. She can be reached at sbendavid@lewithackman.com. **Amy I. Huberman** worked as an associate at Lewitt Hackman and is now working for the public defender’s office.

delivery services for the company as an independent contractor. Three months after he left the company, Lee sued on his own behalf and on behalf of all similarly situated Dynamex delivery drivers, claiming that the company's alleged misclassification of its drivers led to its violation of the applicable IWC wage order governing the transportation industry. As a result, Dynamex was found to have violated the California Labor Code and engaged in unlawful business practices in violation of Business and Professions Code §17200.

After extensive motion practice, including denials of class cert and then appellate reversal, the trial court eventually certified the class. In the trial court's class certification order, the court focused on three alternate definitions of "employ" in the wage order and as discussed by the court in *Martinez v. Combs*.⁶ The *Martinez* court held that "to employ" means "to exercise control over the wages, hours or working conditions of the worker; suffer or permit the worker to work; or engage the worker, thereby creating a common-law employment relationship."⁷

Dynamex filed a writ in the Court of Appeal arguing that the second and third alternate definitions articulated in *Martinez* applied to the question of joint employment and did not apply to worker classification analysis.⁸ The company contended that the multi-factor test in *Borello* applies to whether a worker is an employee or independent contractor.⁹

The Court of Appeal rejected Dynamex's contention, concluding that neither the provisions of the wage order nor the court's decision in *Martinez* supported the company's argument that the order's definitions of "employ" and "employer" are limited to the joint employer context and not applicable in determining whether a worker is an employee or independent contractor for the obligations imposed by the wage order.¹⁰ The Court of

Appeal upheld the trial court's class certification order.

As a result, Dynamex filed a petition for review with the California Supreme Court.

California Supreme Court's Decision

California's highest court agreed with the Court of Appeal and held it did not err in concluding the "suffer or permit to work" definition of "employ" contained in the wage order may be relied on in evaluating whether a worker is an employee under a wage order.

The court engaged in lengthy discussion of the tests utilized in *Borello* and in *Martinez*, interpreting the test in *Borello* as calling for the "application of a statutory purpose standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification—either employee or independent contractor—best effectuates the underlying legislative intent and objective of the statutory scheme at issue."¹¹

The court next interpreted the *Martinez* test which, although not directly involving the issues of whether workers were employees or independent contractors, addressed the meaning of "employ" and "employer" as used in the wage orders. It disagreed with Dynamex's argument that the second and third alternate definitions discussed above should be understood as applicable only to the joint employer context,¹² noting that the *Martinez* court took pains to emphasize the importance of not limiting the meaning and scope of "employment" to only the common law definition.¹³

Ultimately, the court determined it was appropriate to interpret the "suffer and permit to work" standard in California's wage orders as "placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's

coverage; and requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test, namely that 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 the work and in fact; that the worker performs work that is outside the usual course of the hiring entity's business; and, that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."¹⁴

Application of the ABC Test

The court explained each prong of its newly adopted ABC test:

- A. 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. The court concluded that a worker who is, either by contract or practice, subject to the type and degree of control a business typically exercises over employees should likewise be considered an employee under the common law test.¹⁵ Further, it noted that depending on the nature of the work and overall arrangement of the parties, a hiring entity need not control the precise manner or details of the work to be found to have maintained control over the worker.¹⁶
- B. The worker performs work that is outside the usual course of the hiring entity's business. The court looked to whether the individual is providing services to the business in a role that is comparable to that of an employee, rather than an independent contractor.¹⁷ Workers who provide services within the usual course of the business are likely employees.¹⁸ The court provided an example of a retail store

which hires an outside plumber to repair a leak in a bathroom in its store.¹⁹ The plumber's services are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber to work as its employee.²⁰

- C. 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 court noted that the term "independent contractor" when applied to an individual worker, is ordinarily understood to be an individual who independently made the decision to go into business for himself or herself.²¹ However, when a worker has not independently made the decision to establish a business but is instead designated as an independent contractor by a hiring entity, there is risk the business is attempting to evade the wage order.²² The fact that a hiring entity has not prohibited or prevented a worker from engaging in an independent business is not sufficient to establish the worker autonomously made the decision to go into his/her own business.²³

Other Labor Code Provisions

So what about Labor Code rules that are not mentioned in the IWC Wage Orders, for example, Labor Code §2802? Does the ABC test apply to wage claims that do not arise from a wage order?

Labor Code §2802 requires employers to indemnify employees for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties..." For a driver, this might mean vehicle related expenses. For now, employers will argue the holding in *Dynamex* does not extend to other provision in the Labor Code, like §2802.²⁴ Therefore, these may still be controlled by the *Borello* test.

Decisions Post-Dynamex

One question raised is whether the *Dynamex* ruling will apply to the determination of joint employer status. So far, the answer appears to be no.

In *Curry v. Equilon Enterprises, LLC*, the Court of Appeals concluded the Supreme Court did not intend to apply the ABC test to joint employment issues and that the public policy reasons relied on in adopting the ABC test do not apply to other contexts, such as joint employment.²⁵


Significantly, one possible result is that the alleged employee, not the alleged joint employer, will continue to bear the burden of proving joint employment, while those accused of being “joint employers” of another’s workers may still be able to argue other tests apply.

Dynamex’s Impact on California Businesses

The decision to classify a worker as an employee or independent contractor should not be taken lightly, as the potential for misclassification is great and penalties can be severe.

A hiring entity classifying its workers as employees is required to pay Social

workers’ compensation insurance and comply with the state’s nuanced and ever-changing laws governing employment in California. Thus, misclassification can result in an onslaught of claims and penalties against the hiring entity.

Businesses engaging independent contractors are encouraged to contact legal counsel to review the relationship under the ABC test and determine if its contractors are classified correctly. 

¹ *Dynamex Operations, Inc. v. Superior Court*, 4 Cal.5th 903 (2018).

² *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal.3d 341 (1989).

³ *Id.* at 355.

⁴ *Dynamex Operations, Inc.*, *supra* at 957.

⁵ *Id.* at 916.

⁶ *Martinez v. Combs*, 49 Cal. 4th 35; *Dynamex*, *supra* at 914 (2010).

⁷ *Id.*

⁸ *Id.* at 915.

⁹ *Dynamex*, *supra* at 915.

¹⁰ *Id.* at 944.

¹¹ *Id.* at 934.

¹² *Dynamex*, *supra* at 944.

¹³ *Id.* at 938.

¹⁴ *Id.* at 956-57.

¹⁵ *Dynamex*, *supra* at 958-59.

¹⁶ *Id.*

¹⁷ *Id.* at 959.

¹⁸ *Dynamex*, *supra* at 959.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Dynamex*, *supra* at 962.

²² *Id.*

²³ *Id.*

²⁴ *Dynamex*, *supra* at 942.

²⁵