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Labor & Employment ADVISORY ■

JANUARY 22, 2021

The California Supreme Court Holds That Its Worker Classification Decision in *Dynamex* Is Retroactive

In *Vazquez v. Jan-Pro Franchising International*, S258191, the California Supreme Court answered the question of whether its 2018 decision in *Dynamex Operations West Inc. v. Superior Court*, 4 Cal.5th 903 (2018), applies retroactively with an emphatic "yes." In doing so, the court reaffirmed the application of the "ABC" test to worker classification cases not yet finalized at the time the *Dynamex* decision was rendered. As we know, *Dynamex* imposed the "ABC" test on worker classification determinations by holding that a worker can be found to be an independent contractor only if the hiring entity establishes: (A) 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; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) 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 court emphasized the definitive and retroactive nature of its decision in *Dynamex* by observing that it saw "… no reason to depart from the general rule that judicial decisions are given retroactive effect."

In arguing against the retroactive application of *Dynamex*, defendant Jan-Pro noted that before *Dynamex*, the decision of how to classify a worker was made under the standards enunciated in the seminal case *S.G. Borello & Sons v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). In imposing the new "ABC" test, the defendant argued, the *Dynamex* decision had changed a settled rule the parties had relied on, thus making the *Dynamex* decision fall under the exception to the general rule of retroactivity and not applicable to its case. The court gave short shrift to the argument that it would be unfair to apply the ABC standard to California businesses that reasonably believed *Borello* applied to cases that predated the *Dynamex* decision. Holding that *Borello* did not rule on how the "suffer or permit to work" definition found in the industrial wage orders should be applied to distinguish employees from independent contractors for purposes of those wage orders, the court concluded that *Dynamex* did not change any settled rule. The court thus took a narrow view of *Borello* despite its application in 30 years of misclassification cases. The court emphasized that *Borello* did not determine who should be an employee for purposes of a wage order and that it was therefore not reasonable to rely on it.

To support its position, the court noted that its decision in *Martinez v Combs*, 49 Cal.4th 35 (2010), had signaled that the question of whether workers were properly considered employees or independent contractors for purposes of California wage orders had not been decided and they were not deciding whether "the decision in [*Borello*] has any relevance to wage claims." Similarly, the court noted that in *Ayala v. Antelope Valley Newspapers Inc.*, 59 Cal.4th 522 (2014), while the court requested briefing on the classification issue, it did not rule on the issue: "we leave for another day the question of what application, if any, the wage order tests for employee status might have to wage and hour claims such as these." The court thus concluded that employers were on notice that a worker's status as an employee or independent contractor "… might well depend on the suffer or permit to work prong of an applicable wage order—and that the law was not settled in this area."

Moreover, the court noted that the ABC test ultimately adopted in *Dynamex* drew on the factors articulated in *Borello* and was presumably not beyond the bounds of what employers could reasonably have expected. Focusing on its consistent policy position in favoring protection of employee rights under the wage orders, the court noted that a prospective application of *Dynamex* would potentially deprive workers of the intended protections of the wage orders.

Takeaways

The decision reaffirms the primacy of the "ABC" test in determining worker classification status. While the decision did not address the question of whether the same analysis applies to cases decided under a different prong of the "to employ" definitions found in *Martinez*, the sweep of *Dynamex*, its later codification in AB 5, and the presumption favoring the finding of employee status dictates that employers not rely on finding favor from the California courts in finding an independent contractor status in their work relationships.

The court also did not address how the ABC test should apply in the context of a franchisor–franchisee–employee context. In fact, in a footnote, the court distinguished the issues decided by the court in *Patterson v. Domino's Pizza LLC*, 60 Cal. 4th 474 (2019), from the present case, noting that the question in *Patterson* was the propriety of imposing vicarious liability on a franchisor for a franchisee's wrongdoing, rather than the question of what standard should apply in determining the classification of workers as employees or independent contractors. Hopefully the *Vazquez* Court will address this issue more squarely and provide further guidance to the franchisor community.

Employers should consult with their counsel to determine if their worker relationships may fit under the exceptions found in AB 5, many of which still apply the *Borello* standard to determine the proper classification. In addition, given the success of Proposition 22, there may be further challenges via the California initiative approach that the employer community will continue to monitor.

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