

Dynamex: Stricter Definition of Independent Contractors Brings New Challenges for California Employers

May 30, 2018

www.mwe.com

Boston Brussels Chicago Dallas Düsseldorf Frankfurt Houston London Los Angeles Miami Milan Munich New York Orange County Paris Seoul Silicon Valley Washington, D.C. Strategic alliance with MWE China Law Offices (Shanghai)

© 2018 McDermott Will & Emery. The following legal entities are collectively referred to as "McDermott Will & Emery," "McDermott" or "the Firm": McDermott Will & Emery LLP, McDermott Will & Emery AARPI, McDermott Will & Emery Belgium LLP, McDermott Will & Emery UK LLP. These entities coordinate their activities through service agreements. This communication may be considered attorney advertising. Previous results are not a guarantee of future outcome.

McDermott Will&Emery



Pon Holland 650-815-7462 rjholland@mwe.com

Today's Panel



Ellen Bronchetti 650-815-7460 ebronchetti@mwe.com



Kevin Connelly 312-984-3239 keconnelly@mwe.com

www.mwe.com

The Dynamex Presumption



"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 in question satisfies *each* of three conditions:..."



3

www.mwe.com

The Dynamex Presumption



This presumption means:"(1) 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;



The Dynamex Presumption



www.mwe.com

This presumption means: "(1) 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 (2) requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test"

The Dynamex Test



(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 the work and in fact;



The Dynamex Test



www.mwe.com

(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 the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business;

The Dynamex Test



www.mwe.com

(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 the work and in fact; and (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 that involved in the work performed

The Dynamex Test: Part A

INT	states and	we built its many each part of the Auth its part of minimatic on the office of particle ware definition.
DYNAKS	L fun, 251; 1000 ant 24 175,728 (#	 Parene Jacki Kaske yn John as constant de Anton of the Integratie – Wyske was in 100 mil 100 mil 100 mil 100 professioner en net mel auf Grahat.
LET HOL OS ANG	atiyada. Litayadko	reaction of decision therein rates can experiment operations to SML As after or standar source optimizer our meaning our comparing one malative can be permitted with the second standard from a constraint when the second standard standard standard from a constraint when the second standard standard standard standard standards.
alentak.	night opening	eenaar. No dia performanda dei tee work, and to fraz, eest the jotta performant dei ezhiet har on water were et nelejent terr werstaar auter that were place waarde de, there was notice with a subject, without a cost to effort and
(ia)	pertoneses	Serie from and parties in the special type of constraints and the constraint senses one explosive model or to radius or explosive much the constraint www.math.involver.confile.chains with special by symptomic and specialise
onnatori peratultat	tradente la	li proposes o doi adfante parto (n estis alcandal, Parlina, an antiz AP 404). 1940 - 48 C.A.M. et pagas 255-254, 255-254, formaling in the advance of the source for 255 - 24 annual and 1950 - 556 antia a chairte e mail dei convei da
ice lina irredi ii inijoati	"determined	nadea leganda ar data hi af tha sea car order in ha reade in have more stated that was were seen that is recently on indicably provide over the angement. Ind
Sec Duria Ma Ciberria	damas (au actor repo 1941 30 A Backnet, Ty	an an an San San San San San San
with the state of g	10.000,000 A	and Information in the first flat, the ABC interfaces common breachers in the set or large whether contrast on an its original to a cancel, before a restorate all to one of the density of the contrast of the density of the one have important in the density of the density of the density of the one have important in the density of the density of the density of the density of the provided of the density of t

- intended to be broader and more inclusive than the common law test
- a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees

Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?

www.mwe.com

The Dynamex Test: Part B



Part B: Does the worker perform work that is outside the usual course of the hiring entity's business?

www.mwe.com

The Dynamex Test: Part C

IN T DYN/MER DES AND CERTIFIC CERTIFIC	vitatieve n de Alliens E faie, 244 digener 20 195326, p2 delysed as independen mediaenag nicknag b mediaenag independen perioreas	alfore alfore ap 56, 1 rem rah to const orme for accurate to const orme for	Inconstruction entropy of the second of the	1 Anny Anny and a second state of the secon	As a matter of common usage, the term "independent contractor," when applied to an individual worker, ordinarily has been understood to refer to an individual who independently has made the decision to go into business for himself or herself."
Contractor garanety, J errotore, J Becon your Control No. Control No. Control No. Control No. Control No. Control No. Control No. Control No.	 mathema fr mathema fr function with Some mathema fraining mathema fraining<td>Li projes anti (140 and 1422) made (192 made (192 made (192) hat (192) hat (192) hat (192) hat (192)</td><td>inverses an annual se annual services of the production of the services of the services of the services of the annual services of the ann</td><td>For example, our are defined to enable scaling or the fill the order of 100 mm second plot fill the second plot in the interval of the fill the interval plot in the fill the interval plot fill the second plot in the fill the interval plot in the fill the interval plot fill the second plot in the fill the interval plot in the fill the interval plot in the fill the interval plot in the interval plot in the interval plot in the interval plot in the interval plot interval pl</td><td>"The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself."</td>	Li projes anti (140 and 1422) made (192 made (192 made (192) hat (192) hat (192) hat (192) hat (192)	inverses an annual se annual services of the production of the services of the services of the services of the annual services of the ann	For example, our are defined to enable scaling or the fill the order of 100 mm second plot fill the second plot in the interval of the fill the interval plot in the fill the interval plot fill the second plot in the fill the interval plot in the fill the interval plot fill the second plot in the fill the interval plot in the fill the interval plot in the fill the interval plot in the interval plot in the interval plot in the interval plot in the interval plot interval pl	"The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself."

Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?

www.mwe.com

Is there safe harbor in Contracting with a business?



IN THE	that to sill any pr	Approximation of the second state of the second state of press to each
	TO, weathquart	stabled on up to operate the just an object or savel to an a removal black one
	mail any and postin	A. In any child conference of the University Constraints and a state of
VYNASCO OFE	formation exists	contract is applied to be a total whether a not stand we are not
(60	Acres 155- at 15	and the standard as a capable strength. The sector sector a motive of
1.0	central: Wardware	agreens's opposed the estation
EL HOLKING	matching	The Aparton second that the other or porest is working age that
OS ANGELET I	tropic entity de	has a part of \$10 forest may other be our a state institutions the South
1.004	BUAR MELTING	description is an address of 1999 Cariner's description and prior the Proof.
namer in the		matan n fa nyanitay mpigika ina atmoket crassion a ayo
1441	hand by the laber in	weiters to be to be according to be CDD to the opporters that an and
	wersels a new and	a with a state that the providence of the line of the state of the sta

17 Although the suffer or permit to work standard is not limited to the joint employer context, there is no question that the standard was intended to cover a variety of entities that have a relationship with a worker's primary employer, for example, a larger business that contracts out some of its operations to a subcontractor but retains substantial control over the work. (See generally Goldstein et al., Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment (1999) 46 UCLA L.Rev. 983, 1055-1066 (Enforcing Fair Labor Standards).) It is important to understand, however, that even when a larger business is found to be a joint employer of the subcontractor's employees under the suffer or permit to work standard, this result does not mean that the larger business is prohibited from entering into a relationship with the subcontractor or from obtaining benefits that may result from utilizing the services of a separate business entity. Even when the subcontractor's employees can hold the larger business, so long as authorized by contract, can seek reimbursement for any such liability from the subcontractor. (See id. at pp. 1144-1145.)

We'd like to hire a bookkeeper for a period of time as an independent contractor: is that okay?



We are going to bring on an interim CFO/ consultant as an IC, and if it works out, we will hire her: is that okay?



Dynamex references examples like the plumber hired by a retail store who may be needed once a year: what about a window washer needed 4 times per year? Is there a quantitative limit? Plumbers and electricians are so 20th century: in 1955, businesses put a plumber on retainer but now I need an IT wizard on retainer: is that OK under Dynamex?



I'm trying to think of an instance where a person is a true IC these days (and not a vendor or employee)...



Is Dynamex the death knell for the IC Gig Economy platform?



Employers Will Either Embrace Employment Or Face Litigation

20



trucking companies, told Law360. "[For the transportation sector], you can't have this level of

Facing Litigation in The Gig Economy

Arbitration will be essential to avoid class actions

What can be done to avoid being nibbled to death by ducks?



Berman Hearings

Individual Arbitrations

Union Activities

www.mwe.com

Facing Litigation in The Gig Economy: Dynamex's Mini-Restatement

IN A descent possive loss a general ad general antimeter. "A training starty train and dot that the recognitive track posted to substytem in a filler and P 2 (2007), "Day the metric produces on the second filler and and the second start of the

27 In Fleece on Earth v. Dep't of Emple. & Training (Vt. 2007) 923 A.2d 594, the Vermont Supreme Court held that the plaintiff children's wear company that designed all the clothing sold by the company and provided all the patterns and yarn for work-at-home knitters and sewers who made the clothing had failed to 7714 establish that the workers were sufficiently free of the company's control to satisfy part A of the ABC test, even though the knitters and sewers worked at home on their own machines at their own pace and on the adays and at the times of their own choosing. Noting that the labor statute at issue "seeks to protect workers" and envisions employment broadly," the court reasoned that "[t]he degree of control and direction over the is production of a retailer's product is no different when the sweater is knitted at home at midnight than if it were produced between nine and five in a factory. That the product is knit, not crocheted, and how it is to be knit, is dictated by the pattern provided by [the company]. To reduce part A of the ABC test to a matter of what time of day and in whose chair the knitter sits when the product is produced ignores the protective purpose of the [applicable] law." (923 A.2d at pp. 599-600.) (See, e.g., Western Ports v. Employment Sec. Dept. (Wn.Ct.App. 2002) 41 P.3d 510, 517-520 [hiring entity failed to establish that truck driver was free from its control within the meaning of part A of the ABC test, where hiring entity required driver to keep truck clean, to obtain the company's permission before transporting passengers, to go to the company's dispatch center to obtain assignments not scheduled in advance, and could terminate driver's services for tardiness, failure to contact the dispatch unit, or any violation of the company's written policy]; cf., e.g., Great N. Constr., Inc. v. Dept. of Labor (Vt. 2016) 161 A.3d 1207, 1215 [construction company established that worker who specialized in historic reconstruction was sufficiently free of the company's control to satisfy part A of the ABC test, where worker set his own schedule, worked without supervision, purchased all materials he used on his own business credit card, and had declined an offer of employment proffered by the company because he wanted control over his own activities].)

Facing Litigation in The Gig Economy: Dynamex's Mini-Restatement

INT ANALISM IN (1996 1221010 DYNAMS

 Post T — and a surface sequenced, support a surface where models and association of the bandwide states and a surface over perturbation for an information."
 The area defined as a perturbation of the second states and association of the approximation of the second states of the second states and the second states of the second states of the second states and the second states of the second states of the second states and the second states of the second states of

29 In McPherson Timberlands v. Unemployment Ins. Comm'n (Me. 1998) 714 A.2d 818, the Maine Supreme Court held that the cutting and harvesting of timber by an individual worker was work performed in the usual course of business of the plaintiff timber management company whose business operation involved contracting for the purchase and harvesting of trees and the sale and delivery of the cut timber to customers. Rejecting the company's contention that the timber harvesting work was outside its usual course of business because the company did not currently own any timber man harvesting equipment itself, the court upheld an administrative ruling that the harvesting work was "not 'merely incidental' to [the company's] business, but rather was an 'integral part of' that business." (714 A.2d at p. 821.) By contrast, in Great N. Constr., Inc. v. Dept. of Labor, supra, 161 A.3d at page 1215, the Vermont Supreme Court held the hiring entity, a general construction company, had established that the specialized historic restoration work performed by the worker in question was outside the usual course of the company's business within the meaning of part B, where the work involved the use of specialized equipment and special expertise that the company did not possess and did not need for its usual general commercial and residential work. (See also, e.g., Appeal of Niadni, Inc. (2014) 166 N.H. 256 [performance of live entertainers within usual course of business of plaintiff resort which advertised and regularly provided entertainment]; Mattatuck Museum-Mattatuck Historical Soc'y v. Administrator, Unemployment Compensation Act (Conn. 1996) 679 A.2d 347, 351-352 [art instructor who taught art classes at museum performed work within the usual course of the museum's business, where museum offered art classes on a regular and continuous basis, produced brochures announcing the art courses, class hours, registration fees and instructor's names, and discounted the cost of the classes for museum members].)

Www........

Facing Litigation in The Gig Economy: Dynamex's Mini-Restatement

IN Assession in the second sec

31 In Brothers Const. Co. v. Virginia Empl. Comm'n (Va.Ct.App. 1998) 494 S.E.2d 478, 484, the Virginia Court of Appeal concluded that the hiring entity had failed to prove that its siding installers were engaged in an independently established business where, although the installers provided their own tools, no evidence was presented that "the installers had business cards, business licenses, business phones, or business locations" or had "received income from any party other than" the hiring entity. (See also, e.g., Boston Bicycle Couriers v. Deputy Dir. Of the Div. of Empl. & Training (Mass. App.Ct. 2002) 778 N.E.2d 964, 971 [hiring entity, a same-day pickup and delivery service, failed to establish that bicycle courier was engaged in an independently established business under part C of the ABC test, where entity did not present evidence that courier "held himself out as an independent businessman performing courier services for any community of potential customers" or that he "had his own clientele, utilized his own business cards or invoices, advertised his services or maintained a separate place of business and telephone listing"]; cf., e.g., Southwest Appraisal Grp., LLC v. Adm'r, Unemployment Compensation Act (Conn. 2017) 155 A.3d 738, 741-752 [administrative agency erred in determining that hiring entity failed to establish that auto repair appraisers were customarily engaged in an independently established business based solely on the lack of evidence that appraisers had actually worked for other businesses, where appraisers had obtained their own independent licenses, possessed their own home offices, provided their own equipment, printed their own business cards, and sought work from other companies].)

www.mwe.com

Facing Litigation in The Gig Economy: Using MA Law: A Judo Countermove?



Ruggiero v. American United Life Insurance Company, 137 F.Supp.3d 104 (D. Mass. 2015): Plaintiff was an insurance agent who had entered into a contract with American United Life Insurance Company ("AULIC") to sell its insurance products and also recruit and train other agents to do the same; on the pivotal question (the B prong), AULIC successfully argued that selling insurance fell outside its usual course of business (which was limited to drafting policy language, obtaining regulatory approval of policies, investing premiums, and paying claims but not selling policies).

He with two and tree in encoder or telepedate bases on expand the entopoly to reliad treasministic data is want conference.

[1] Insums eggen wir, fahrsenheit von teine die nicht nicht mittellt darbe lieber Masseratieten Wass. Als Zeit mittellief stagt bei.

MERCAN STREET AND AND ADDRESS STREET AND ADDRESS ADDRE

SPREAME WELL ADDRESS

 Explorements and presentation of invariants Stational and a Constraint Stational Acceleration Stational Acceleration and a stational of the sign model and a stational acceleration and the sign model and the provider and stational acceleration and the sign of the stational acceleration and the sign of the stational acceleration acceleration acceleration and the sign of the later of space-state the stational acceleration a

www.mwe.com

Facing Litigation in The Gig Economy: Using MA Law: A Judo Countermove?



Maxamitersteam at an annal for an annal for an annal for an annal for annal for an annan distant tiz Duma t (ski)tat Chevrose the Webs th the performance all distant spirit years time or compares of refer to executive the Sealer Bar Sealer Sealer Bar Sealer S III and it remains to builty was called an excound for any romptow HI wart we seen bases a carro la datas en si crubos

[1] Inventopper et mit PERSONAL PROPERTY AND HTTEREFY YOR DA. CONTRACTOR OFFICE iii Ge

Sebago v. Boston Cab Dispatch, Inc. 471 Mass. 321 (2015): Taxicab drivers were customarily engaged in an independently established trade (the C prong) because (1) city rule created a framework such that leasing taxicabs, dispatching taxicabs, and transporting passengers for fares each could function as a separate and distinct business; (2) drivers could lease taxicabs and medallions from whomever they wished; and (3) drivers earned as much as they were able, were not required to accept a single dispatch, and were free to advertise their services through personalized business cards.



www.mwe.com

It ain't over till it's over...