

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

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Today's Panel



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

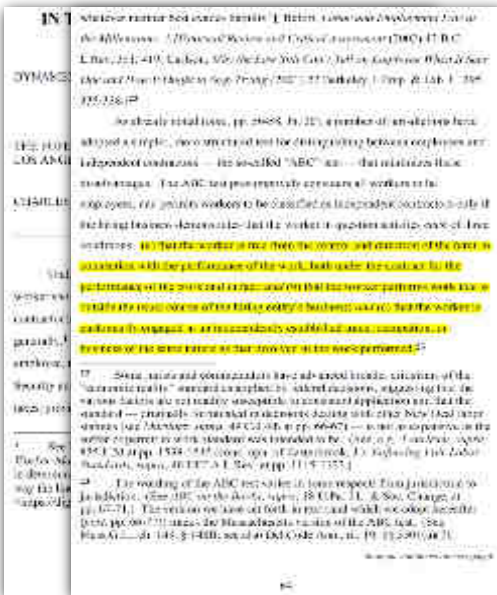


Ellen Bronchetti
650-815-7460
ebronchetti@mwe.com



Kevin Connelly
312-984-3239
keconnelly@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:....”

The Dynamex Presumption



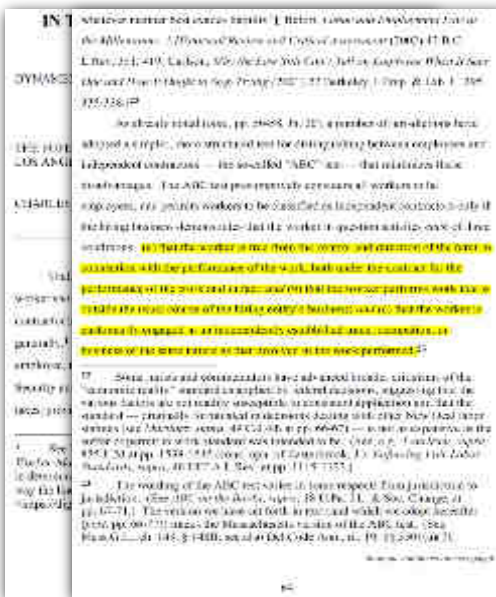
This presumption means:“(1) **placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order’s coverage;**

The Dynamex Presumption



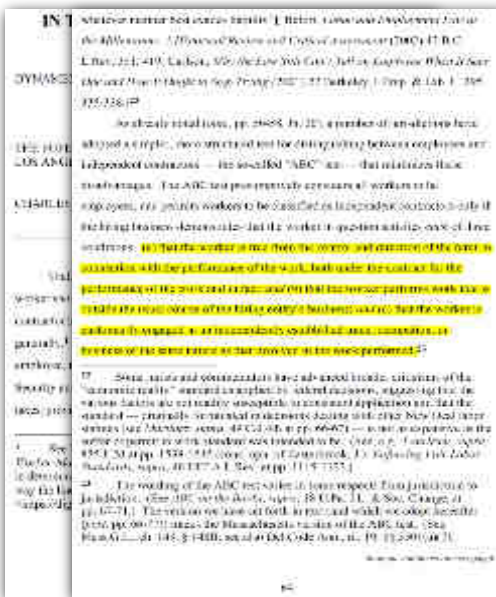
This presumption means: “(1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order’s coverage; and (2) requiring the hiring entity, in order to **meet this burden, to establish each of the three factors embodied in the ABC test**”

The Dynamex Test



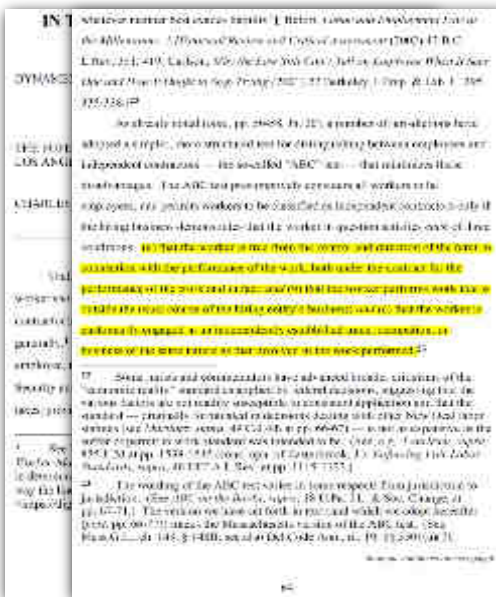
(a) that the worker is **free from the control** and direction of the hirer in connection with the performance of the work, **both under the contract** for the performance of the work **and in fact**;

The Dynamex Test



(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

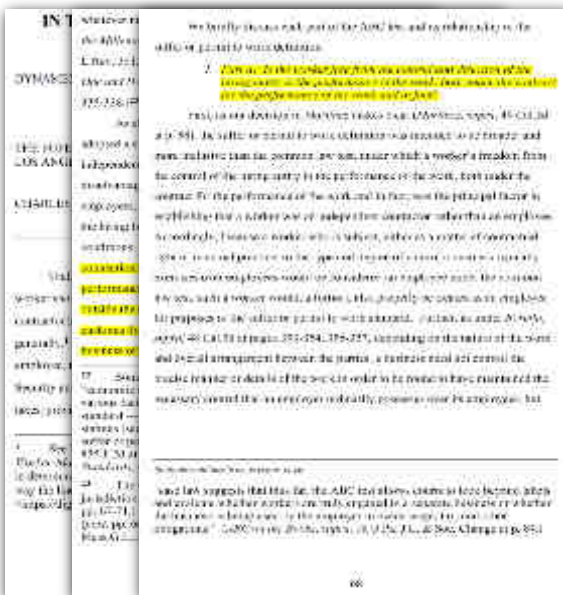


(a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) 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

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?

The Dynamex Test: Part B

☐ Employees = those “who would ordinarily be viewed by others as working in the hiring entity’s business”

☐ **Workers’ willingness to be contractors is now a nonfactor:** “If the wage order’s obligations could be avoided for workers who provide services in a role comparable to employees but who are willing to forgo the wage order’s protections, other workers who provide similar services and are intended to be protected under the suffer or permit to work standard would frequently find themselves displaced by those willing to decline such coverage.”

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

The Dynamex Test: Part C

[illegible]

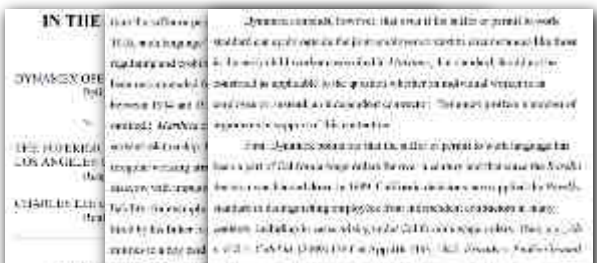
As a matter of common usage, the term “independent contractor,” when applied to an individual worker, ordinarily has been understood to refer to an individual who independently has made the decision to go into business for himself or herself.”

“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?

Is there safe harbor in
contracting with a business?





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 responsible for violations of the wage order under the suffer or permit to work standard, 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 ICGig Economy
platform?



Feature

Transpo Cos. Brace For Post-Dynamex Legal Onslaught

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

Shortly after Dynamex, ride-hailing company [Lyft Inc.](#) and [Postmates Inc.](#), whose couriers deliver food, groceries and other goods on-demand, were hit with a **pair of putative class actions** in California state court claiming they mislabeled drivers and couriers as independent contractors and insisting the companies cannot pass the new standard.

Shannon Liss-Riordan of Boston-based [Lichten & Liss-Riordan PC](#), who is representing the Lyft and Postmates drivers and is also behind a number of high-profile misclassification lawsuits, told Law360 the Dynamex ruling is a tremendous help to plaintiffs challenging their misclassification as independent contractors in California.

"In many of these [cases] that we're seeing where we have all these companies who in recent years have come up with this idea that they can somehow build a business around a workforce of independent contractors, it just doesn't work under the test," she said. "I think this is great news for workers."

Arbitration will be essential to
avoid class actions

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



Berman Hearings

Individual Arbitrations

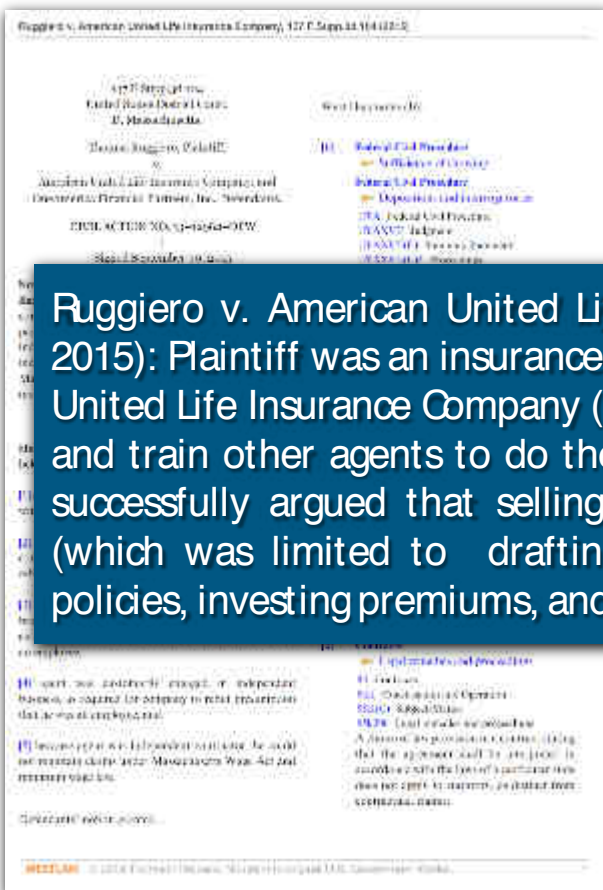
Union Activities

27 In *Fleece on Earth v. Dep't of Empl. & 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 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 days 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 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].)

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 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].)

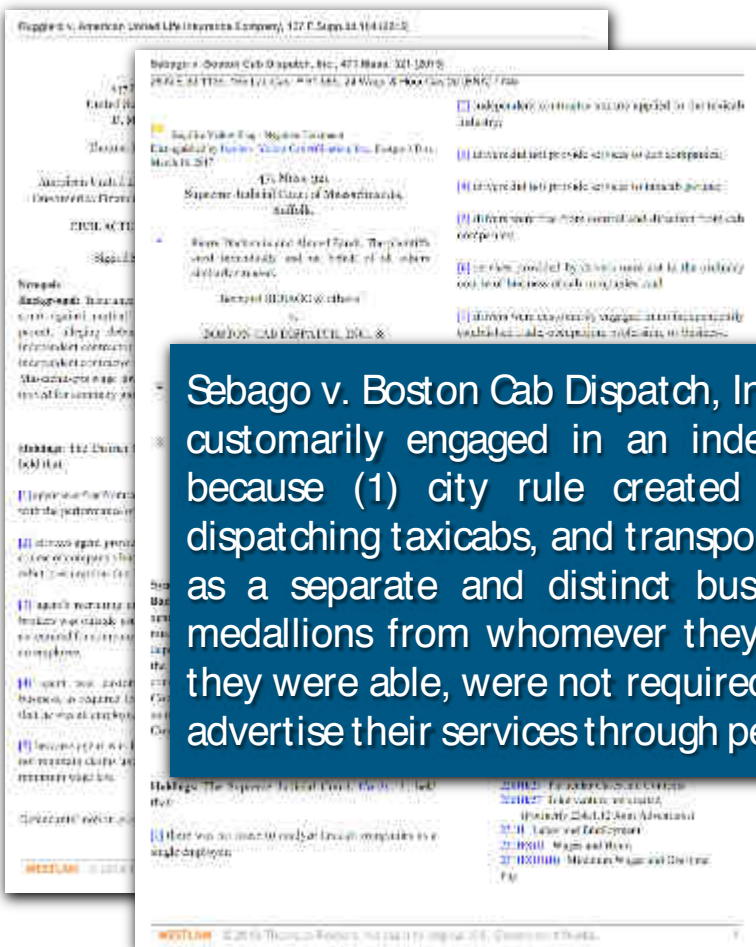
31 In *Brothers Const. Co. v. Virginia Empl. Comm'n* (Va.Ct.App. 1998) 494 S.E.2d 478, 484, the Virginia Court of Appeal concluded that the hiring entity had failed to prove that its siding installers were engaged in an independently established business where, although the installers provided their 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].)

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).

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



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

