

Taking the “Con” Out of Contractors: California Supreme Court Tightens Standards for Independent Contractors

Recognizing the “potentially substantial economic incentives that a business may have” to mischaracterize workers, the California Supreme Court this week announced a strict new test for classifying workers as independent contractors. In *Dynamex Operations West, Inc. v. Superior Court*, the court adopted the narrow “ABC Test,” placing the burden on employers to establish that a worker is not covered by California’s Wage Orders.

The Dynamex Claims

Dynamex is a delivery service that changed the classification of its drivers from employee to independent contractor back in 2004. Certain of the drivers sued Dynamex, claiming that they were misclassified as independent contractors and asserting various claims under the Wage Orders and related statutes. The Dynamex ruling does not resolve the ultimate issue in the case, but specifies the proper test to apply in order to determine whether the drivers are employees or contractors for purposes of the Wage Orders.

The ABC Test for Worker Classification Under the California Wage Orders

To classify a worker as an independent contractor, a hiring entity must establish all three of the following criteria:

- A. The worker performs the work free from the control and direction of the hiring entity, both under the terms of the parties’ contract and in actual fact; and
- B. The worker performs work that is outside the usual course of the hiring entity’s business; and
- C. The worker is customarily engaged in an independently established trade, occupation, or business.

If the hiring entity cannot establish any one factor, the worker is an employee for purposes of the Wage Orders. The court stressed a common sense application, ensuring that the protections of the Wage Orders, including minimum wage and overtime, apply to “all workers who would ordinarily be viewed as working in the hiring business.” The court also emphasized the need to strike a balance to ensure that true independent contractors will remain exempt from the Wage Orders’ protections.

Examples of True Contractors

The court explained that under the ABC Test, the term “employee” for purposes of the Wage Orders does not include workers who provide only occasional services unrelated to a company’s primary line of business and who have traditionally been viewed as working in their own independent business. For example, the following are typically contractors:

- Independent plumbers
- Independent electricians
- Independent architects
- Sole practitioner attorneys

As the court explained, when a retail store engages an outside plumber to repair a leak, or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store’s usual course of business. The plumber and electrician would not reasonably be seen as employees of the retail store. Those workers therefore “could not reasonably have been intended by the Wage Orders to be treated as employees of the hiring business” and are genuine independent contractors.

Examples of Employees

By contrast, an employee generally is any worker whose role is comparable to that of an employee of the business. An employee “would ordinarily be viewed by others as working in the hiring entity’s business and not as working, instead, in the worker’s own independent business.” For example:

- An employment relationship exists when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the clothing company.
- Likewise, cake decorators hired by a bakery to work on a regular basis on its custom-designed cakes are employees.

In both examples, the workers are part of the hiring entity’s usual business operations and can reasonably be viewed as employees of the hiring entity under the Wage Orders.

What Should Businesses Do?

- Apply the ABC Test to any workers classified as contractors.
- If the worker fails one or more elements of the ABC Test, reclassify the worker as an employee for purposes of Wage Orders. Consult with legal counsel about how and when to implement the transition and address the impact of possible incorrect prior classification.
- Note that different tests for worker classification may be used for purposes other than application of the California Wage Orders. For example, different tests may apply under federal law or for purposes of other California laws and regulations.
- Working with legal counsel to navigate the thorny questions regarding proper classification of workers can help ensure the correct legal outcome, minimize potential exposure, and protect your internal audit with the attorney-client privilege

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