

California Adopts Stricter Test For Independent Contractor Status



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On April 30, the California Supreme Court adopted a new and more onerous test (the ABC test) for determining whether individuals are employees or independent contractors. In its decision in *Dynamex Operations West, Inc. v. Los Angeles County Superior Court*, 2018 Cal. LEXIS 3152 (Cal. 2018), the court abandoned the test that it had applied since 1989 from *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). Although the *Dynamex* case arose from claims under California wage orders — which govern, among other things, the duty to pay the minimum wage and to compensate for overtime hours worked — the decision has broader implications.

The *Borello* test evaluated multiple factors to determine whether an individual was an independent contractor. Not all of the factors had to be met to establish independent contractor status. The principal factor of the *Borello* test was whether the “person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” The test also included nine additional factors:

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(1) right to discharge at will, without cause; (2) whether the one performing the services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is part of the regular business of the principal; and (9) whether or not the parties believe they are creating a relationship of employer-employee.

Borello, 48 Cal. 3d at 351.

The *Dynamex* court ruled that the so-called “ABC test” — and not the *Borello* test — will govern whether a worker is an independent contractor under the California wage orders. The ABC test imposes a significantly higher burden on companies than the *Borello* test and will make it more difficult to establish independent contractor status. Under the ABC test, workers will be presumed to be employees unless a company can prove all three of the ABC factors:

(A) 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; (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.

Dynamex, 2018 Cal. LEXIS 3152, *89-90. In contrast to the *Borello* test (and the independent contractor tests found in other laws), the hiring entity’s right to control is not the most important factor in determining whether an independent contractor relationship exists under the ABC test, but only one of three required factors.

Although other states use the ABC test (often under their unemployment statutes), the California Supreme Court adopted a stricter version of that test, becoming the second state after Massachusetts to do so. In other states that use the ABC test, part B may be established either by showing that the services are outside the usual course of the business for which the work is performed *or* that the work is performed outside of all the places of the hiring entity’s business. Like Massachusetts, the California test includes

only the first prong of part B — that the work is outside of the usual course of the hiring entity’s business. The court reasoned that, because many employees work remotely, this stricter part B analysis is more appropriate.

Many companies will find it challenging to meet part B because they will have to show that the services performed are not related in any significant way to the hiring entity’s business. The examples provided by the court illustrate the narrow circumstances in which a worker will meet part B. The court explained that a plumber hired to fix a leak in a retail store performs services that are not part of the store’s usual business. On the other hand, a cake decorator hired by a bakery to work on its custom-designed cakes provides a service — designing cakes — that is in the usual course of the bakery’s business.

The ABC test may be particularly troublesome for gig economy companies that have an independent contractor model. Typically, those companies use contractors to perform services that are key to their businesses. For example, a food delivery service that retains independent contractors to deliver food that customers order via an app will now have to show (in claims under the California wage orders) that delivering food is outside their usual course of business, a burden that may be impossible to meet. As a spokesperson for the National Employment Law Project opined, “most on-demand companies will fail the ABC test” and “most workers will win.”

Following the California Supreme Court’s decision in *Dynamex*, California companies should evaluate their independent contractor relationships to assess whether those relationships meet each factor of the ABC test. If one or more of the ABC factors are not satisfied, those companies should either explore whether their independent contractor relationships can be modified or whether to reclassify their independent contractors as employees.