

THE
ISSUE

Whether a worker in California can properly be classified as an *independent contractor*, versus an *employee*, has long been debated.

THE NEW
STANDARD

Prior to *Dynamex*, the seminal case on independent contractors versus employees was *S. G. Borello Sons, Inc. v. Department of Industrial Relations*, which established a multi-factor control standard. In *Dynamex*, the California Supreme Court adopted a shorter and tougher “ABC” test to distinguish *employees* from *independent contractors*.

WHAT CONTRACTORS
SHOULD KNOW

An internal audit of each worker classified as an *independent contractor* is now imperative.

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HAS THE CALIFORNIA SUPREME COURT SOUNDED THE DEATH KNELL FOR INDEPENDENT CONTRACTORS?

The California Supreme Court, in the recent case of *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, answered the question of whether a worker can properly be classified as an independent contractor, or instead, as an employee.

THE STAKES COULD NOT BE HIGHER FOR HIRING BUSINESSES.

The stakes are high because, if a worker can properly be classified only as an employee, the hiring business bears responsibility for all of the following:

- ☐ *Paying federal Social Security and payroll taxes, unemployment insurance taxes, and state employment taxes;*
- ☐ *Providing workers' compensation insurance; and*
- ☐ *Complying with numerous state and federal statutes and regulations governing wages, hours, and working conditions.*

The *Dynamex* case dealt with delivery drivers for a nationwide package and document delivery company. At issue were the California wage orders which impose obligations relating to minimum wages, overtime, and meal and rest breaks. The company considered its drivers independent contractors rather than employees.

THE CALIFORNIA SUPREME COURT ADOPTS A NEW “ABC” TEST.

Prior to *Dynamex*, the California Supreme Court's seminal case on independent contractors versus employees was *Borello*, which established a multi-factor control standard. In *Dynamex*, the Court adopted an “ABC” test to distinguish employees from independent contractors. Under this “ABC” test, a worker is properly considered an independent contractor only if the hiring entity establishes all of the following:

- (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; 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 the work performed for the hiring entity.

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All three parts of the “ABC” test must be established to permit an independent contractor classification. The Court clarified that an independently established business under Part C generally must take the following steps: (1) incorporation, (2) licensure, (3) advertisements, and (4) offering to provide services to the public.

EXAMPLES OFFERED BY THE COURT

Here are examples the *Dynamex* Court provided of **proper** independent contractor classifications:

- ☐ *When a retail store hires an outside plumber to repair a leak in a bathroom;*
- ☐ *When a retail store hires an electrician to install a new electrical line.*

Here are examples the *Dynamex* Court provided of **improper** independent contractor classifications:

- ☐ *When a clothing manufacturer hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will later be sold by the company;*
- ☐ *When a bakery hires cake decorators to work on a regular basis on its custom-designed cakes.*

An underlying concern for the Court in creating this “ABC” test was the worry about the unfair competitive advantage and the incentives that businesses have in mischaracterizing workers as independent contractors. This decision is believed to greatly restrict the ability of hiring entities to classify workers as independent contractors. An internal audit of any worker performing work for you as an independent contractor is now in order.

**If you have questions, please contact
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Read the entirety of the decision at:
<http://www.courts.ca.gov/opinions/archive/S222732.PDF>

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