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9th Circuit: California's Strict Independent-Contractor Test Applies Retroactively, SHRM, ft. Katherine Catlos

Katherine S. Catlos, partner in Kaufman Dolowich & Voluck LLP, San Francisco, and Chief Diversity & Inclusion Officer, was quoted in *SHRM's article by Lisa Nagele-Piazza on May 6, 2019.*

The 9th U.S. Circuit Court of Appeals dealt a blow to employers by ruling that California's stringent new "ABC" test for determining whether a worker is an employee or an independent contractor applies retroactively.

"This is a significant case," said Katherine Catlos, an attorney with Kaufman Dolowich & Voluck in San Francisco. She noted that the decision will likely be appealed.

The ruling comes several days after the U.S. Department of Labor issued an employer-friendly opinion letter stating that some gig-economy workers can be properly classified as independent contractors under federal law. But many employment laws are state-based and businesses must follow state standards under those laws.

Misclassification claims are a frequent source of litigation because employees are entitled to minimum wage, overtime pay and other benefits that are not afforded to independent contractors.

Applying the ABC Test

The 9th Circuit provided guidelines to use when evaluating the ABC test. For example, for Prong B, the court discussed what the hiring entity needs to prove in order to establish that a worker was not performing tasks that are a part of the company's usual course of business.

"The court suggested a 'follow-the-money' approach for Prong B," Catlos said. Is the hiring entity's financial gain dependent on the tasks the worker performs? The lower the financial impact, the more likely a court will find in favor of independent-contractor status, she noted.

In *Dynamex, the California Supreme Court used the example of a retail store hiring a plumber to repair a bathroom leak. The plumber provides "incidental services for otherwise unrelated businesses" and may be properly classified as an independent contractor. However, the state high court said, when a bakery hires cake decorators to regularly work on its custom-designed cakes, the workers are performing tasks that are part of the company's usual business operation.*

The 9th Circuit decision provides guidance to franchisors—but it is also informative for any businesses that hire independent contracts, including those in the gig economy, Catlos said. Current franchisors and all entities who use independent contractors should review their contracts and audit their "on the ground" practices to ensure workers are truly independent contractors in light of the court's guideposts and observations, she added.

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