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The California Supreme Court Finally Puts To Rest The Retroactivity Issue of Dynamex

By: Allyson Thompson

On Thursday, January 14, 2021, the California Supreme Court announced in the case of Vazquez v. Jan-Pro Franchising International, Inc.FN1, a unanimous verdict that its ruling in the controversial 2018 Dynamex case applies retroactively. This ruling settles a question that employers who historically have classified their workers as independent contractors have been seeking clarification on since April 2018, when the landmark decision of Dynamex Operations West v. Superior Court (2018) 4 Cal. 5th 903 was handed down.

In the 2018 Dynamex decision, the California Supreme Court held that workers are presumptively employees for the purpose of California's Industrial Wage Orders and that the burden is on the hiring entity to establish that a worker is an independent contractor not subject to Wage Order protections. The Court also held that, in order to establish that a worker is an independent contractor, the hiring entity must prove each of the three parts of the "ABC test", including (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 terms of the contract for the performance of the work and in actual practice; (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. In practice, Facator B has proven the most difficult for employers seeking to classify workers as independent contractors to overcome.

The ABC test represented a dramatic shift from long-standing case law that held that the test to be applied in classification claims arising from applicable Industrial Wage Orders was the Borello test, set forth in the S.G. Borello & Sons Inc. v. The Department of Industrial Relations (1989) 48 Cal.3d 341 . The Borello test considers 11 factors in determinating whether a worker should be classified as an independent contractor, including whether the hiring entity has all necessary control over the manner and means of accomplishing the work.FN

The Dynamex decision was codified into law by California Assembly Bill 5, which took effect on January 1, 2020. In response to the passage of AB 5, companies began to lobby for exemptions, and to date approximately 100 professions have been specifically exempted from AB 5. Notably, however, gig economy giants such as Lyft, Door Dash and Uber were not exempted. That led to Proposition 22 in which California voters reversed the legislature, so that that gig workers can now be classified as independent contractors. You can read more about the exemptions here: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257

What was not made clear by the 2018 Dynamex case was whether the new ABC test should be retroactively applied, meaning was it the test going forward or could workers now have claims of misclassification going back potentially as far as 2014? A bevy of lawsuits were filed as soon as the Dynamex decision was issued. Many of those cases were stayed pending the Supreme Court's ruling on Vazquez. With that ruling, the Court has ended the debate once and for all. You can read the full text of the decision here: https://www.courts.ca.gov/opinions/documents/S258191.PDF

So what is the effect of the Vasquez holding on employers? It is that the ABC test applies to all independent contractor misclassification-related claims arising from the Labor Code and Wage Orders, both prior to 2020 and going forward. For all pending non-Wage Order claims, meaning claims involving a worker who is not covered by an applicable Wage Order, the Borello test continues to apply.

Employers with questions about the proper classification of workers are invited to contact Allyson Thompson, Esq. of Kaufman Dolowich & Voluck.

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