

# CALIFORNIA EMPLOYMENT LAWYER

## ADVISOR TO EMPLOYERS AND EMPLOYEES

### THE CALIFORNIA SUPREME COURT RESTRICTS THE USE OF INDEPENDENT CONTRACTORS AND ADOPTS THE STREAMLINED “ABC” TEST FOR DETERMINING STATUS OF WORKERS AS INDEPENDENT CONTRACTORS OR EMPLOYEES

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#### A. The *Dynamex* “ABC” Test

In *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (“*Dynamex*”), the California Supreme Court restricted the use of independent contractors and streamlined its nearly 30-year old standard for determining classification of a worker as either an independent contractor or employee by adopting the “ABC” test utilized by several jurisdictions.

Under the ABC test, a worker is *presumed to be an employee*, unless the hiring business establishes each of the following:

- (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; 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. (*Dynamex, supra*, at pp. 956-957; citations and footnote omitted.)

The Court observed that under California and federal law, classification of a worker as an employee or independent contractor has considerable significance for workers, businesses, and the general public. (*Dynamex, supra*, 5 Cal.5th at pp. 912, 913.) Employees are protected by anti-discrimination laws, wage and hour laws, and family and medical leave protections; independent contractors are not. Employees can access federal and state programs, including unemployment insurance and workers’ compensation; independent contractors cannot. Additionally, employers are subject to liability for employees and are required to pay tax and benefit contributions only for

employees. (*Dynamex*, at p. 950, fn. 20.) Misclassification provides a significant risk that businesses will avoid legal obligations, deny workers the benefits of protective labor laws, and unfairly compete with their competitors because of significant economic incentives involved in the classification of workers as independent contractors. (*Id.*, at p. 913.)

**B. The ABC Test Applies Only to Wage Claims Under the California Industrial Welfare Commission Wage Orders. Labor Code and Common Law Claims Are Determined Under the *Borello* Test.**

In *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558 (“*Garcia*”), the Fourth District Court of Appeal held that the *Dynamex* decision applied only to wage-order claims. “*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California’s labor protections’.”<sup>1</sup> (*Garcia, supra*, 28 Cal. App.5th at p.570.) *Dynamex, Garcia* explained, applied the “suffer or permit to work” standard to claims brought under the wage orders without deciding non-wage order claims, such as reimbursement claims brought under Labor Code section 2802. (*Garcia*, at p. 571.) Reasoning that *Dynamex* did not reject *Borello*’s multi-factor test, the court held that while the ABC test applied to wage order claims, for claims brought under the Labor Code or common law, the proper test to determine whether a worker is an employee or independent contractor remains the *Borello* multi-factor standard. (*Ibid.*)

**C. The *Dynamex* ABC Test Is Retroactive.**

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<sup>1</sup> In its seminal 1989 decision, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, the Supreme Court identified several “secondary factors” to be analyzed in determining whether a worker is an employee or independent contractor. The secondary factors include: (a) whether the worker is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether the work is usually done under the direction of the principal or by a specialist without supervision, in the locality; (c) the skill required in the occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and place of work; (e) the length of time over which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether the work is part of the regular business of the principal; (h) whether the principal has the right to discharge at will, without cause; and (i) whether the parties believe they are creating an employment relationship. (*Borello, supra*, 48 Cal.3d at pp. 350-351.)

*Garcia* noted that *Dynamex* did not directly address retroactivity of the decision. However, when asked to modify the opinion to apply the ABC test only prospectively, the Supreme Court denied the request. (*Garcia, supra*, 28 Cal.App.5th at p. 572, fn. 12.) The general rule, *Garcia* explained, is that “judicial decisions are given retroactive effect.” (*Ibid.*)

**D. Lessons to be Learned and Applied from *Dynamex* and *Borello*.**

Below are lessons to be applied from *Dynamex* and *Borello*. The list is NOT intended to be exhaustive, merely illustrative of the principles.

<b><i>Dynamex</i> and <i>Borello</i> Factors</b>	<b>Lessons to be Applied</b>
1. The worker is <i>presumed</i> to be an employee.	1. The hiring entity has the burden of proof to establish that the worker <i>IS NOT</i> an employee.
2. The worker must be free from control and direction not only under any employment contract but in the performance of the job.	2. Instructions, manuals, written procedures, training, etc. regarding how to do the job tend to show that the worker <i>IS NOT</i> free from control and direction.
3. Independent contractors perform services outside the usual course of the hiring entity’s business which are not an integral part of the business.	3. Example: A trucking company hiring truck drivers it classifies as independent contractors runs the risk of misclassification because (1) the work performed <i>IS NOT</i> outside the entity’s usual business and (2) <i>IS</i> an integral part of the hiring entity’s business.
4. A contract or agreement stating worker is Independent Contractor and NOT Employer - Employee.	4. A business cannot unilaterally determine a worker's status simply by assigning the worker the label “independent contractor” or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor. ( <i>Dynamex v. Superior Court</i> (2018) 4 Cal.5th 903, 962.)

<p>5. Kind of occupation or business.</p>	<p>5. Independent contractors are individuals or businesses that advertise to general public or trade via media, have customers aside from hiring entity and do not work exclusively for hiring entity, often have corporate or LLC structure and/or business license, often have own office, assistants, and are an established trade or occupation <i>NOT</i> integral to hiring entity.</p>
<p>6. Who performs the work: individual worker or assistant(s)?</p>	<p>6. Independent contractors may have assistants or substitute others to perform services. An Independent contractor often hires, pays, and supervises assistants. Employees generally must perform work personally.</p>
<p>7. Continuing relationship.</p>	<p>7. Independent contractor - principal relationship ends when the job is completed. A continuing relationship tends to show the “permanence” of an employer-employee relationship, even if the work is <i>NOT</i> full-time and is part-time, seasonal, or for a short duration.</p>
<p>8. Hours of work.</p>	<p>8. The employment relationship is characterized by set hours. Independent contractors are masters of their own time.</p>
<p>9. Location of work performed.</p>	<p>9. Employees typically perform the work at the employer’s premises, a route, or at a location designated by the employer. Independent contractors typically perform work away from hiring entity’s location and free from supervision.</p>

10. Reports.	10. Employees typically submit regular reports to a superior. Independent Contractors typically do not submit reports. Review of results is what is important, although a report related to end result may be submitted by an independent contractor.
11. Payment.	11. Employees are typically paid by the hour, week, or month. Independent contractors are often paid by the job, commission, or lump sum broken down into hourly pay. There is significant overlap with this category because of how payment is broken down.
12. Expenses.	12. Employees must be reimbursed for expenses. Independent contractors typically are not reimbursed for job expenses. It is often factored into payment for the job by the independent contractor.
13. Profit/Loss.	13. Profit/loss and use of capital typifies an independent contractor relationship.
14. Termination of worker "at will."	14. If the hiring entity or person has the right to fire the worker "at will" without incurring liability, the relationship is one of employer-employee.
15. Right to quit.	15. If the worker has the right to quit or not complete the job without incurring liability for breach of contract, the relationship is employer-employee. Independent contractors are generally liable for breach of contract if the worker quits before the job is completed or if the job is not completed satisfactorily.

16. Level of skill.

16. A low level of skill generally indicates employment. A high level of technical training often indicates independent contractor status, especially where it is combined with an independent business.