DYNAMEX IS NOT "ARMAGEDDON"... EVEN THOUGH IT MAY FEEL LIKE IT!

by TERESA A. MCQUEEN

On May 1, 2018, my inbox was inundated with emails from clients and colleagues, all voicing various levels of panic and providing me with links to a number of alarmist articles predicting—among other catastrophic events—"Armageddon." The panic inducing reason? The California Supreme Court's long-awaited decision in the *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, decided April 30, 2018, and its newly fashioned ABC test for independent contractors.

A New Reality

This much-anticipated ruling has employers (and many independent contractors) across the state scrambling to come to terms with its impact and the reality of its application to current business models utilizing independent contractors instead of traditional workers. Specifically, this case answers the question of "what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders.*"[1] California wage orders make clear an employer's obligations concerning basic working conditions for all California employees (e.g., minimum wages, maximum hours, meal and rest breaks).[2]

The court's ruling refashioned existing classification tests for determining when an individual could be classified as an independent contractor. Prior to *Dynamex*, embracing the gig economy and implementing alternate business models that base growth projections on the utilization of independent contractors required finesse. Success (risk avoidance) was to be achieved only through correct interpretation and application of a complex and highly subjective multi-factor test.[3] The court's new direction on independent contractor classification calls into question the legitimacy of this growth model by tightening the guidelines for determining whether an independent contractor is truly independent.

New Realities Call For New Perspectives

The Test

The court's goal of creating a clear and simple test is premised on the idea that all workers of an entity are employees unless the entity can establish each of the three ABC factors. Based on this premise, an individual is properly

classified as an independent contractor *only if* the employer can establish:

> (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;
> (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."[4]

Prior independent contractor analysis required application of the multi-factor *Borello Test* with its state directed focus on "whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed."[5] The adoption of a new straightforward standard simplifies the analysis and makes sense given the court's record of employee protection. It is also consistent with its stated intent of assuring that traditional burdens of employee protections lie with the employer and not the public or the individual. California now joins Massachusetts and New Jersey in limiting the subjectivity of prior classification models by returning to a more traditional view of what defines an independent contractor.

A Glass Half-Full

To gain a bit of perspective, it's worth noting that the employee/independent contractor debate has been ongoing since at least 1944. The United States Supreme Court in *Board v. Hearst Publications* noted that, "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."[6] While this case dealt with vicarious liability, its underlying issues of what classifies an employee as an employee continue to this day.

No doubt, working within the current wage and hour system can be a burden. This is especially true if the business isn't at an operational stage to take on the mandated burdens associated with employee expansion. But isn't this where practicality meets the road to reality? Isn't this where it all went wrong—when businesses began seeking alternate growth models (pushing the boundaries of the independent contractor analysis) in the hope of building and competing in the larger marketplace?

Dynamex explains at length the reasoning behind its ground-shifting decision in an attempt to dispel obvious concerns and address objections. In both practice and in theory, uniformly enforced wage and hour laws operate not only to protect workers, and the public at-large, but to assure a level playing field in the marketplace. Compliance by all ensures that your competitors won't be able to undermine you in the market by failing to assume their fair share of the costs, responsibility or other burdens of employee administration.

Truth be told, *Dynamex's* ABC test is as close as we're likely to come to a bright-line rule on determining when an independent contractor is really independent for wage and hour purposes. Less wiggle room and increased enforcement abilities make this a powerful tool for transformation.[7]

Many believe that pre-*Dynamex* classification practices provided employers leeway and flexibility. Reality and the latest Daily Journal Verdicts & Settlements paint a very different picture. No matter which side of the employer/employee bar you found yourself on, the lack of an easily applied concise standard made it impossible to take any solid risk-averse position when it came to a worker versus independent contractor analysis. And, from a business perspective, bumping along in the dark when it comes to classification issues that could potentially cost millions of dollars or the extinction of the business makes absolutely no sense.

Dynamex is already forcing businesses utilizing independent contractor growth models to reassess current work practices (hence the many frantic emails!). In essence, this eliminates a fractionalized, murky classification analysis and resets it with a perspective that places everyone at the same starting point. From this new starting point, businesses can then, with a clear mandate, utilize the independent contractor model if they meet ABC parameters.

It's Not Armageddon . . . Really.

Pre-*Dynamex* classification practices permitted a business to start its employee/independent contractor analysis with a conclusion: That the worker will be an independent contractor. Dynamex may seem like Armageddon because businesses ascribing to this logic must now reverse their thinking and base their analysis on the premise that the worker is an employee *unless* it can be classified otherwise under very limited parameters.

Scaretactics aside, *Dynamex* does not and will not lead to a new alternate universe where all workers are employees. The court's detailed reasoning goes out of its way to dispel this over-generalization. For example, in one footnote, the court suggests that if a business finds advantages (economic or noneconomic), other than to dodge wage and hour requirements, in providing its workers greater freedom and flexibility, the business is free to make it happen: they just have to find a way to do it within the letter and spirit of the law.[8]

Dynamex could very well be the bellwether of change for the modern workplace. A much needed opportunity to reimagine traditional roles. To ask the difficult questions: How do we work? What does it mean to be flexible? How do we measure success? Who knows, it might really be "easy as ABC, one, two, three."

ENDNOTES

(1) *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903, 913-14 (2018).

(2) *Id*.

(3) *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations* 48 Cal.3d 341 (1989).

(4) *Dynamex*, 4 Cal. 5th at 957.

(5) State of California, Cal. Dept. of Industrial Relations, *Independent Contractor Versus Employee* (2018), https://www.dir.ca.gov/dlse/faq_independentcontractor.htm.

(6) 322 U.S. 111, 121 (1944)

(7) In October 2017, California passed SB306 granting the Division of Labor Standards Enforcement independent investigatory powers to initiate an investigation of an employer on its own initiative (with or without a complaint).

(8) *Dynamex*, 4 Cal. 5th at 961, n.28.

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