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## Health Care Newsletter

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### **DYNAMEX UPDATE: Are There Still Independent Contractors in California? *Dynamex Operations West. v. Superior Court (April 30, 2018)***

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On April 30, 2018, the California Supreme Court issued a landmark decision in *Dynamex Operations West v. Superior Court*, No. S222732, in which the Court chose to essentially scrap the nearly 30-year old test for determining whether a worker is an employee or an independent contractor for claims asserted under California's Wage Orders.

The decision sent shockwaves through the California business and health care communities, as businesses struggled to determine the practical effects of the ruling. Many questions remained unanswered in the wake of the decision, including whether the decision has retroactive effect (apparently it does) and whether and how it applies outside the context of Wage Orders. Very few of these questions have been answered in the intervening five months.

Briefly, *Dynamex* replaced the decades-old *Borello* control test, which applied multiple factors to the determination of whether a worker qualifies as an independent contractor, with a simplified "ABC" Test currently used in various other jurisdictions around the country.

The revised standard adopted by the Court can be summarized as follows:

- The Court interpreted California's wage precedents and policy as *placing the burden on the business to prove* that a worker is an independent contractor rather than an employee, otherwise the worker will be presumed to be an employee.
- To meet its burden under the ABC Test, a business must establish each of three ABC factors:
  - (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;
  - (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.

Factor "A" of the ABC Test, which requires that the worker must be "free of the control of the hiring entity in the performance of the work," is more or less a restatement of part of the *Borello* control test, and can be based on a myriad of related factors evidencing control of the employer over the worker's performance of work, including whether the worker supplies his own tools or controls the specific details of his work, without interference by the hiring entity.

The second factor mandates that in order to be considered an independent contractor, a worker must "perform work that is outside the usual course of the hiring entity's business." To illustrate the meaning of the "usual course of business," the Supreme Court gave the example that "when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a

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new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having "suffered or permitted" (the California law definition of employment) the plumber or electrician to be working as its employee.

"On the other hand," the Court said, "when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company," or "when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes," the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees" and not as independent contractors.

Factor "C" of the ABC Test, which requires that the workers "must be customarily engaged in an independently established trade, occupation or business of the same nature as the work performed," requires a showing that the worker has "independently made the decision to go into business for himself or herself." Such workers would be expected to have taken "the usual steps to establish and promote his or her independent business," for example through "incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like."

Misclassifying workers can have a potentially large impact on businesses, because if a worker should be classified as an employee, the business bears responsibility for paying federal social security and payroll taxes, unemployment insurance taxes and state employment taxes as well as providing workers' compensation insurance. However, misclassification itself is not a violation; failure to pay a misclassified employee what he or she should have been paid is the violation. If a re-classified employee would be an exempt employee, the issue may be largely moot, so one strategy might be to make sure that any physician independent contractor receives compensation at a level sufficient to insure exempt status (currently approximately \$46,000 per year).

The *Dynamex* decision can be expected to have a profound effect on the health care industry, where a significant number of workers, especially physicians, are classified as independent contractors. No cases have yet interpreted the decision in the healthcare industry, so the decision's practical effect is not yet known. The broad language of the decision suggests some interim conclusions, however:

- Physicians who provide services on a full-time and exclusive basis to a single entity are at risk of re-classification (and always were, even before the *Dynamex* decision).
- Physicians who are individually incorporated and provide services to a number of entities may satisfy the first and third prong, but may well fail the second, at least if they provide services squarely within the entity's professional service offerings. However, in *Curry v. Equilon Enterprises, LLC*<sup>1</sup>, the Court of Appeal for the Fourth Appellate district, in a case involving co-employment, seemed to be satisfied that there was an employer responsible for compliance with the wage orders and did not hold the asserted co-employer also to be liable. Curry may provide support for the proposition that where a

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<sup>1</sup> Curry v. Equilon Enterprises, LLC, 23 Cal. App. 5th 289, 233 Cal. Rptr. 3d 295, 2018 Cal. App. LEXIS 466

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bona fide employment relationship exists with one entity, that entity (which possibly could be a physician's professional corporation) could still enter into an independent contractor arrangement for the physician's services. It is not clear, at this point whether *Curry* will be interpreted in this fashion.

- Physicians who provide administrative services, e.g., as a medical director in a hospital, may still be correctly characterized as independent contractors, especially if the physician otherwise maintains a medical practice.

It is also not clear what the practical effect of re-classification would be, beyond the obvious: liability for employment taxes and unemployment and workers' compensation insurance. For example, if an emergency physician were re-classified as an employee, he or she would almost certainly be an exempt employee, so no overtime or break requirements would be applicable. Physician independent contractors who are currently compensated on an hourly or productivity-based system could continue to be compensated that way (after a salary component to bring them, up to exempt level), although their employers would be required to withhold taxes. Such workers could enjoy the benefits of the workers compensation system, although it is not clear how many would do so. Finally, discrimination laws that protect employees would become applicable to such workers.

Because the new standard on its face only pertains, at least at this point, to wage issues, and not expressly to workers compensation or payment of payroll taxes (which incorporate their own definitions of "employee" and "independent contractors"), and the *Dynamex* case expressly carved out payment of employee expenses as not subsumed within the new standard, it is not clear whether a physician could be classified as an employee for wage order purposes and as an independent contractor for other purposes.

Much is yet to be decided regarding the effect of the *Dynamex* decision. In 2018, the California legislature passed AB 2496, which would have codified *Dynamex* in the context of janitorial employees, but Governor Brown vetoed it. Meanwhile, a number of companies in the gig economy continue to push for legislative relief. Any such relief, if enacted, may apply broadly, or may apply only to so-called peer-to-peer services. As frustrating as it is for all concerned, we are still in a wait and see posture.



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