

CALIFORNIA ADOPTS NEW TEST FOR DETERMINING INDEPENDENT CONTRACTOR CLASSIFICATIONS

On April 30, 2018, the California Supreme Court issued a decision that establishes a new three-part test for determining whether a worker can be classified as an independent contractor. While the new test provides greater guidance and is more definitive than the prior multi-factor balancing test, the new test makes it far more difficult for businesses to classify workers as independent contractors, and it creates substantial risk for companies that currently classify any workers as independent contractors.

The California Supreme Court case, *Dynamex Operations West, Inc. v. Superior Court*, involved a class-action lawsuit by delivery drivers against Dynamex, a same-day courier and delivery service. Workers sued Dynamex after the company restructured its business, reclassifying drivers from employees to independent contractors. The workers alleged that they were misclassified and that Dynamex was required to comply with various Labor Code and Wage Order requirements applicable to employees (e.g. meal and rest breaks, overtime).

Instead of applying the balancing test historically used to evaluate independent contractor classifications, the Court adopted and applied the “ABC test” – under this test, **an individual is an independent contractor only if each of the following is true:**

- (A) 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) the worker performs work that is outside the usual course of the hiring entity’s business; and
- (C) 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

Previously, California courts turned to the *Borello* test, under which the main factor in determining whether a worker was properly classified as an independent contractor was whether the company had the right to control the manner and means by which the work was performed. However, the courts would then weigh nine additional factors, which included whether the company had the right to discharge the worker at will and without cause, whether the worker was engaged in a distinct occupation or business, and whether the worker provided his or her own tools to accomplish the objective, among other factors. *No one factor was determinative*, which has always led to great uncertainty for employers as to whether they could safely classify someone as an independent contractor. The “ABC test” differs vastly from the previous test used by California courts to evaluate

independent contractor classifications.

While the California Supreme Court did not provide significant guidance in the *Dynamex* decision as to how the ABC test will be applied in other cases, it did cite to specific examples of appropriate independent contractor classifications. For instance, the Court expressed that a plumber hired by a retail store to repair a bathroom leak is certainly an independent contractor (the store does not control the plumber, the store does not engage in plumbing services in its usual course of business, and the plumber is engaged in a customarily independently established trade), but a work-at-home seamstress hired by a clothing company to make dresses from cloth and patterns provided by the company (and later sold by the company) does not satisfy the ABC test and thus is not an independent contractor.

Takeaway:

Based on California's adoption of this ABC test, businesses need to be particularly discerning about whether their current independent contractors satisfy each of the three required factors. If workers are deemed misclassified as independent contractors, the business is exposed to significant liabilities, including, but not limited to, unpaid minimum wage, overtime pay, meal and rest break penalties, liquidated damages, derivative claims, and employment tax exposure. California's adoption of the ABC test should trigger all companies doing business in California to audit their independent contractor classifications pursuant to the new guidance. Hoge Fenton's employment law team has significant experience in this area of the law and is available to assist you.

Your Hoge Fenton Employment Team



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