



California Opinion Letter Extends Dynamex Reach

Insights

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It's been a busy week on the *Dynamex* front, and the news for businesses continues to get worse. As we recently discussed, the 9th Circuit held just last week that *Dynamex* and the ABC test should be applied retroactively. The very next day, California's Division of Labor Standards Enforcement (DLSE) released an opinion letter concluding that the ABC test applies to both IWC Wage Order Claims and certain Labor Code provisions that enforce Wage Order requirements.

According to the May 3 opinion letter, "because wage order provisions are not independently actionable..., the obligations imposed by the wage orders do not appear only in the wage orders themselves. Wage order obligations are also imposed by certain Labor Code provisions, which serve to enforce the wage orders."

Therefore, the DLSE concluded that Labor Code provisions that implicate or "derive" from employer obligations under the IWC Wage are also subject to the ABC test. The agency specifically mentioned the following:

- minimum wage (Labor Code sections 1182.12 and 1197);
- overtime (Labor Code sections 510 and 1194);
- liquidated damages (Labor Code section 1194);
- meal and rest periods (Labor Code sections 226.7 and 512);
- itemized wage statements (Labor Code section 226); and
- expense reimbursement claims (Labor Code section 2802).

With respect to "waiting time" penalties under Labor Code section 203, the DLSE essentially said: it depends. "Where section 203 serves to enforce the underlying minimum wage and overtime obligations of the wage orders," the agency said, "application of the ABC test to these claims would be appropriate."

So how much weight should California employers accord DLSE's take on these issues? On the one hand, state and federal courts have held on numerous occasions that DLSE opinion letters are not entitled to administrative regulation deference, and have instead looked to interpret the scope of the law themselves. Therefore, a court ruling could reach a different result.

On the other hand, it is now clear that the positions taken in this letter are the way in which the DLSE will be interpreting the law in the near future. Therefore, employers with claims filed or pending before the DLSE will want to take note of their opinion on these matters.

California employers should also closely track pending legislation. Specifically, Assembly Bill 5 would not only codify the *Dynamex* decision, but would make it applicable to the IWC Wage Orders, the Labor Code, and the Unemployment Insurance Code.

All in all, this is a still rapidly moving area of the law. California employers will need to keep a close eye on these developments in order to ensure compliance with the new legal standard.

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