



# Flurry Of Recent Developments On The Dynamex Front

Insights

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It's been tough to keep up with developments concerning the fallout from the *Dynamex* case and California's new ABC test for determining employee/independent contractor status. The past few months have seen several recent regulatory and judicial developments, while high-stakes negotiations over legislative relief continue in Sacramento.

## 9th Circuit Says Dynamex And ABC Test Should Apply Retroactively

On May 2, the 9th Circuit Court of Appeals rejected the call from businesses to apply *Dynamex* only on a go-forward basis, clearing the way for retroactive application of the new standard. That ruling created headaches not only for businesses in the gig economy but for just about any business that utilizes contract labor. In a longstanding misclassification battle against a janitorial franchising operation, the appeals court ruled in favor of the workers and concluded that the ABC test should be applied to the case that has been ongoing since 2008.

The business argued that several justifications existed to reject retroactive application: its long-standing reliance on the former misclassification standard; the fact that the changes was substantive in nature; and overall effect the change would have on the fair administration of justice. The court had none of it. It noted:

- The California Supreme Court rejected the chance to re-hear the *Dynamex* case after the parties had explicitly called for it to rule on the retroactivity question. "By denying the petition, even without comment, the court strongly suggested that the usual retroactive application, rather than the exception, should apply to its newly announced rule," the 9th Circuit said. "To be sure, a denial of a request for clarification is not a holding on the merits. But in an unusual case such as this, it is a data point for us to consider in light of California's general tradition that judicial pronouncements have retroactive effect."
- The new test "remains faithful" to the fundamental nature of California's wage and hours law, which is to remedy the problem of workers not being paid the amount to which they are entitled. It said that such remedial legislation must be liberally construed in a manner that services its remedial purpose.
- Most shockingly, the 9th Circuit said that the adoption of the ABC test was a "clarification rather than a departure from established law."

## DLSE Opinion Letter Extends Dynamex Reach

The very next day, the Division of Labor Standards Enforcement (DLSE) issued an opinion letter that concluded the ABC test applies both to IWC Wage Order Claims and certain Labor Code provisions that enforce Wage Order requirements. According to the 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.”

### **Legislative Negotiations Continue**

Last August, there was an attempt by the business community to come up with a legislative solution to some of the difficulties created by this new standard, but that effort fizzled when legislative leadership announced that there would be no discussion of the issue in 2018. However, there is legislation moving forward this year which represents a vehicle for ongoing discussions with the business community concerning *Dynamex*. Assembly Bill 5 by Assemblymember Lorena Gonzalez (D-San Diego) was introduced early in the year and negotiations over its fate have been continuing for several months.

Recently, AB 5 passed the House after it was amended, indicating that negotiations are advancing, and to the benefit of *some* industries. Specifically, the bill now provides that the ABC test would not apply to the following (1) a person or organization licensed by the California Department of Insurance; (2) a physicians or surgeon licensed by the State of California; (3) a securities broker-dealer or investment advisor or their agents or representatives registered with the SEC or FINRA or licensed by the State of California; (4) a direct sales salesperson under Unemployment Insurance Code Section 650; (5) real estate licensees; (6) persons providing hairstyling or barbering services that meet certain conditions; and (7) certain specified “professionals” (law, dentistry, architecture, engineering, accounting, marketing, and human resources) that meet certain criteria. For these

engineering, accounting, marketing, and human resources) that meet certain criteria. For these individuals, the analysis of employee or independent contractor status would generally be made under the previous *Borello* standard.

The business community continues to push for further amendments to the bill that would afford further *Dynamex* relief to business in a comprehensive manner, not just through industry-specific carve-outs. These include: (1) a broader exemption that would apply to many other professionals; (2) a broader exemption for individuals that prefer to make their own schedules with regard to the days and hours they work and make their own decisions regarding to whom they perform services; (3) an exemption for business to business contracts; and (4) preservation of the ability to subcontract for short-term projects and unexpected, immediate demands for additional help.

Negotiations over AB 5 continue in the hopes that it will provide some relief to the employer community, and we are likely to see revisions of some sort before the state Senate votes on the measure. We will continue to monitor further developments and provide updates on this bill, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information.

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