Calif. High Court Will Likely Apply Dynamex Retroactively

Publication
8.01.19

Imagine you're coaching a football team that has been thoroughly pummeled by the opposition and the game is just about over. You're all set to admit defeat and head into the locker room when the referees signal out of the blue that you will get one more last-gasp chance to score and somehow salvage a win.

Unfortunately, you'll need to throw a 99-yard Hail Mary to get the job done. Not an impossible task, but definitely an uphill battle with the odds firmly stacked against you.

That's the way many California businesses must feel in the wake of the U.S. Court of Appeals for the Ninth Circuit's July 22 decision to withdraw a decision that had confirmed that the notorious ABC test should be applied retroactively. While most had adjusted to the concept that the strict — some say impossible — misclassification standard for determining independent contractor status would be applied to all prior circumstances that existed even before the California Supreme Court pulled the rug out from under businesses across the state, there now appears a slight glimmer of hope. The state's high court has been asked to weigh in and offer its opinion on the matter, opening the door for businesses to snatch an unlikely victory from the jaws of defeat.

Background: Dynamex Changes The Game

To set the stage for this latest development, you need to go back to April 2018, when the California Supreme Court sent shockwaves through the business community with its Dynamex Operations West Inc. v. The Superior Court of Los Angeles County decision. That case scrapped the flexible Borello standard for determining contractor status that had been in place for decades and replaced it with a very rigid legal test — the ABC test. Under Dynamex, a worker is considered an employee under the California wage orders unless the hiring entity establishes all three of these prongs:

(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.

This was a nightmare for most companies using contractors as part or all of their workforces — especially those in the gig economy. But to compound the problem, the question immediately arose whether this new test would be applied solely to situations arising after the April 30, 2018, decision date, or also on a retroactive basis to all workplace relationships that existed before the ABC test was adopted. The California Supreme Court didn't help matters when it failed to address the issue of retroactivity in its 82-page decision and later denied Dynamex's petition for rehearing seeking a definitive answer on the matter.

Ninth Circuit Eventually Answers Retroactivity Question

For the next year, litigation sprung up over the issue and companies caught in the crosshairs argued that the flexible Borello test should be applied to past cases in order to comport with basic principles of fairness and due process. And to be clear, this is no simple academic exercise, no pure hypertechnical debate over an inconsequential issue; much rides on this question. Retroactivity under Dynamex could find a business liable under a misclassification theory as far back as four years, which could lead to substantial damages and associated penalties.

Recognizing how much was at stake, businesses characterized the ABC test as a new legal standard not announced until after business relationships were formed in reliance on the old standard. Because Dynamex was a tectonic shift in the law completely unforeseen by the business community, radically altering the legal landscape by introducing a substantive change in established law, they said, it would be unfair to hold businesses to the new standard in past cases.

Into the vacuum stepped the Ninth Circuit. On May 2, 2019, the federal appeals court issued a ruling in Vazquez v. Jan-Pro Franchising International Inc., concluding that Dynamex and the ABC test should be applied retroactively. The appeals court made three main points.

First, it said that the California Supreme Court's rejection of the chance to rehear the Dynamex case to address the retroactivity question was a strong suggestion that retroactive application should apply to its newly announced rule. "To be sure, a denial of a request for clarification is not a holding on the merits," it said. "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."

Second, the Ninth Circuit said that the ABC test "remains faithful" to the fundamental nature of California's wage-and-hour 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. Third, and most shockingly, the appeals court said that the adoption of the ABC test was a "clarification rather than a departure from established law."

Federal Appeals Court: "Nevermind"

With just a one-page, three-sentence order released on July 22, issued without prior warning or any

With just a one-page, three-sentence order released on July 22, issued without prior warning or any fanfare, the Ninth Circuit called a do-over on the Jan-Pro decision and washed away all of those conclusions. It simply said that the May 2 opinion in the matter was withdrawn and that it would soon file a revised disposition and order certifying to the California Supreme Court the question of whether the Dynamex decision and the ABC test apply retroactively.

It's not necessarily an unusual step for a federal appeals court to conclude that a state's highest court is the best forum for deciding questions of state law. In fact, it happened in the Ninth Circuit just a few weeks prior, as the Washington Supreme Court issued a ruling concluding that obesity was considered a disability under state law after the federal appeals court certified the question to the state (Taylor v. Burlington Northern Railroad Holdings Inc.).

But what makes the Dynamex retroactivity situation unique is that the Ninth Circuit already decided the issue and businesses had begun adjusting to the new reality. The court, for some reason, waited over two months after it originally issued its opinion before deciding that a second bite at the apple at the California Supreme Court was in order.

Business Community Shouldn't Necessarily Get its Hopes Up

This latest development may end up being tossed out in the dustbin of history, as there are no assurances — or even signs — that the California Supreme Court will conclude retroactivity was a mistake. While it is unclear how the court will ultimately rule on the question, given its earlier refusal to modify or even clarify its decision, some have already speculated that it will swiftly and clearly rule that the decision should be applied on a retroactive basis, consistent with the original Ninth Circuit decision.

While a chance is a chance, and a slight glimmer of optimism is better than no hope at all, businesses may instead want to rest their hopes on the California Legislature to resolve the issue in their favor. Perhaps the best prospect for employers at this time comes via legislative negotiations around Assembly Bill 5, currently pending in the California State Senate. While that bill passed the state Assembly as a vehicle to codify the ABC test, even many of its supporters said they felt it needed revisions before going through the Senate.

Specifically, negotiations continue over exempting a number of professions and industries, as well as small businesses, from its provisions. Currently, the bill would exempt doctors, dentists, lawyers, architects, accountants, engineers, insurance agents, investment advisers, direct sellers, real estate agents, hairstylists and barbers who rent booths at salons, and marketers and human resources professionals with advanced degrees. The business community is working feverishly to add further exemptions to the bill, including ones that would carve out workers performing "short-term projects" or those people who control their own schedules (such as your average gig economy worker).

At the very least, businesses are crossing their fingers and hoping that a provision can be carved

At the very least, businesses are crossing their fingers and hoping that a provision can be carved into the final version of the bill that would confirm that Dynamex should not be applied on a retroactive basis. The next few months will prove pivotal to the issue, and we should soon have resolution on the retroactivity question once and for all. Whether the 99-yard Hail Mary is successful remains to be seen, but there's one final chance for businesses to pull out a win.

This article was originally featured on *Law360* on August 1, 2019.

Related People

Benjamin M. Ebbink
Partner
916.210.0400
Email

Richard R. Meneghello
Chief Content Officer
503.205.8044
Email