Misclassification Doomsday in California: State Supreme Court Adopts Notorious "ABC" Test

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My colleague Ashton Riley described it as the "contractor apocalypse." As I said for an interview in the New York Times, "It's a massive thing – definitely a game-changer that will force everyone to take a fresh look at the whole issue." Yesterday the California Supreme Court issued its long-awaited decision in *Dynamex Operations West, Inc. v. Superior Court*, and, unfortunately, the wait wasn't worth it. The state Supreme Court scrapped the flexible legal test used since 1989 to determine whether a worker was an independent contractor or employee and installed a rigid three-pronged test that will appear in the nightmares of your average gig economy business executives for the foreseeable future.

The new test? The burden is now on the business to demonstrate that every worker is not an employee by proving all three of these elements:

1. 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;
2. the worker performs work that is **outside the usual course** of the hiring entity's business; and
3. 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.

We've briefly discussed this test before back in February when oral arguments took place; we took a slightly deeper dive back in January when attorneys for the Grubhub plaintiff asked the federal court trying the pivotal misclassification case to hold off on making a decision until the *Dynamex* case was decided. The bottom line: it's going to be a lot harder for some gig economy companies in California to withstand misclassification challenges. As you can see, this test is very difficult to overcome and could require many businesses to restructure the very nature of the way they do their work, especially in light of the B and C prongs.

We'll have more soon once we've had a chance to further analyze the 82-page ruling and construct our list of best practices for gig businesses in light of this game-changing decision.

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