



Examining the Dynamex 'ABC Test' by Various On-Demand Worker Types

Insights

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The California Supreme Court issued its long-awaited decision in Dynamex Operations West, Inc. v. Superior Court *last week*. The weight of the court's decision to apply a three-prong test to determine whether a worker is an employee is heavy, without a doubt. As my colleague Rich Meneghello says, the decision will "appear in the nightmares of gig economy executives."

Though the *Dynamex* decision was borne of facts involving delivery drivers for a parcel delivery company, it will have broad application. And it has, indeed, caused much consternation amongst business executives utilizing on-demand workers across all industries, whether app-based or traditional. As with most standards, it remains to be seen how lower courts will interpret the new test.

The court did create small amounts of wiggle room with each of the prongs. While recognizing each situation has factual dissimilarities, let's examine a few scenarios, in light of the *Dynamex* test, in an attempt to predict the worker-business relationships with the greatest likelihood of misclassification.

To recap, the analytical framework under the new ABC test provides that the burden is 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.

Motor Carriers/Delivery Drivers

The first group of workers, motor carriers or delivery drivers, are most analogous to the *Dynamex* plaintiffs. The industry is quite varied, as short- and long-distance haulers are engaged by logistics companies, or directly by manufacturers. Depending on how the business is operated, the former group is most likely to be found to be engaging in the hiring company's usual course of business, even though logistics companies provide more than hauling services, such as holistic planning. But

again, this is a very fact-intensive question best answered in each individual case. Drivers who sign agreements with multiple manufacturers to pick up on-demand work, and where the driver must accept the work, will likely pass muster for Prongs A and C. Whether the 'usual course of business' would include short- or long-hauling of materials for manufacturers remains to be seen.

However, before too much ink can be spilled on this industry, we need to see how California courts will respond to the argument that Prong B is preempted by the Federal Aviation Administration Authorization Act (FAAAA) and is therefore unenforceable against motor carriers and other delivery personnel. This could get many businesses in this industry off the hook with respect to the 'ABC' test.

IT Workers

Our second group, Information Technology workers, provides a clearer analysis. However, just as with delivery drivers, great variability exists in the nature of the relationship between worker and business. For example, the IT consultant who markets information security services to multiple businesses is almost certainly going to meet all three prongs. However, the IT worker who markets general IT services but whose work is a mixture of one-off projects and long-term engagement is not as clearly going to fall into the Prong B definition, especially where other IT staff are employed by the contracting business.

Freelancers, Generally

What about the freelancing professional? A professional such as an accountant, management consultant, or a doctor looking to take on gigs with multiple companies may look to a staffing agency, an association, or a platform marketplace for a wide variety of freelancing professionals. Freelancing doctors who take gigs at medical clinics or hospitals would seem to be working right into Prong B. However, those doctors who utilize an app-based platform marketplace that brings together a highly varied group of professionals and customers would appear to satisfy the test. What is the usual course of business of an online marketplace? Could the freelancing professional be deemed an employee of the online marketplace?

Is there any distinction for freelancers who offer non-professional services, such as running errands, packing boxes, or preparing mailers? It likely comes down to the form of the hiring entity and its relationship with the ultimate users of the freelancer's services. If the very nature of the company is to provide labor for a discrete set of customers with formal agreements regarding the same, Prong B would appear to favor a finding that the worker is providing services in the usual course of the company's business. However, if the platform merely operates as a marketplace, where both workers and those requiring the services interact with the app to meet their respective needs, the platform entity is in a better position to argue satisfaction of all three prongs.

Conclusion

While the *Dynamex* decision is certainly going to make it much more difficult to establish independent contractor status, specific factual nuances—whether in the nature of the work being performed, in the nature of the relationship between the worker and the hiring entity, or in the

performed, in the nature of the relationship between the worker and the hiring entity, or in the identity of the ultimate customer—will assist in clarifying the court’s decision. All companies in California who utilize independent contractors should look to understand the nature of their relationships with those workers, and assess both the reasons for the use of independent contractors and the financial impacts of potential misclassification issues.

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