No Relief In Sight For California Employers Dealing With The Notorious ABC Test

Insights

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While businesses, chambers of commerce, local leaders, and others have put the full-court press on the California legislature to take action to somehow lessen the impact of the new ABC Test for determining misclassification in light of the state Supreme Court's recent *Dynamex* decision, it appears there is no relief in sight. For the foreseeable future, California employers need to adjust to the new reality and assume things aren't going to be changing.

For those unfamiliar with the *Dynamex* decision or the ABC Test, here's the quick crash course. Rather than continuing to applying a fair and reasonable balancing test that took into account a number of common factors when making the determination about whether a worker was properly classified as an independent contractor, the California Supreme Court ruled on April 30 that hiring entities need to prove that all of their workers satisfy the three-part "ABC test." The test appears notoriously difficult to overcome, especially because Prong B of the test requires you to prove that the worker is performing work outside the usual course of your business. We've written about this test extensively; you can read more about it here.

As we described earlier this summer, the California Chamber of Commerce and a coalition of dozens of businesses and business advocacy groups—including gig companies Uber, Lyft, Handy, Instacart, Caviar, Doordash, and Postmates—directed a letter to Governor Jerry Brown and the entire state legislature on June 20 seeking relief from the effects of *Dynamex*. "The economic impact of this ruling has far-reaching negative implications for nearly all sectors of the economy," they said, encouraging the lawmakers to suspend or postpone the application of the decision until all impacted parties can work together to develop a "balanced test" for determining misclassification status.

Another coalition of nine gig companies stepped up the pressure in July, sending another letter to the state's leading Democratic figures asking them to override or somehow limit the impact of the *Dynamex* case. "The magnitude of this issue requires urgent leadership," the July 23 letter says, warning that the application of the ABC test would "stifl[e] innovation and threaten the livelihoods of millions of working Californians." According to Bloomberg, the letter—sent to the state secretary of labor and the governor's cabinet secretary—says that, without political intervention, the ruling will "decimate businesses." Bloomberg reports that the letter was sent on behalf of Uber, Lyft, Instacart, DoorDash, Postmates, TaskRabbit, Square, Total System Services, and Handy.

There appeared to be a small window of time to get something done in 2018. The legislature reconvened on August 6 for a whirlwind session, with all bills passed and sent to Governor Brown by August 31, who would then have until September 30 to sign or veto them. But on August 8, legislative leaders "declared that effort dead." In an interview aired by Capital Public Radio, Assembly Speaker Anthony Rendon said the legislature would not take action this session. "Ultimately, this decision is about the future of the way work looks. And that requires us to be thoughtful and deliberate," Rendon said. "And there's no way we can be thoughtful and deliberate in three weeks." In the same report, the state Senate leader agreed.

It looks like the state's businesses will have to wait until the next legislative session for any movement on this issue. No doubt there will be intense lobbying behind the scenes until then, with business leaders hoping to press pro-business Democrats to consider taking action. There's no hint as of yet, however, that this lobbying will have any impact on the legislature; hiring entities need to proceed under the assumption that the ABC Test is the new normal when it comes to misclassification.

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