The Ghost of Borello Returns This Halloween! Court Holds Dynamex ABC Test Applies Only to Wage Order Claims

Insights
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As we have covered extensively, the California Supreme Court dropped a proverbial bomb earlier this year in the *Dynamex* case when it adopted a new legal standard known as the "ABC Test," making it much more difficult for businesses to classify workers as independent contractors. A few days ago, a California Court of Appeal held that the new test is limited to claims arising under the California Wage Orders, and that other claims continue to be governed by the prior (and more employer-friendly) standard known as the *Borello* test. This holding, if it stands, is good news for employers. However, it's not all treats for employers on this Halloween. The new case has a few tricks of its own, as the good news appears to be tempered by some other less-favorable positions.

Garcia v. Border Transportation Group LLC

The *Garcia* case was filed back in 2015 (prior to the *Dynamex* decision) and involved various claims for wage and hour violations by a taxi driver who alleged that he had been misclassified as an independent contractor rather than an employee. The plaintiff alleged eight total causes of action – some arising under the Industrial Welfare Commission Wage Orders (unpaid wages, failure to pay minimum wage, failure to provide meal and rest periods, failure to furnish itemized wage statements, and derivative claims for unfair competition), while the remaining claims arose under other statutory provisions and not the Wage Orders (overtime (because taxi drivers are excluded from the overtime provisions of the Wage Order), wrongful termination, and waiting time penalties).

The trial court ruled in favor of the employer and held that Garcia was an independent contractor, not an employee. This decision was based on the common law standard for making such determinations, known as the *Borello* test. This common law test had long been resolved by examining who has the right to control the manner and means of accomplishing the work at issue, among other factors.

However, while Garcia's appeal of the trial court's granting of summary judgment was pending, the California Supreme Court issued its bombshell ruling in *Dynamex*. Under the new "ABC" test articulated in that case, a worker is considered an employee under the Wage Orders unless the hiring entity establishes all three of these prongs:

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 work is performed [illegible] **outside the usual course** of the hiring entity's business; and

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.

Court Limits *Dynamex* ABC Test to Wage Order Claims

In evaluating whether the trial court had properly ruled for the employer, the Court of Appeal's October 26 decision first held that the new test set forth in *Dynamex* applied only to Garcia's Wage Order claims. It noted that the court in *Dynamex* did not decide what standard applied in non-Wage Order claims (such as Labor Code section 2802 expense reimbursement claims). As the Court of Appeal stated:

"*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections…[The California Supreme Court] did not reject *Borello*, which articulated a multifactor test for determining employment status under the Worker's Compensation Act. Nor did it address the appellate court's ruling that 'insofar as the causes of action in the complaint…are not governed by the wage order' and predicated solely on the Labor Code, 'the *Borello* standard is the applicable standard for determining whether a worker is properly considered an employee or an independent contractor.'"

The court concluded that it was logical to apply the "suffer and permit" standard (and the ABC test) to Wage Order claims because the Wage Orders expressly define "employ" in this manner. However, the court refused to apply *Dynamex* to non-Wage Order claims, noting, "There is no reason to apply the ABC test categorically to every working relationship…We conclude *Borello* furnishes the proper standard as to those [non-Wage Order] claims."

While this decision may be appealed to the California Supreme Court, for the time being it represents welcome news for California employers. First, it gives some indication that the lower courts may be inclined to put a "box" around the holding in *Dynamex* and limit its application only to Wage Order claims. Second, this decision should help employers in arguing that pending civil actions or administrative enforcement efforts that attempt to apply the ABC test in the non-Wage Order context are improper.

We'll have to see if other lower courts follow suit, and whether the holding in *Garcia* is challenged. But the case does represent a glimmer of hope for California employers who desperately needed some good news in the post-*Dynamex* world.

Bad Omen on the Retroactivity Front?

Other parts of the decision are potentially less-positive.

One of the biggest questions following the *Dynamex* decision was whether the ABC test applied retroactively, or would only operate going forward. The California Supreme Court heard supplemental arguments on this issue but refused to modify its decision either way – leaving it up to

lower courts to determine whether *Dynamex* had retroactive effect. At least one trial court in Orange County has concluded that the decision was indeed retroactive.

The *Garcia* decision did not resolve this issue directly because the court stated that the defendant "implicitly assumed retroactivity" in its supplemental briefing discussing the impacts of *Dynamex*—this, despite upending decades of court precedent and reliance upon the *Borello* standard by thousands of employers. Therefore, the court did not address the issue.

However, in non-binding language (known as "dicta") in a footnote, the court stated:

"As an academic point, we observe that *Dynamex* applied the ABC test to the class certification question before it, and the Supreme Court denied later requests to modify the opinion to apply the ABC test only prospectively. Moreover, to the extent *Dynamex* merely extended principles stated in *Borello* and *Martinez*, it represented "no greater 'surprise' " than tort decisions that routinely apply retroactively. (*Newman*, supra, 48 Cal.3d at p. 984; see *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 25 [rejecting argument that judicial decision was "unforeseeable," precluding retroactive application, where it "was but a logical extension" of previously established principles].)"

So the issue is still unresolved. As of now, employers have some strong arguments that tossing out decades of precedent and adopting an entirely new test for employment classification should only apply going forward. But if a court ultimately does take on the issue directly – and if runs with the argument the *Garcia* court hinted at in the footnote – it could spell trouble for California employers.

Don't You Forget About Me – Part C of the ABC Test

In addition, while most of the concern regarding the new ABC test has focused on Part B (whether the worker performs work that is outside the "usual course" of the hiring entity's business), the *Garcia* court's application of the test focused exclusively on Part C. In fact, it didn't even reach application of Part A or Part B.

Specifically, the court applied the new ABC test (only to the Wage Order claims) in evaluating whether the trial court had properly granted summary judgment or whether there was a triable issue of fact. But the court focused its analysis exclusively on Part C.

As discussed above, Part C of the new test requires the purported employer to prove that 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 third "C" prong seeks to identify those workers that have taken steps to create their independent business. If the worker has independently made the decision to go into business for themselves, they are likely to be found as satisfying this third prong. If, on the other hand, they are "simply designated as an independent contractor by the unilateral action of a hiring entity," there is a substantial risk they will be found to be an employee. What steps a worker must take to establish this prong has remainder a mystery, but *Garcia* provided some insight that the California courts may take a more restrictive approach than other jurisdictions which have adopted the ABC test.

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In *Garcia*, the court emphasized that *Dynamex* makes clear that the key question in Part C is not whether the entity ***prohibited or prevented*** the worker from engaging in an independently established business. Instead, the inquiry is whether the worker fits the common conception of an independent contractor – "an individual who ***independently*** has made the decision to go into business for himself or herself" and "generally takes the usual steps to establish and promote his or her business."

Importantly, the court held that the critical inquiry is not whether the worker is ***"capable"*** of independent business operation, but whether there is an ***"existing"*** showing of independent business operation. In so doing, the court rejected the defendant's reliance on a 2015 decision by the Massachusetts Supreme Court (*Sebago v. Boston Cab Dispatch, Inc.*) similarly involving taxi drivers. That decision merely looked at whether the drivers were "capable" of performing the service to anyone. However, the court in *Garcia* held that, while the wording of the ABC test in *Dynamex* tracked the Massachusetts statute, Part C of the test in *Dynamex* requires an **existing, not potential** showing of independent business operation. The *Garcia* court pointed to *Dynamex*'s approval of cases from Utah, Vermont, North Dakota, and Connecticut for its interpretation of Prong C, and followed a Connecticut case for its holding (*Kirby of Norwich v. Administrator, Unemployment Compensation Act*).

Because the court ruled that the employer did not meet their burden of establishing Part C, summary judgment was inappropriate and they reversed and remanded the case for further action. Whether this part of the court's decision survives remains to be seen. The defendant in the case may appeal, and has good arguments that the court in *Garcia* may in fact have overreached the holding in *Dynamex* as it relates to Part C of the ABC test. As a result, much potentially remains to be done before we can put Part C "to bed."

However, the *Garcia* decision represents a good lesson for California employers. While much of the focus has been on Part B of the ABC test, this case is a stark reminder that ***all*** prongs of the new test can be equally challenging for California employers and must be met individually. Even if a business were to satisfy the first two prongs of the test, failing to satisfy Part C could prove fatal to avoiding liability for misclassification claims.

What This Means Moving Forward

It's still early going in the post-*Dynamex* fallout, and this is one of the first appellate court decisions to apply the new standard. Moreover, this case could very well be litigated further or appealed, so this is not the end of the story. And it remains to be seen how other California courts will apply this new standard. It may take several years for a uniform analysis to form in the courts. And while the Legislature failed to step in last year and provide any relief to California employers, there is a flurry of discussion about legislative efforts next year to soften the impact of the decision. In the interim, California employers should re-evaluate their classification of their workers to ensure full compliance with the law.

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