



## 2 Competing Dynamex Bills To Be Weighed In California Legislature

Insights

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December 3 was the first day of the new legislative session in California, the first day that members could introduce bills for the 2019-2020 legislative session. If the first day is any indication, there is one issue that will dominate employment policy discussion in 2019: *Dynamex*, *Dynamex* and *Dynamex*.

### ***Dynamex* – The Shot Heard ‘Round the World (Or At Least in California)**

The most significant and pressing concern facing California employers is continued fallout from the blockbuster decision by the California Supreme Court in the *Dynamex* case, where the court adopted an entirely new test for determining whether an individual is an employee or an independent contractor. As we discussed [here](#), this new legal standard, known as the “ABC Test,” makes it more difficult for businesses to utilize independent contractors and threatens to upend entire industries in California – and has potential far-reaching implications for the gig economy in particular.

There was an attempt late in the year by the business community to come up with a legislative solution to some of the difficulties created by this new standard, but that effort fizzled when legislative leadership announced there would be no discussion of the issue. But this issue has not gone away.

### **Labor Takes the Offense to Control the Debate**

Even before the legislature reconvened on December 3, it was anticipated that there would likely be numerous bills on the matter – from industry-specific bills to more comprehensive solutions proposed by the business community.

However, on Day One it was actually labor that took the offensive, as Assemblywoman Lorena Gonzalez Fletcher (D-San Diego) announced that she would be introducing legislation sponsored by the California Labor Federation to codify the *Dynamex* decision. She wasted little time in introducing Assembly Bill 5. The bill is a placeholder (or “spot”) bill for now, but declares that it is intended to codify *Dynamex* and “clarify the decision’s application in state law.”

As reported in the Sacramento Bee, Gonzalez Fletcher stated that putting the decision into law “offers a quicker resolution than fighting in court for years over its implications for issues like workers’ compensation and unemployment insurance.” This statement should give California employers pause. Two recent Court of Appeal decisions interpreting *Dynamex* provided some good

news to employers – the first held that the new “ABC test” was inapplicable to joint employer analysis, while the second decision held that *Dynamex* was limited to claims arising under the Industrial Welfare Commission Wage Orders, and did not apply to statutory claims or other areas of the law.

The author’s statement above indicates that labor may attempt not only to codify *Dynamex*, but may attempt to nullify these recent appellate court decisions by extending the “ABC test” to other areas of California employment law.

More broadly, the introduction of AB 5 likely represents an effort by labor to control discussion and debate around the *Dynamex* issue to ensure that any legislative compromises are made on their terms, and their terms only. As noted in the Sacramento Bee article, a representative of the California Labor Federation said “labor is open to incorporating changes in the bill that clear up the intent and the applications of the ABC test...There could even be industries with unique employment models that are exempted.”

Therefore, AB 5 may be as much about process as it is about substance. It’s no secret that there will likely be multiple *Dynamex* bills as various industries attempt to forge their own legislative relief to the court decision. AB 5 should be viewed as labor’s “shot across the bow” to control the discussion on their terms and in their own legislative vehicle – and enable them to say “no” to other legislative proposals introduced in 2019. And with the new Democratic “super-duper majorities” in the legislature, there is little question that labor will have their way.

### **Republicans Get in the Game As Well**

Despite labor’s strong signal with AB 5, December 3 also saw the introduction of the first legislative proposal to provide *Dynamex* relief to the business community – Assembly Bill 71 by Assemblywoman Melissa Melendez (R-Lake Elsinore). AB 71 proposed to essentially revert to life before *Dynamex* by declaring that, for purposes of state law, the determination of whether someone is an employee or an independent contractor shall be based on the multifactor *Borello* test that applied before the California Supreme Court adopted the new ABC test.

In a press release announcing the legislation, Assemblywoman Melendez stated, “This legislation addresses the chilling and potentially harmful impacts the *Dynamex* decision will have on the business community in our state and for the nearly 2 million Californians who have made the choice to have flexible work schedules as independent contractors...Without clear legislative action, the *Dynamex* case could unravel gig and tech economies and threaten the traditional business models of realtors, teachers, beauticians, truck drivers, construction trades and countless other professions.”

At the end of the legislative session last August, Melendez introduced a resolution urging Governor Brown to call a special session of the Legislature to suspend the *Dynamex* decision and look for an alternative solution for businesses and workers alike. That resolution was never heard.

Based on the political realities in Sacramento, as well as labor's efforts to "occupy the field" on all things *Dynamex*, AB 71 likely faces an uphill battle in advancing in the legislature. But it is likely the first of many bills (from both sides of the aisle) seeking to forge a compromise on this hot-button issue.

### **One to Watch**

Many have described 2018 as the year of the #MeToo movement, as legislative proposals related to sexual harassment dominated discussion in state houses across the country. And while that topic is likely to be a continued focus in 2019, it is clear that the dominant policy issue in California will focus on the fallout after *Dynamex*.

As we recently discussed, new Governor-elect Gavin Newsom will quickly have his business background bona fides put to the test as he is forced to deal with this issue one way or another in 2019. So this will be *the* issue to watch closely in 2019. At the end of the day, the question for California employers will be whether the legislature provides any meaningful relief, or does further harm by codifying and expanding an already-difficult standard.

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