THE PAST LOOKS LIKE THE PRESENT: THE CALIFORNIA SUPREME COURT DETERMINES THAT THE DYNAMEX DECISION ON INDEPENDENT CONTRACTOR CLASSIFICATION APPLIES RETROACTIVELY

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On 14 January 2020, the California Supreme Court held that its earlier landmark decision setting forth the definitive rule for independent contractor classification, *Dynamex Ops. W. Inc. v. Superior Court*, 416 P.3d 1 (2018), applies retroactively. In *Vasquez v. Jan-Pro Franchising International, Inc*., S258191 (2021), the Court explained that *Dynamex*'s A-B-C test for determining whether a worker should be considered an independent contractor rather than an employee affects all non-final cases governed by the wage orders—even those cases filed prior to the *Dynamex* decision.

In *Dynamex*, the Court held that California wage orders carry a presumption that any worker performing work for a business is an employee of that business, and the employee is entitled to the protection of the wage orders. The *Dynamex* decision set forth the "A-B-C" test for determining when this presumption would not apply, stating that the hiring entity could overcome the presumption and demonstrate that a worker is an independent contractor if the hiring entity showed that (A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work; (B) the worker performs work that is outside the usual course of the hiring entity's business; and (C) 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. The subject of the Vasquez case was an alleged employment relationship that arose prior to the *Dynamex* decision. The defendant in Vasquez claimed that it reasonably believed that a different test—one set forth in *S.G. & Borello & Sons v. Department of Industrial Relations*, 48 Cal.3d 341 (*Borello*)—would apply to all cases arising prior to the *Dynamex* decision. It therefore asserted the federal district court adjudicating the dispute should apply the *Borello* test rather than the A-B-C test. On appeal, and after hearing the arguments presented, the Ninth Circuit certified a question to the California Supreme Court on the issue, asking the Court to resolve whether the *Dynamex* decision would not just affect all subsequent cases, but also apply retroactively.

In response to the Ninth Circuit's certified question, the California Supreme Court unanimously held that *Dynamex* applies retroactively. The Court noted that the *Dynamex* decision dealt with an issue of first impression, rather than addressing a previously-settled rule. The Court explained that no previous California Supreme Court opinion had interpreted how the "suffer or permit to work" language in the California wage orders would affect the classification of a worker as an employee or an independent contractor. The Court pointed to a large body of case

law—including cases from the U.S. Supreme Court—that held that judicial interpretation of legislative language applies to cases arising both after and before the decision. As such, the Court held that *Dynamex*'s interpretation of the "suffer or permit to work" language as requiring the application of the A-B-C test should apply retroactively.

The Court rejected the employer's argument that it had reasonably relied on the standard set forth in *Borello*, and that basic fairness should dictate that the *Dynamex* rule not apply retroactively. First, the Court explained that the *Borello* decision did not involve interpretation of wage orders, nor did *Borello* suggest that it was analyzing the question of how the wage orders define whether a worker was an employee or independent contractor. Second, the Court pointed to several of its own cases following *Borello* where it had suggested that the question of independent contractor status would be resolved by the "suffer or permit to work" language, and that *Borello* had not settled this area of the law. Third, the Court noted that *Dynamex* explicitly discussed how the unwieldiness of *Borello*'s numerous factors made it an improper standard for employers. The Court further noted that the *Dynamex* decision itself involved a retroactive application of the A-B-C test to the parties in that case, and concluded that the employer had not made a showing that justified declining to apply the *Dynamex* decision retroactively.

Retroactive application of the *Dynamex* decision will have significant short-term implications for employers. Although the Court noted in *Vasquez* that statute of limitations considerations will limit the number of cases impacted by the decision, *Vasquez* will certainly have a significant influence on both currently pending cases, as well as cases not yet filed that still fall within the applicable statute of limitations and arose before *Dynamex*. In light of the *Vasquez* decision, employers should carefully evaluate any current cases in which they are litigating misclassification claims, as well as any independent contractor relationships arising prior to *Dynamex*.

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