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EMPLOYEE CLASSIFICATION

Dynamex independent contractor test limited to wage order claims

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A cab driver sued a taxi company for violations of California labor law. The trial court applied the employment classification test established in S.G. Borello & Sons, Inc. v. DIR and found the driver was an independent contractor. The driver appealed, and the court of appeal reversed and sent the case back to the trial court for further proceedings, finding the California Supreme Court's recently issued decision in Dynamex Operations West, Inc. v. Superior Court governed the classification analysis for the driver's Wage Order claims, but not for his non-Wage Order claims.

Calexico cab driver sues for Wage Order violations

Calexico strictly regulates its local taxi industry. Taxi service operators must obtain a city council-issued "certificate of public convenience and necessity," which includes a limited number of vehicle permits. Calexico's municipal code contemplates two different business models: Cab drivers can either operate as employees or contract independently with vehicle permit owners. Regardless, all drivers must obtain separate driving permits for each taxi service operator with which they are associated. In 2009, Border Transportation Group (BTG) owned approximately two-thirds of the total vehicle permits in Calexico.

In 2009, Jesus Cuitlahuac Garcia began driving for BTG in his 1998 Ford Crown Victoria. For more than four years, Garcia operated his car as a taxi for hire, leasing a vehicle permit from BTG and paying for an optional radio dispatch service. His leases labeled him an independent contractor and disavowed any employment relationship. When his Crown Victoria failed in 2013, he leased a car from BTG.

After Garcia's employment ended, he filed a wage and hour lawsuit against BTG. Some of his claims were based on Industrial Welfare Commission (IWC) Wage Order 9, which regulates the minimum working conditions for employees in the transportation industry.

The trial court granted BTG's motion for summary judgment (dismissal without a trial), finding Garcia was an independent contractor, not an employee, and he therefore was not entitled to protection under the Labor Code. Garcia appealed.

After briefing was completed, the California Supreme Court issued its ruling in *Dynamex Operations West, Inc. v. Superior Court.* The court of appeal asked the parties to submit supplemental briefs and then held that BTG failed

to meet its burden under *Dynamex* on Garcia's Wage Order-related claims, but summary judgment was appropriate on his non-Wage Order claims.

The classification quagmire

Classifying workers as employees or independent contractors is significant for workers, businesses, and the general public. Employees, unlike independent contractors, are shielded by antidiscrimination, wage and hour, and medical leave laws. Employees can access government programs, including unemployment insurance and workers' compensation; contractors cannot. The costs of payroll taxes and employment benefits dissuade businesses from classifying workers as employees. California courts have struggled to find a classification test that strikes the right balance between protecting workers and providing understandable, practical guidelines for employers.

In 1989, the California Supreme Court decided *S.G. Borello & Sons, Inc. v. Department of Industrial Relations,* establishing what has been considered the seminal test for determining whether a worker is an employee or an independent contractor. *Borello* endorses a multifactor test but emphasizes that the principal indicator of an employment relationship is whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the work.

The supreme court revisited the classification issue in *Dynamex.* In that case, a class of delivery drivers sued for overtime, reimbursement of expenses, and other claims, alleging they had been misclassified as independent contractors. Instead of relying on *Borello,* the supreme court looked to the IWC Wage Orders, which regulate wages, hours, and basic working conditions for California employees.

Specifically, the Wage Orders define "employ" to mean "suffer or permit to work." Using that definition and rejecting the idea that *Borello* is the only test available to assess workers' status as employees or independent contractors, the supreme court created a three-part "ABC" test for determining whether a worker is properly classified under the "suffer or permit to work" standard for purposes of Wage Order claims. Under the ABC test, a worker is presumed to be an employee unless it's established that he is:

(A) Free from employer control and direction in connection with his work performance;

(B) Performing work that is outside the usual course of the employer's business; and

(C) Customarily engaged in an independently established trade, occupation, or business of the same nature.

The failure to satisfy any one of those elements is sufficient to classify the worker as an employee for purposes of the Wage Orders.

Importantly, *Dynamix* does not replace the *Borello* standard in every case in which classification is relevant to the enforcement of California's labor protections. *Borello* remains the standard for non-Wage Order claims, including, for example, those predicated solely on the Labor Code or workers' comp law.

Dynamex controls Wage Order claims, Borello controls the rest

BTG and the trial court relied solely on *Borello* to deem Garcia an independent contractor. BTG argued and the trial court agreed that it did

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not exercise control over its drivers, who remained free to set their hours, use their cars for personal errands, decline the optional dispatch service, keep fares, enter into sublease agreements, hold other jobs, and advertise under their own names. In response, the court of appeal pointed out that *Dynamex,* not *Borello,* governs whether Garcia was an employee entitled to Wage Order protection or an independent contractor who was not protected.

Five of Garcia's eight claims—for unpaid wages, failure to pay minimum wage, failure to provide meal and rest periods, failure to furnish itemized wage statements, and unfair competition—arose under Wage Order 9. The court of appeal found there was a triable issue on those claims over whether BTG satisfied its burden under part "C" of the *Dynamex* ABC test.

Specifically, BTG failed to make a real—not just a potential—showing that Garcia had been engaged in his own independently established business. BTG presented no evidence that he actually provided driving services for other entities "independently" of his relationship with it. Given the limitations of his driver's permit, it was questionable whether he was even capable of providing services to a different company.

Because BTG did not meet its burden to establish part "C" of the *Dynamex* test, summary judgment was inappropriate for Garcia's Wage Order claims. At the same time, the court held that because the California Supreme Court has remained silent on the application of *Dynamex* to non-Wage Order claims, summary judgment was appropriate for those claims under the *Borello* standard. *Garcia v. Border Transportation Group LLC, et al.* (California Court of Appeal, 1st Appellate District, 10/22/18).

Bottom line

Garcia illustrates that courts will apply two different legal standards to decide whether a worker is an employee or an independent contractor. For Wage Order claims, courts will look to the new *Dynamex* test. For non-Wage Order claims, courts will apply the traditional *Borello* test. As this case shows, results may vary, meaning a worker may be considered an employee for certain purposes and an independent contractor for others. Black. White. Gray.

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