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California Supreme Court Adopts "ABC Test" for Independent Contractors

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On April 30, 2018, the California Supreme Court issued its long-awaited opinion in *Dynamex Operations West, Inc. v. Superior Court*, clarifying the standard for determining whether workers in California should be classified as employees or as independent contractors for purposes of the wage orders adopted by California's Industrial Welfare Commission. In so doing, the Court held that there is a presumption that individuals are employees, and that an entity classifying an individual as an independent contractor bears the burden of establishing that such a classification is proper under the "ABC test," which is used in some other jurisdictions.

Depending on the applicable statute or regulation, California has a number of different definitions for whether an individual is considered an entity's "employee." In *Dynamex*, the Court concluded that one of these definitions—"suffer or permit to work"—may be relied upon in evaluating whether a worker is an employee for purposes of the obligations imposed by the wage order. But the Court held that the Court of Appeal had gone too far in providing a literal interpretation of "suffer or permit to work" that would encompass virtually anyone who provided services.

The California Supreme Court also held that it is the burden of the hiring entity to establish that a worker is an independent contractor who was not intended to be included within the applicable wage order's coverage.

To meet this burden, the hiring entity must establish *each* of the following three factors, commonly known as the "ABC test":

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
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> (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

The Court concluded that the "suffer or permit to work definition is a term of art that cannot be interpreted literally in a manner that would encompass within the employee category the type of individual workers . . . who have traditionally been viewed as *genuine* independent contractors who are working only in their own independent business."

What California Employers Should Do Now

Following *Dynamex*, entities doing business in California that treat some workers as independent contractors will want to review their relationship under the "ABC test" to determine whether any or all such workers should be reclassified.

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