IS YOUR INDEPENDENT CONTRACTOR NOW AN EMPLOYEE?

EFFECTIVE JANUARY 1, 2020, CALIFORNIA CODIFIES THE GROUND BREAKING *DYNAMEX* DECISION

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Uber and Lyft just lost another battle, and their drivers are one step closer to becoming employees. But they are far from alone. On September 10, 2019, California's Senate voted 29-11 in favor of Assembly Bill ("AB") 5, and Governor Gavin Newsom signed the bill on September 18, making the law effective January 1, 2020. This statute will not only make it harder to deem workers as independent contractors going forward, but will also apply retroactively. California businesses of many stripes, including lenders and appraisal companies, now face the challenge of determining if their "independent contractor" is really an employee.

AB 5 codifies the California Supreme Court's ground breaking 2018 decision in *Dynamex Operations West, Inc., v. Superior Court*, as well as the Federal Court of Appeals decision in *Vazquez v. Jan-Pro Franchising International, Inc.*, which applied *Dynamex* retroactively. Intentionally or not, however, AB 5 actually goes much farther than the *Dynamex* decision, which was limited to wage orders, and essentially applied all California Labor Code protections to workers covered by the bill. When AB 5 goes into effect, it has the potential to turn many industries upside down, and not just those in the gig economy, where companies rely on hundreds of thousands of independent contractors. From truckers to real estate appraisers to (potentially) real estate licensees, including loan brokers, workers traditionally classified as independent contractors may now be employees and could receive all Labor Code protections and benefits that employees get, from minimum wage to unemployment insurance to employee reimbursements, as well as being able to unionize. The impact on businesses has the potential to be enormous.

By way of background, in *Dynamex* the Supreme Court held that workers are presumed to be employees, unless the employer proves otherwise. Thus, to be properly classified as an independent contractor, an employer must prove all three of the following factors, in what is called the ABC test:

A. The worker must be free, in everyday tasks, from the hirer's control and direction;
B. ***The work performed must be outside the usual course of the hiring entity's business***; and
C. The worker must be customarily engaged in an independent occupation or business of the same type as the work he or she is performing for the hiring entity.

Factor A, the right to control, is nothing new. And Factor C is usually not that hard to establish – most independent contractors operate independently in the field for which they are hired.

Factor B, however, presents an extremely difficult obstacle to overcome. For example, it will be challenging for Uber and Lyft to claim that the drivers they use are performing work outside the usual course of their business – driving is precise focus of their businesses. And the same could be true for appraisal companies that hire independent appraisers; trucking companies that hire independent drivers; cleaning companies that hire independent cleaners, etc. To safely overcome Factor B, the worker must be clearly hired to do something outside the company's scope of business, such as an appraisal company hiring someone to clean their office. AB 5 codified the *Dynamex* ABC test, and unless the employer proves all three factors, workers must be classified and treated as employees for purposes of California law, with the failure to do so potentially subjecting companies to liability for non-compliance not only with California's wage orders, such as minimum wage, meal breaks, and overtime pay, but the entirety of Labor Code protections, such as the obligation to reimburse employees for all necessary expenditures or losses incurred in the discharge of their job duties.

AB 5 also adopts the holding in *Vazquez v. Jan-Pro Franchising International, Inc.*, a federal case involving a complaint brought by a class of janitors based on their being classified as independent contractors prior to the issuance of the *Dynamex* decision. The Court of Appeals sent the case back to the trial court to apply the ABC test to determine whether janitors were misclassified as independent contractors, even though their claims accrued before the *Dynamex* decision was issued. Thus, exposure for misclassification extends to claims that accrued before the decision in *Dynamex* was even issued, so long as those claims are not barred by the statute of limitations.

There is some good news for certain businesses, including the mortgage industry. AB 5 contains specific exemptions for many professionals, who remain governed by the pre-*Dynamex* test for determining classification. Those exempt include, but are not limited to, doctors, dentists, lawyers, architects, insurance agents, accountants, engineers, securities brokers/dealers, financial advisers, direct sales salespersons, commercial fishermen, real estate licensees and hair stylists who rent booths. Additionally, contracts for certain professional services may be exempt if the hiring entity demonstrates true independence of the contractor, pursuant to nine very specific factors set forth in the statute. Moreover, AB 5 does not apply to the relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry. These industries successfully lobbied for exempt status.

One of the biggest questions facing the lending industry is whether entities licensed as loan brokers are exempt or whether those entities have to apply the *Dynamex* factors to workers, which would be very difficult. The answer may depend on the type of license the loan broker holds. Pursuant to AB 5, Department of Real Estate ("DRE") licensees, i.e., those licensed by the State of California pursuant to Division 4 (commencing with Section 10000) of the Business and Professions Code, are exempt from the *Dynamex* factors. However, California Financing Law licensees, for example, are not exempt and, therefore, would likely be deemed employees.

However, whether you employ DRE licensees or some other exempt worker, it does NOT automatically mean that every worker can be deemed an independent contractor. Being exempt simply means that the difficult *Dynamex* factors do not apply; yet, the pre-*Dynamex* factors laid out in the "*Borello"* decision DO apply (stemming from the 1989 decision in *S.G. Borello & Sons, Inc. v. Dep. of Industrial Relations).* While these factors are easier to comply with than the *Dynamex* factors, they are too numerous to discuss in this article.

The most important take-away from this article and AB 5 is that California business owners using independent contractors face new challenges and uncertainty. First, businesses must determine if their worker is exempt. If exempt, do other areas of the law control, such as the Labor Code. Next, even if exempt, does the relationship meet the easier *Borello* test? Answering this last question may depend on how the business documents the relationship with its potential independent contractor. We strongly encourage all of our clients to consult with our office or their independent legal counsel before deeming anyone an independent contractor. It's not impossible, but it will take some work!

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