THE INESCAPABLE EMPLOYEE

COURTS SIGNIFICANTLY RESTRICT INDEPENDENT CONTRACTOR CLASSIFICATION IN CALIFORNIA

by T. Robert Finlay, Esq.

What do unicorns and independent contractors in California have in common? Both, arguably, do not exist.

Two court decisions have made it much more difficult and dangerous to classify workers as independent contractors, rather than employees. Last spring, the California Supreme Court issued its decision in *Dynamex Operations West, Inc., v. Superior Court.* The *Dynamex* 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. However, Factor B presents a difficult obstacle to overcome. For example, it may be difficult for "Gig" economy businesses to prove that the work performed is outside the usual course of the hiring entity's business. For example, it will be difficult 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 is could be true for appraisal companies that hire independent appraisers; cleaning companies that hire independent cleaner crews, 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. In short, it is this aspect of the *Dynamex* test that is proving extremely difficult to get around, thus leading to the argument that all such 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 with California's wage orders, such as minimum wage, meal breaks, overtime pay, etc.

In another blow to companies in California, the Federal Court of Appeals recently applied it retroactively. *Vazquez v. Jan-Pro Franchising International, Inc.* arose out of the trial court's dismissal of a complaint brought by a class of janitors based on a determination that they were properly classified as independent contractors prior to the issuance of the *Dynamex* decision. In reaching the retroactive application of *Dynamex*, the *Vasquez* court reasoned that "[g]iven the strong presumption of retroactivity, the emphasis in *Dynamex* on its holding as a clarification rather than as a departure from established law, and the lack of any indication that California courts are likely to hold that *Dynamex* applies only prospectively, we see no basis to do so either." Accordingly, 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.

But, there is some hope on the horizon. As we speak, legislators in Sacramento are discussing a legislative response to *Dynamex.* While we don't expect a complete reversal, we are optimistic that legislation will pass that will exempt certain professions. Please stay tuned and let us know if you have any questions. Meanwhile, companies in California remain at risk for prospectively ***and retroactively*** misclassifying certain workers as independent contractors instead of employees.

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