Insights: Alerts

California Supreme Court Adopts a More Streamlined, Worker-Friendly Test to Determine Independent Contractor Status

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In a broad-ranging decision issued on April 30, 2018, the Supreme Court of California announced a new legal standard to determine whether a worker is an employee or an independent contractor under California law, adopting a more streamlined and worker-friendly standard hinging on only three factors. This new standard displaces the more complex standard that has been applied by California courts for decades.

In the case, *Dynamex Operations West, Inc. v. Superior Court*, a delivery driver brought a class-action lawsuit alleging that the company misclassified its drivers as independent contractors to skirt California wage-and-hour laws. The company argued, among other things, that the proper test to determine worker classification was a multi-factor test the Supreme Court of California had previously used in its 1989 decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*. That test required the consideration and weighing of 10 different factors on a case-by-case basis. Under the *Borello* test, the most important factor was whether the company had control over the manner and means of the work performed, but additional factors to be considered included the right to discharge at will, the manner of payment, and whether the company and the worker believed they were creating an employer-employee relationship.

The Supreme Court of California disagreed with the company's position, holding that the proper standard for determining employee status is the "suffer or permit to work" standard. Under that standard, if a business engages, suffers, or permits an individual to work, then the individual is presumed to be an employee. A business can overcome this presumption only by establishing all three factors of what has come to be known as the "ABC Test": that the worker (a) is free from its supervision, (b) performs work that is outside the usual course or place of business, and (c) works "in an independently established trade, occupation, or business of the same nature" as the work the individual performs for the business.

Practical Implications

The *Dynamex* decision may prove to be a watershed moment for plaintiffs or plaintiffs' attorneys in California, particularly in light of the rapid growth of the gig economy in recent years. By creating a presumption in favor of employee status and a relatively clear standard for rebutting that presumption, the *Dynamex* decision lends greater certainty to the issue of whether a worker is an employee or an independent contractor. The *Dynamex* standard, however, sets a high bar for companies to overcome in establishing that a worker is an independent contractor, and employers in California may find it more difficult to settle or prevail on state wage-and-hour claims alleging that workers have been misclassified as independent contractors.

As we have previously indicated, companies with workers in California must continue to exercise extreme vigilance

in ensuring compliance with that state's wage-and-hour laws, as the penalties for noncompliance can be staggering. In particular, companies with operations in California would be wise to undertake a comprehensive audit of their independent contractor positions to ensure compliance with the law in light of the *Dynamex* decision.

Related People



Susan W. Pangborn
t 404.815.6305
spangborn@ktslaw.com



Thomas H. Christopher
t 404.815.6385
tchristopher@ktslaw.com