

## Employee or Independent Contractor?

Employers in California are regularly confronted with the question of classifying workers as employees or independent contractors. The question has profound ramifications for payroll taxes, unemployment insurance costs, wage and hour requirements, and workers' compensation insurance.



Recently, the California Supreme Court issued a decision that makes it harder to label workers as independent contractors under Industrial Welfare Commission (IWC) wage orders. In *Dynamex Operations West, Inc. v. Superior Court*, the Supreme Court placed the burden on an employer seeking to classify an individual as an independent contractor instead of an employee to satisfy a three-factor test. Workers are

first presumed to be employees unless the employer proves all three factors that the worker: 1) is not under the control of the employer; 2) performs work outside of the usual course of business; and 3) is in a customarily independent trade.

*Dynamex* involved a class action lawsuit by delivery drivers against a package and document delivery company. Plaintiffs alleged Dynamex misclassified drivers as independent contractors, and that Dynamex had therefore violated an IWC Wage Order and engaged in unfair business practices.

The Supreme Court wrestled with the core issue of the appropriate legal standard for determining if a worker is an employee or an independent contractor. The company argued the appropriate standard involved the application of various common law factors, including whether the employer controlled the details of the work of the drivers. The workers argued the meaning of “employ” under wage orders has three alternative definitions, any one of which might apply to categorize a worker as an employee: (1) to exercise control over wages, hours, and working conditions; (2) to suffer or permit to work; or (3) to engage, thereby creating a common law employment relationship.

In a unanimous decision, the Supreme Court agreed with the workers. Relying on the “suffer or permit to work” definition of “employ”, the Court adopted a three-factor test that the company must satisfy in order to establish that a worker is an independent contractor:

1. The worker is free from the control and direction of the hiring entity in the performance of the work, both under the contract calling for the performance of work and in fact.
2. The worker performs outside the usual course of the hiring entity’s business.
3. The worker is customarily engaged in an independently-established trade, occupation, or business of the same nature as the work performed for the hiring entity

The Court held that the failure of the company to prove any one of these factors is sufficient to establish that the worker is an employee. The Court provided examples in its decision as well, noting:

When a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store’s usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that

will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees.

The Court noted that "treating all workers whose services are provided within the usual course of the hiring entity's business as employees is important to ensure that those workers who need and want the fundamental protections afforded by the wage order do not lose those protections." The message is clear: the label an employer chooses, or the label used in a contract, does not matter in classifying a worker. Instead, the type of work performed matters.

The *Dynamex* decision will have substantial consequences for California employers, particularly those operating in the so-called "gig economy" where temporary positions are common and workers are often engaged on a short-term basis. All employers subject to IWC wage orders, particularly those in the transportation industry, should immediately assess whether workers need to be reclassified in light of *Dynamex*.

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