

## Updates

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New "ABC" Test Distinguishes Employees From Independent Contractors for California's Wage Orders

The Supreme Court of California recently adopted a new standard for distinguishing between employees and independent contractors under California's Industrial Welfare Commission (IWC) Wage Orders. Ruling unanimously, the court embraced the "ABC" test adopted in several other jurisdictions.

The ABC test places the burden on the service recipient (referred to by the court as the "hiring entity") to establish all three of the ABC test factors in order to establish a contractor relationship. The court rejected the long-used multifactor test, rooted in principles of agency, that was confirmed in the 1989 California Supreme Court case, *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, and the ABC test applies to claims based on California's Wage Orders, which govern overtime, minimum wages, meal and rest periods, and certain other wage and hour obligations.

### *Dynamex* Background

In *Dynamex Operations West, Inc. v. Superior Court*, --- P.3d--- (2018), 2018 WL 1999120 (April 30, 2018), two delivery drivers brought a putative class action lawsuit alleging that Dynamex's contracted delivery drivers were employees not independent contractors. The drivers claimed that their "misclassification" violated Wage Order No. 9 and various sections of the California Labor Code, including Labor Code 2802 that addresses reimbursement of "reasonable and necessary" business expenses. The trial court certified the class, which was defined as drivers who, during a pay period, did not themselves employ other drivers and did not do delivery work for other delivery businesses or for the drivers' own personal customers.

The trial court, in certifying a class of drivers, relied upon the three alternative definitions of "employ" and "employer" set forth in the applicable wage order, and as interpreted by the California Supreme Court in *Martinez v. Combs* (2010) 49 Cal.4th 35, 64.

Dynamex appealed arguing that the trial court had improperly based its certification decision on the definition of "employ" from the wage order rather than using the common law *Borello* test for ascertaining independent contractor status. The trial court and court of appeal rejected Dynamex's contention that the multifactor standard set forth in *Borello* was the appropriate standard under California law for distinguishing employees and independent contractors in case brought under a wage order.

The California Supreme Court agreed with the court of appeal holding that the trial court did not err in concluding that the "suffer or permit to work" definition of "employ" contained in the wage order may be relied upon in distinguishing between an employee or independent contractor for purposes of the obligations imposed by the wage order. Under the wage order's definition of "suffer or permit to work," the California Supreme Court concluded that to engage independent contractors, the hiring entity must establish the three factors outlined in the "ABC" test utilized in other jurisdictions.

The California Supreme Court adopted Massachusetts' version of the ABC test. The court stated that "the burden is on the hiring entity to establish that the worker is an independent contractor" and that the hiring entity must prove three factors, which are that the worker:

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

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

This decision is limited to disputes brought under California's Wage Orders, which impose a variety of obligations relating to the minimum wages, maximum hours, and meal and rest breaks for categories of California employees. The court expressly declined to address whether the *Borello* standard was applicable to claims under California Labor Code Section 2802 for reimbursement of expenses as the court of appeal's conclusion that "the *Borello* standard applied in determining whether a worker is an employee or an independent contractor" for claims *outside* the scope of the applicable wage order was not raised in by the drivers on appeal.

Companies doing business in California that engage independent contractors to provide services in California should consult experienced counsel to review independent contractor agreements and contracting practices. Modifications may be necessary to achieve compliance with the ABC test as used in Massachusetts.

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