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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 67

CA SUPREME COURT IMPOSES A PRESUMPTION OF EMPLOYMENT IN THE WAGE ORDER CONTEXT

On Monday, April 30th, the California Supreme Court issued a decision that the long-standing flexible *Borello* classification standard for employee versus independent contractor does not apply in the context of California wage orders, deciding instead to embrace a more rigid classification test, imposing a presumption, in the wage order context, that all workers are employees until and unless an employer can prove otherwise.¹ In *Dynamex*, the California Supreme Court adopted the Industrial Welfare Commission’s “suffer or permit to work” definition of employ to determine the classification of workers in the wage order context instead of applying the long-standing, multi factor *Borello* standard.

In adopting the “suffer or permit to work” definition in the wage order context, the Court acknowledged that the term could not be interpreted literally. Instead, they fleshed out the definition and determined that the “ABC” test, currently applied in several other states, would control.

“[W]e conclude that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the ‘ABC’ test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors.”²

Under the “ABC” test, there is a presumption that a worker is an employee unless the entity hiring the worker can establish that: (A) the worker is free from the entity’s control or direction while performing the work contracted for, both under the contract and in fact; (B) the work performed is outside the usual course of the entity’s business; and (C) the worker is customarily engaged in an independent trade, occupation, profession, or business.³

By adopting the “ABC” test in the wage order context, the California Supreme Court has rejected several decades of case law establishing the *Borello* standard. Under the *Borello* standard, “[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . .”⁴ Under the *Borello* standard, a court would consider several factors in addition to the “right to control,” including, among other, the kind of occupation engaged, whether the employer has the right to fire the worker at will and without cause, and whether the employer supplies the equipment and place of work.”⁵

The Court concluded that it is appropriate and consistent with the history of the “suffer and permit” definition of employ to place the burden on the hiring entity to establish that a worker is in fact an independent contractor that should not be covered by the wage order. To satisfy this burden, the hiring entity must satisfy all three elements of the “ABC” test. The failure to satisfy even one of the elements will result in the applicable worker being classified as an employee that is covered by the wage order.

Part A of the “ABC” test seeks to classify as employees those individuals that are subject to the control of the entity either “as a matter of contractual right or in actual practice.”⁶ Part B of the “ABC” test seeks to classify as employees “all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor.”⁷ Part C of the “ABC” test seeks to classify as employees those individuals “who have not independently decided to engage in an independently established business.”⁸

It is evident by the Court’s language in the case that they sought to create a more rigid and bright line test for determining employee status in the context of wage orders compared to the long-standing *Borello* test. The Court’s decision will have a lasting impact on employment relationships in California. Under this new standard, workers will be more likely to be classified as employees than independent contractors. Transportation businesses should implement more procedures and due diligence at the onset of establishing an independent contractor relationship to ensure that they are able to satisfy all three elements of the “ABC” test to avoid misclassification allegations.

¹ *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, S222732 (California Supreme Court).

² *Dynamex* pg 7.

³ *Id.*

⁴ *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 341, 350 (Cal. 1989).

⁵ There are nine total secondary factors and no single factor is controlling. The weight given to each factor is determined based on the context of the employment relationship.

⁶ *Dynamex* pg 69.

⁷ *Id.* pg 70.

⁸ *Id.* p

As always, Benesch’s experienced and skilled transportation team would be glad to assist you in properly establishing independent contractor relationships and to navigate the new burdens that the California judiciary have placed on your business. If you need assistance or have any questions about how this new classification test impacts your business operations, please feel free to contact Benesch’s Transportation Team.

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