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California Supreme Court Affirms that the Dynamex "ABC Test" for Independent Contractor Classification Applies Retroactively

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On January 14, 2021, the California Supreme Court in Vasquez v. Jan-Pro Franchise International, Inc. held that the three-part "ABC" test previously set forth in Dynamex Operations West Inc. v. Superior Court also applies retroactively to all non-final cases that predate the April 2018 Dynamex decision. In issuing this decision in Vasquez, the California Supreme Court responded to a certified question from the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit had previously withdrawn its own opinion applying the Dynamex ABC test retroactively before certifying the question for decision by the California Supreme Court.

In April 2018, the California Supreme Court issued its decision in *Dynamex*, where the court set a new standard -the ABC test-for determining whether a worker is an employee or an independent contractor. At the time of the *Dynamex* decision, the California Supreme Court declined to answer whether the ABC test applied retroactively. The California state legislature later codified the ABC test in Assembly Bill 5 (AB 5). The ABC test sets forth that hiring entities must classify workers as employees unless they meet all of the following three conditions:

A. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

B. The person performs work that is outside the usual course of the hiring entity's business.

C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

There is a presumption that workers are employees, and the burden falls on the hiring entity to demonstrate each of the above three prongs. Until January 14, 2021, there was no definitive answer to the question regarding whether the *Dynamex* ABC test should apply retroactively.

In *Vasquez*, the California Supreme Court held that the ABC test applies retroactively, citing California's general rule that a California Supreme Court ruling applies retroactively unless the Supreme Court creates an entirely new rule. The hiring entity, Jan-Pro, argued that *Dynamex* should not apply retroactively because the ABC test was a "sea change in the law." The California Supreme Court in *Vasquez* decided that the ABC test from *Dynamex* was not an entirely new rule. Rather, the court opined that the ABC test had been used in California for many years, and *Dynamex* simply constituted "an authoritative judicial interpretation of language-suffer or permit to work-that has long

been included in California's wage orders to define the scope of the employment relationships governed by the wage orders." The *Vasquez* case will now return to the Ninth Circuit, which previously pledged to abide by the California Supreme Court's decision at the time it certified the question for the Supreme Court's decision.

The *Vasquez* decision does not have any direct effect on AB 5, which codifies the ABC test and applies it generally to the California Labor Code, Unemployment Insurance Code, and Industrial Welfare Commission (IWC) wage orders. The *Vasquez* decision also does not have any direct impact on the federal preliminary injunction that currently enjoins enforcement of AB 5 against motor carriers in California.

The *Vasquez* decision solidifies the retroactive application of the ABC test in California. Unless a hiring entity can demonstrate an applicable exemption from the ABC test, the ABC test will govern wage and hour cases concerning allegations of independent contractor misclassification brought under California IWC wage orders.

For more information on this topic, contact a member of the firm's Labor & Employment Practice Group.

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