

California Court of Appeal Finds That In-Home Caregivers May Be Employees of Placement Agencies

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In [Duffey v. Tender Heart Home Care Agency, LLC](#), the California Court of Appeal for the First District addressed whether an in-home caregiver was an independent contractor or employee. Reversing a trial court order dismissing the plaintiff's overtime claim, the court of appeal concluded that an in-home caregiver may be an employee when the caregiver's placement agency has control over the caregiver's wages.

Background

Nichelle Duffey provided services as an in-home caregiver for Tender Heart Home Care Agency, LLC. Caregivers like Duffey provide companionship, personal care, medication reminders, bathing assistance, transportation, and other services to clients. Tender Heart is a placement agency. It identifies caregivers for clients, who then pay Tender Heart for the caregiver's services.

Duffey was classified as an independent contractor and was therefore not eligible for overtime. Duffey submitted timesheets to Tender Heart, which then billed the client and paid her from the money it received, minus its fees. Rate sheets attached to the contract between Duffey and Tender Heart set forth the standard hourly rate for shifts of various lengths, but the rate charged to clients varied depending on each client's particular needs.

Tender Heart emailed work opportunities to Duffey, who was free to reject offers and did so on occasion. Under her contract with Tender Heart, Duffey was also free to, and did, contract with other agencies. The contract also provided that the relationship between a caregiver and client could be terminated only by those parties, not Tender Heart. Duffey's contract with Tender Heart, however, could be terminated by either party with notice or in the event of a material breach by Duffey.

Trial Court Proceeding

After terminating her contract with Tender Heart, Duffey sued Tender Heart in California state court, including a claim that Tender Heart failed to pay overtime wages under the Domestic Worker Bill of Rights (DWBR), which is found at Sections 1450 to 1454 of the California Labor Code. The DWBR, which took effect January 1, 2014, entitles domestic work employees to overtime wages for all hours worked over nine hours per day or 45 hours per week.

Tender Heart moved for summary adjudication on some of Duffey's claims, including the overtime claim, in part, on the grounds that she was an independent contractor. In its ruling on that motion, the trial court applied the common law test for employment established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, which set forth a multifactor test for determining whether a worker is an employee or an independent contractor, with the employer's "right to control the manner and means" by which the worker performed his or her duties serving as the most important factor. Applying the *Borello* standard, the trial court concluded the undisputed facts established that Duffey was an independent contractor.

The Court of Appeal's Decision

On January 11, 2019, the court of appeal issued its decision reversing the trial court's summary adjudication order. It found that the trial court erred in relying exclusively on the *Borello* common law test for determining the Duffey's independent contractor status, and also decided against applying [the ABC test established more recently](#) in *Dynamex Operations West, Inc. v. Superior Court*.

Focusing on the language of the DWBR, the California court of appeal determined that the statute "contains two alternative definitions of employment for purposes of its provisions: (1) when the hiring entity exercises control over the wages, hours, or working conditions of a domestic worker; or (2) when a common law employment relationship has been formed." In applying these two definitions, the court of appeal adopted *Dynamex's* reasoning that independent contractor relationships are discouraged and that the hiring entity bears the burden of establishing that a domestic worker is an independent contractor rather than an employee.

With respect to the first standard—whether the entity “exercises control over the wages, hours, or working conditions of a domestic worker”—the court looked to the California Supreme Court’s previous ruling in *Martinez v. Combs*, where it found that this language in a wage order was meant to cover situations involving multiple entities exercising control over different aspects of the employment relationship. The court of appeal concluded that California’s legislature intended the same meaning to apply to a domestic work employer because it enacted the DWBR in 2013, several years *after* the *Martinez* decision was issued.

With respect to the second standard—whether a common law employment relationship had been formed—the court of appeal looked to the multifactor test set forth in the *Borello* decision.

1. *Control Over Plaintiff’s Wages, Hours, or Working Conditions*

Applying the first standard, the court found there was no control over Duffey’s working conditions or hours because she was free to accept or decline jobs.

Construing the evidence in the light most favorable to the plaintiff, however, the *Duffey* court concluded that a material dispute of fact existed because Tender Heart potentially exercised control over Duffey’s wages by negotiating and/or setting her rate of pay. In particular, a rate sheet attached to the parties’ independent contractor agreement listed the “total combined negotiated caregiver and agency fees based on standard services for one client,” and testimony suggested the rate sheet may have been the starting point for rates charged to clients. And while Tender Heart paid caregivers a portion of what it billed clients, there was no set formula for determining the percentage that was paid to caregivers. For these reasons, the court of appeal concluded the evidence, *viewed in the light most favorable to the plaintiff*, suggested that Tender Heart could “control” her wages.

2. *Common Law Definition of “Employment”*

The *Duffey* court further assessed whether a disputed fact existed as to Duffey’s independent contractor status under the common law standard. It again found that a triable issue of fact existed.

Relying heavily on the California Supreme Court’s *Borello* decision, the *Duffey* court concluded that Tender Heart’s involvement in the contracting of clients, assessment of clients’ needs, matching of caregivers and clients, and negotiating of rates charged to clients and determining what portion is paid to caregivers, if established, “constitute substantial control over the details of the caregiving business.” The *Duffey* court rejected Tender Heart’s position that it was not in the business of caregiving and was instead a referral agency, with the court of appeal concluding that, without caregivers, Tender Heart would not be able to perform its contracts with clients and carry out its business operations.

The *Duffey* court further concluded that other *Borello* factors also created a disputed fact regarding Duffey’s employee status. It determined there was evidence the duties of a caregiver did not require special skills or training and that “Tender Heart’s ability to decline to make additional referrals” to caregivers is “akin to the ability to terminate at will.” The *Duffey* court also found no evidence that Duffey

“held herself out in business,” that caregiving required “specialized tools,” or that the plaintiff had “an opportunity for profit or loss.”

Key Takeaways and Implications

On its face, the *Duffey* opinion is limited to domestic workers who fall within the DWBR’s protections. Businesses subject to the DWBR may want to consider this decision carefully in determining whether workers are lawfully categorized as independent contractors. But the court’s analysis of what facts can be used to establish “control” may create some confusion for other California employers. While the court of appeal focused on Tender Heart’s control over the operations of its business, every business controls its operations, including the rates it charges for its services and with whom it does business. The focus under *Borello* is generally not whether a company controls *its business*, but whether a company’s control over *the workers’ activities* is so pervasive that the workers effectively become employees.

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