

# THE NATIONAL LAW REVIEW

## Ninth Circuit Holds ABC Test Applies Retroactively

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### Background

For nearly 30 years, California businesses have used the factor-based *Borello* test (named after *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989)) to determine whether workers should be classified as employees or independent contractors. Then, in 2018, the California Supreme Court issued its landmark decision in *Dynamex Operations W., Inc. v. Super Ct.*, 4 Cal. 5th 903, adopting the “ABC” test, which presumes workers are employees for purposes of state wage order claims unless the hiring entity shows all of the following:

- A: That the worker is free from the control and direction of the hiring entity;
- B: That the worker is performing work outside the usual course of the hiring entity’s business; and
- C: That the worker is customarily engaged in an independently established trade, occupation, or business.

However, the *Dynamex* Court did not address whether the newly created ABC test applies retroactively. This seeming omission is significant—if the test applies retroactively, businesses may be held liable under the ABC test for misclassifying workers *prior to the adoption of the test* by the Court. Unsurprisingly, litigants have vigorously advocated for and against retroactive application of the ABC test since its inception last year.

While lower courts have reached varied conclusions, on May 2, 2019, the Ninth Circuit ruled that the ABC test does, in fact, apply retroactively. *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 2019 U.S. App. LEXIS 13237 (9th Cir. May 2, 2019).

### Background of the Vazquez Case

In *Vazquez*, a group of janitor-franchisees of Jan-Pro, an international janitorial business, alleged that Jan-Pro misclassified them as independent contractors. Relying on pre-*Dynamex* law, the District Court for the Northern District of California granted summary judgment in favor of Jan-Pro. The plaintiffs appealed the order. While the appeal was pending, the California Supreme Court issued its *Dynamex* decision. The Ninth Circuit ordered the parties to brief the effect on *Dynamex* on the *Vazquez* case—in particular, whether *Dynamex* should apply retroactively.

### Retroactive Application of Judicial Decisions

Although judicial decisions generally are given retroactive effect, considerations of fairness and public policy may require that a decision be applied only prospectively. See *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 978 (1989); *Claxton v. Waters*, 34 Cal. 4th 367, 378 (2004). Relevant considerations include: (a) the reasonableness of the parties’ reliance on the former rule, (b) the nature of the change as substantive or procedural, (c) retroactivity’s effect on the administration of justice, and (d) the purposes to be served by the new rule. *Id.* at 378-79. Thus, retroactive application may be deemed inappropriate when a decision changes the law and would unfairly undermine the reasonable reliance of parties on the existing state of the law. *Newman*, 48 Cal. 3d at 983.

### The Rationale for the Ninth Circuit’s Decision

The Ninth Circuit cited two key reasons for its decision that the ABC test should apply retroactively. First, although the California Supreme Court’s refusal to hear a matter does not constitute a ruling on the merits, the



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Ninth Circuit found that the *Dynamex* Court's denial of rehearing to clarify the issue of retroactivity "strongly suggest[s] that the usual retroactive application, rather than the exception, should apply to its newly announced rule." Second, the ABC test was not really "fabricated anew," but instead represents an "extension" of the previously utilized *Borello* test. Accordingly, the Ninth Circuit felt that retroactive application of the ABC test would not change the law or otherwise undermine reliance on the existing state of the law. The Ninth Circuit also disposed of any due process concerns, holding that applying the ABC test retroactively would be neither arbitrary nor irrational.

## Key Takeaways

Jan-Pro will likely petition the Ninth Circuit to rehear the appeal. However, at least three California state courts have already applied the ABC test retroactively, which suggests an en banc panel of the Ninth Circuit would uphold the *Vazquez* decision.

Not all hope is lost, though. California courts have held the ABC test does not apply in the joint employer context, to workers' compensation claims, or to all wage-and-hour claims (such as waiting time penalties under Labor Code section 203). Moreover, Assemblywoman Melissa Melendez (R-Lake Elsinore) recently introduced Assembly Bill 71, which would overturn the *Dynamex* decision and return to the factor-based *Borello* test. As with all employment-related issues, more is sure to come, and employers are urged to review their classification policies and consider making changes to avoid future liability.

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