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The Jig Is Up: California Supreme Court Asserts New Independent Contractor Test Impacting The "Gig Economy" and Companies Engaging Independent Contractors

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Yesterday (April 30, 2018) the California Supreme Court issued an opinion on the appropriate test to employ when assessing "independent contractor" classification under state law.

The Court's unanimous decision throws out the prior multi-factor test for determining independent contractor versus employee status for claims based on the California Industrial Welfare Commission's Wage Orders. This new decision squarely places the burden on employers to establish, through a three-part "ABC Test," that a worker is an independent contractor falling outside the purview of the applicable wage order.

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Those wage orders, applicable only to employees – not independent contractors – impose obligations on employers related to minimum wages, maximum hours, and certain other basic working conditions (such as meal and rest breaks). While the Court's decision will likely have its biggest impact on the state's growing "gig economy" – a topic we have recently addressed more broadly – it will also extend to nearly every company that engages independent contractors in California.

In the case, *Dynamex Operations West, Inc*., two delivery drivers brought individual and class claims against a nationwide delivery company. The drivers claimed that the company misclassified its drivers as independent contractors instead of employees, leading to violation of the state's wage orders and the California Labor Code. While the drivers were generally free to set their own work schedules, they had to notify the company of the days they intended to work in advance. Deliveries were assigned in the company's sole discretion, but drivers were not required to make all deliveries assigned so long as the company was able to find another driver. Additionally, drivers used their own vehicles, but wore company badges and shirts (purchased with their own funds), and sometimes were required to attach company or customer decals to their vehicles when making deliveries. The company argued that these facts supported its classification of the workers as independent contractors. The Court disagreed.

Under the previously used "control-of-work-details" or "economic reality" test to determine independent contractor or employee status, courts (and hiring entities) looked to the nature of the work performed, the overall arrangement between the parties, and the purpose of the applicable statutes, among other things. Now, under the California Court's new "ABC Test" for determining worker status, hiring entities classifying workers as independent contractors must be able to prove that such workers:

a) are free from the control and direction of the company in connection with the performance of the work, both under the applicable contract for the performance of the work, and in fact; *and*

b) perform work that is outside the usual course of the hiring entity's business; *and*

c) are customarily engaged in an independently established trade, occupation, or business of the same nature as

the work performed.

Absent the ability to meet this “ABC Test,” all workers are to be considered employees subject to all applicable wage orders.

In expanding on what it would take to prove Part A of this test, the Court held that “depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees[.]” Gig workers, telecommuters, and others are likely to be impacted by this prong of the test, depending on the amount of direction and control the hiring entity has over their work.

With respect to the particularly narrow Part B of the new test, the court explained that a plumber hired by a retail store to fix a bathroom leak or an electrician installing a new power line in the store, for example, would not be employees since they were not part of the store’s usual course of business. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses to be sold by the company from cloth and patterns supplied by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the hiring business “can reasonably be viewed as having suffered or permitted the workers to provide services as employees.”

Part C of the test demonstrates the Court’s particular concern with ensuring that workers who are not truly operating as or as part of a business entity (such as a sole proprietorship or LLC) established to perform the work in question, are availed of protections under applicable wage orders and other employment laws in the state.

These narrow requirements will force many California employers to re-examine their worker classifications and make adjustments where necessary to meet this test. We recommend California companies utilizing independent contractors seek legal assistance to ensure contractors are properly classified in light of this decision.