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Keeping Up With A Changing Worker Classification Landscape

By **Eve Wagner** (May 7, 2019, 1:00 PM EDT)


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The U.S. Department of Labor's April 29 guidance letter regarding worker classification expanded the divide between worker protections under federal law and the laws in certain states. The opinion, by then-acting DOL Wage and Hour Division Administrator Keith Sonderling, determined that gig workers at an unnamed services company were contractors who operated independently in the "on-demand" economy.

Using a six-factor test to analyze the "economic realities" of the parties' relationship, the DOL concluded that workers, such as Uber and Lyft drivers, whose services are offered to consumers through an online platform are not subject to minimum wage, overtime and other legal protections accorded employees because they are not economically dependent on the companies for whom they do the work. In reaching this result, the DOL considered the company's "control" over the worker; the "permanency" of the relationship; the worker's "investment in facilities, equipment or helpers"; the "skill, initiative, judgment or foresight" the work requires; "opportunities for profit or loss" and the extent of the services' integration into the business.

Businesses across the country breathed a huge sigh of relief. But not so fast. A year ago, on April 30, 2018, the California Supreme Court completely changed the worker classification landscape. In a landmark ruling, Dynamex Operations West Inc. v. Superior Court of Los Angeles,[1] the court adopted a new test for determining whether a worker should be designated as an employee or independent contractor under California's wage orders. Using an "ABC" test, a worker is presumed to be an employee unless the employer can show all of the following:

> A. The worker 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 worker performs tasks that are outside of the usual course of the hiring entity's business.
>
> C. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

The first prong of the test is not new, but even where the worker is free from control, the second and third prongs of the test must also be met. For a large swath of employees, the second prong will be determinative.

Ride-hailing services, for example, will have to show that the work performed by their drivers is outside the usual course of a business whose primary purpose is to provide rides to consumers — an argument that was rejected by a U.S. district court in California. A software development company will have to convince the trier of fact that programmers who previously worked as independent contractors on an as-needed basis are outside its usual course of work, and so on. The third prong may also be problematic when applied to workers who were traditionally retained as contractors. For example, freelance designers, hair dressers and a whole host of other types of workers may not have their own established businesses, as defined in Dynamex.

The costs of misclassification are painful: In California, violators face steep civil penalties for failure to pay overtime, missed meal and rest breaks, pay stub violations, failure to provide worker's compensation insurance and paid sick leave, and unfair business practices, to name a few.

A bill working its way through the California legislature — AB 5 — would codify Dynamex and confirm its retroactivity. Although the bill would exempt certain occupations, such as doctors and investment advisers, gig economy workers are not currently covered by the exemption. There has been considerable pushback from both the business community and individual workers who enjoy independent contractor status to add additional occupations that would be exempt.

To further drive the point home, in Gerardo Vazquez, et al v. Jan-Pro Franchising International Inc., the U.S. Court of Appeals for the Ninth Circuit on May 2 ruled that Dynamex must be applied retroactively to a cleaning franchisor.[2] The court dismissed arguments that retroactivity would be fatal to the franchising industry. "Given the strong presumption of retroactivity, the emphasis in Dynamex on its holding as a clarification rather than as a departure from established law, and the lack of any indication that California courts are likely to hold that Dynamex applies only prospectively, we see no basis to do so either."

Some workers have expressed concern that requiring them to become employees will eliminate the perks of independence, including greater flexibility, tax benefits and simply not having a boss. The California Labor Federation has taken issue with the contention that employees will not have the same degree of flexibility in doing their jobs as independent contractors.

On the contrary, the federation argues, it is entirely within an employer's discretion to provide job flexibility to employees. According to the federation, the increase in recent years in flextime and telecommuting policies provides ample support for this argument.

And California is not alone. Massachusetts and New Jersey have adopted similar ABC tests, and other states could follow suit. So what does this mean for companies, such as Lyft and Uber, with operations in multiple states? Complications and confusion, as the same type of workers could be deemed employees in "ABC" states and independent contractors in non "ABC" states.

The gig economy, which has exploded in the last decade, poses unique challenges for business management operating in "ABC" states. It will be incumbent on companies with operations in those states to conduct a careful analysis for each position and document the reasons for classification decisions.

In light of the DOL guidance and "ABC" adoption by the states, all companies with multistate workforces will now need to weigh the costs of maintaining a two-class system — with the potential backlash from workers deprived of employment benefits that their co-workers have in other states — or migrating everyone to employee status. If the California approach becomes widely adopted, this latter approach could save companies considerable pain in the long run.

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[1] Dynamex Operations West, Inc. v. Superior Court of Los Angeles (4 Cal.5th 903)

[2] Gerardo Vazquez, et al v. Jan-Pro Franchising Int'l Inc. (Case No. 17-16096).
