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## Law Alert

**To:** Firm Clients and Contacts

**From:** Niesar & Vestal LLP

**Date:** May 8, 2018

**Re:** **California Supreme Court establishes new law: Classification of Workers as “employees” or “independent contractors”**

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In an opinion issued on April 30, 2018, the California Supreme Court established new law that may have important consequences for companies that classify some of their service providers as independent contractors. *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County; Charles Lee, et al, Real Parties in Interest* (the “Dynamex Opinion”).

By way of background, the underlying dispute was between certain individual delivery truck drivers who claimed that Dynamex, a nationwide courier and delivery service, was not providing to them all of the benefits that they were entitled to as employees. Dynamex claimed that they were not employees because they had all signed written agreements that said they were independent contractors. The drivers responded saying that California Industrial Welfare Commission Wage Order No. 9, applicable to the transportation industry, overrode the independent contractor agreements and established as a matter of law that they were employees.

This background is important in that the Dynamex Opinion’s analysis focused on the purpose of Wage Orders in California, i.e. minimum wages, hours, overtime, etc. Thus, in some situations the Dynamex Opinion may not govern the issue of employee vs. independent contractor. For example, consider the case of a highly paid person, treated as an independent contractor by a company, who is sued by a third party with regard to a matter that arose in the course of his services on behalf of the company. Labor Code 2802 provides that an employer

must indemnify an employee for any cost or expense that the employee incurs in the course of the employment unless the employee's actions were known to him or her to be unlawful at the time performed. Since we posit that the service provider here was highly compensated, none of the policy reasons behind Wage Orders are applicable, and the Dynamex Opinion may not be applicable to the question of whether this person was misclassified.

It is also not clear whether the Dynamex Opinion will have much, if any, applicability in situations where a taxing or similar agency attempts to impose an obligation on an alleged employer who has been treating the worker as an independent contractor.

As to persons who are not obviously paid significantly more than an applicable Wage Order would mandate, the Dynamex Opinion sets forth a method of analysis of the classification question that creates a very difficult hurdle for a company to overcome. This may be summarized from the 80-page Dynamex Opinion as follows:

First: The alleged employer has the burden of proving that the person is not an employee; that is, the worker is not a person intended to be included within the applicable Wage Order's coverage; and

Second: To meet this burden of proof the alleged employer must show that all three of the factors in the "ABC Test" apply to the actual relationship between the alleged employer and the claimed employee. These are:

- A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work;
- B) the worker performs work that is outside the usual course of the hiring entity's business; and
- C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

It is important to understand that the Dynamex Opinion is explicit in its statement that the alleged employer must demonstrate that each of the three ABC factors is present in the relationship. If the employee can show that any one is not present, he or she will be classified as an employee.

For those interested in this subject, we will follow in the next few days with examples of what facts are likely to show that each of the ABC factors is or is not present in the worker to company relationship.

Here is a link to the full Dynamex Opinion:  
<http://www.courts.ca.gov/opinions/documents/S222732.PDF>

If you have questions concerning the Dynamex Opinion or whether certain facts will constitute an employer or independent contractor relationship, please contact Gerry Niesar (gniesar@nvlawllp.com) Peter Vestal ([pvestal@nvlawllp.com](mailto:pvestal@nvlawllp.com)) or June Lin ([jlin@nvlawllp.com](mailto:jlin@nvlawllp.com)) or any of our attorneys.

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