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## Law Alert

**To:** Firm Clients and Contacts

**From:** Niesar & Vestal LLP

**Date:** May 17, 2018

**Re:** **Dynamex Opinion Changed California Law Regarding Classification of Worker as Employee or Independent Contractor**

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In our [Law Alert dated May 8, 2018](#) we set out the basic rule regarding classification of workers as either employees or independent contractors as established in the April 30, 2018 Dynamex Opinion. As promised, here is some guidance gleaned from the Dynamex Opinion as to what the ABC factors mean in that classification exercise. Keep in mind that the alleged employer must show that each of these factors is present in the worker/hiring entity relationship or the worker will be deemed to be an employee and not an independent contractor.

A Factor: the worker is free from the control and direction of the hiring entity in connection with the performance of the work.

- A) To meet this test the hiring entity must prove:
- i) the worker's freedom from control is provided for in the contractual relationship as well as shown to exist in fact;
  - ii) the hiring entity does not have the contractual, or actual in fact, right or ability to exercise the type and degree of control that a business typically has over employees; and
  - iii) even though it does not retain the ability to control the precise manner or details of the work to be performed, it does not possess actual control over

the worker's performance that is greater than what would be found in a genuine independent contractor relationship.

- A. Examples of what might, or might not, be sufficient to demonstrate absence of the A Factor:
- i) A worker who specializes in historic restoration, sets his own hours, is not supervised by the hiring entity, purchases all materials used, has his own business card and declined an offer to be an employee because he wanted no control over his activities, was found to be an independent contractor to a construction company that was in the home building industry.
  - ii) Knitters and sewers who worked in their own house, on their own machines, and at whatever hours they chose, but produced clothing that precisely followed the patterns, and used yarn, provided by the hiring company, were found to be sufficiently under the control of the clothing company to be deemed employees.
  - iii) A truck driver was under the control of the hiring entity, and held to be an employee, where he was required to keep the truck clean, obtain the hiring entity's permission to transport passengers, go to the hiring company's dispatch center to obtain assignments, and was subject to termination if he was tardy, failed to contact the dispatch unit or violated any of the hiring company's written policies.

B Factor: the worker performs work that is outside the usual course of the hiring entity's business.

- A) In the Dynamex Opinion this is described as a look at whether the services performed are those that would ordinarily be viewed by others as what would be done by those working in the hiring entity's business and not the type of services performed by an outsider (i.e., independent contractor).
- B) Examples of what would or would not be considered working outside the hiring entity's business:
- i) A retail store hires a licensed plumber to repair an installed bathroom fixture; this would be a clear example of an independent contractor relationship.
  - ii) A bakery that hires a skilled cake decorator to work on a regular basis on its custom-designed cakes will most likely be considered an employee.
  - iii) The knitters described above who follow the patterns supplied by the hiring company to produce products to be sold by that company will be considered employees.

NOTE: with regard to the B factor, the Court emphasized that a significant consideration is to avoid a “race to the bottom”. This means, avoid allowing employers to contract out to alleged independent contractors work that would normally be done by employees, thus giving the hiring company a cost advantage over competitors who provide their employees doing the same work with all the statutorily mandated benefits accorded to employees.

C Factor: 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.

- A) The, or perhaps a, key to this factor may be this quote from the Dynamex Opinion: “[This refers] to an individual who independently has made the decision to go into business for himself or herself.” (emphasis in original) Thus, this will turn on a demonstration that the worker has chosen the burdens and benefits of self-employment by, for example, incorporating, licensure, advertisements, routine offerings of services to the public, etc. “Accordingly, in order to satisfy [Factor C], the hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation or business.”
- B) Examples given are:
  - i) Siding installers were found to be employees when the hiring entity failed to present evidence that “the installers had business cards, business licenses, business phones, or business locations” and also failed to show that they received income from any other party.
  - ii) A “pickup and delivery service failed to establish that a bicycle courier was engaged in an independently established business” where there was no evidence that the courier “held himself out as an independent businessman performing courier services for any community of potential customers” or that he “had his own clientele, utilized his own business cards or invoices, advertised his services or maintained a separate place of business and telephone listing”.

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