NIESAR & VESTAL LLP
Law Alert
January 19, 2021

The California Supreme Court concludes that the *Dynamex* ABC test applies retroactively

On January 14, 2021, the California Supreme Court unanimously concluded in *Vazquez v. Jan-Pro Franchising International* that California's strict "ABC" test applies retroactively.

The ABC test was adopted in an April 2018 decision called *Dynamex*, that said workers must be considered employees unless they (a) work free from control of hiring entity; (b) perform work outside the usual court of the hiring entity's business; and (c) have independent businesses doing that type of work. This test makes it very hard to claim that workers are independent contractors and classifies the vast majority of California workers as employees.

The stringent ABC test was codified into California statutory law by Assembly Bill 5 (AB 5).

Before the ABC Test, California courts used a multifactor test outlined in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, commonly known as the "Borello" test. The Borello test focused on the amount of control a business exercised over a worker. It was considered as more lenient in determining whether a worker is an employee or a true independent contractor.

Since the ABC Test is more stringent than the Borello test, employers argued that the ABC test should not be applied in misclassification lawsuits that predated the *Dynamex* opinion. After all, the Borello test constituted the formal guidance available to businesses and contractors prior to the *Dynamex* decision.

The California Supreme Court disagreed, concluding that it "did not change a settled rule on which the parties below had relied", and that *Dynamex* addressed an issue of first impression. The Court ruled that there was no reason to depart from the general rule that judicial decisions are given retroactive effect. Also, the court rejected Jan-Pro's claim that it could not have anticipated that the distinction between employees and independent contractors would be governed by the ABC test. "Indeed, twice in the last decade, we signaled that the test for determining whether a worker should be classified as an employee or independent contractor in the wage order context remained an open question."

Since most California employment laws have a statute of limitations of three or four years, and the *Dynamex* decision was issued nearly three years ago, this very recent decision of the California Supreme Court is not likely to lead to a plethora of new lawsuits. Nevertheless, this opinion could be very favorable to plaintiffs in the lawsuits that are already pending, some of which include claims going back several years.

This Supreme Court decision may constitute an invitation for employers to review their standard mutual release clauses in their severance agreements. In order to be able to cover situations when a worker was first an independent contractor, and was subsequently classified as an employee after the *Dynamex* case, the mutual release clause should not be limited only to obligations arising out of the employment relationship. Instead, the mutual release clause should include, at the very least, a statement that the consideration provided or to be provided pursuant to the severance agreement represents settlement in full of any and all obligations owed to either party by the other party.

If you have any questions regarding the above-mentioned opinion or the application of the ABC test, please feel free to contact Gerald Niesar (gniesar@nvlawllp.com) or Carolina Aricu (caricu@nvlawllp.com).

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