

Dynamex Operations West. v. Superior Court





June 20, 2018

The Honorable Edmund G. Brown
 Governor, State of California
 State Capitol
 Sacramento, CA 95814

Members of the California State Legislature
 State Capitol
 Sacramento, CA 95814

SUBJECT: *Dynamex Operations West. v. Superior Court* (April 30, 2018)

The California Chamber of Commerce and the organizations listed below respectfully write to voice concern with the recent ruling by the California Supreme Court in *Dynamex Operations West v. Superior Court* (“*Dynamex*”), issued on April 30, 2018. The economic impact of this ruling has far-reaching negative implications for nearly all sectors of the economy. Companies in a wide range of industries throughout California will be exposed to costly litigation and will have limited resources to maintain their business. Innovation and investment in California’s economy will be limited or reduced. And, individuals who intentionally rely upon contracting opportunities for income, will have limited options. We write to bring to your attention to the magnitude of this decision and encourage the Legislature and Administration to suspend or postpone the application of the *Dynamex* decision until all parties impacted by this decision can work together to develop a balanced test for determining independent contractor versus employee status that reflects the needs of California’s economy and the workforce.

Summary of the *Dynamex* Decision:

Prior to *Dynamex*, California courts and state agencies had long applied what is known as the *Borello* test for determining whether a worker was an independent contractor for labor and employment purposes. Notably, the *Borello* decision was also a California Supreme Court decision and was referenced by the California Labor Commissioner as the model to utilize for determining independent contractor status. See

S.G. Borello & Sons, Inc. v Dept. of Industrial Relations (1989) 48 Cal.3d 341.¹ This flexible, multi-factor approach looked primarily at whether the hiring entity had a “right to control” the manner in which the worker performed the contracted service, along with eight other “secondary” factors, such as whether the worker was engaged in a distinct occupation or business, the skill required in the particular occupation, and whether the worker or the hiring entity supplied the tools used to perform the work and the place where the work was performed.

Despite the *Borello* test being used for nearly three decades in the employment context, the California Supreme Court made a surprising and unprecedented departure from the *Borello* test and announced a significant change in the law, adopting the “ABC” test for determining whether an individual is an employee under the Wage Orders. Notably, this test has never existed in any form of California law, either in statute or by a regulatory action. Additionally, while other state legislatures have enacted similar tests, this is the first time that such a test has been imposed by a court, without legislative approval.

Under this new “ABC” test, a person will be considered an independent contractor only if the hiring entity can prove **all** three of the following:

- (A) that 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) that the worker performs work that is outside the usual course of the hiring entity’s business;
- and,
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

This new test places in doubt the sustainability of a significant portion of independent contractor relationships in California and has the potential to cause substantial economic harm to hundreds of thousands of California citizens. Because of the rigidity of the test, specifically factors “B” and “C”, most individuals who control their own schedule, control the projects or tasks that they take on, and control the way in which they perform the tasks or projects, will likely lose existing contracts and work opportunities because they perform work that is similar to that of the business entity retaining their services and/or are not in an independent business or trade of the same work being performed.

We believe it was inappropriate for the Court to issue this new test with broad reaching implications. The Court was limited to consideration of only the facts and arguments before it. The Court never received briefing, testimony, or other evidence regarding the impact the adoption of this new test would have on all the different industries not represented in the case, as well as the negative consequences it will create for California’s economy.

Negative Consequences of the *Dynamex* Decision:

A. *Dynamex* Will Hurt Individuals Seeking Flexible, Independent, or Part-Time Work:

Traditional independent contractors are most common in industries where compensation is based on output rather than the number of hours worked; where workers work for multiple firms or switch firms frequently; or where a middleman/lead generator connects the contractor to the person or group receiving and paying for the service. Industries that commonly utilize independent contractors include, but are not limited to, real estate, healthcare, education, financial planning, agriculture, technology development, insurance, construction, and transportation. Engineers, software developers, designers, technicians, doctors, lawyers,

¹Under *Borello*, each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case [¶] ... Besides the [traditional common law] “right to control the work,” the factors include (1) the alleged employee’s opportunity for profit or loss depending on his managerial skill; (2) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (2) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’s business.

therapists, insurance agents, realtors, accountants, financial advisors, professional consultants, small businesses, writers, editors, drivers, artists, and other professions perform work as independent contractors. The entire franchise business model is based on an independent contractor relationship between a franchisor and franchisee. California has over 76,000 franchise locations that support nearly 730,000 jobs.

On June 7, 2018, the Bureau of Labor Statistics issued its Economic Release regarding Contingent and Alternative Employment Arrangements Summary and found that there are approximately 10.6 million independent contractors. The Economic Release also found the following:

“Independent contractors were more likely than those in traditional arrangements to be in management, business, and financial operations occupations; sales and related occupations; and construction and extraction occupations. In terms of industry, independent contractors were more likely than traditional workers to be employed in construction and in professional and business services.”

Independent contractors overwhelmingly prefer their work arrangement (79 percent) to traditional jobs.”

Effectively, *Dynamex* has the potential to eliminate the vast majority of independent contractors in California. This not only hurts the business model of a broad swath of industries and billions of venture capital dollars that are increasingly invested in businesses--but it also hinders California as a national leader in the innovation economy.

The policy reasoning of the Court in *Dynamex* reveals that it viewed independent contractor status as a threat to workers' rights. But the truth is that the question of employment classification exists at the intersection of important competing interests: On the one hand, the state's interest in protecting workers and, on the other hand every individual's personal liberty to contract and be in business for him or herself. As indicated by the Bureau of Labor Statistics Economic Release, individuals overwhelmingly prefer their arrangement as independent contractors, and the “ABC” test adopted by the Court jeopardizes that flexible work arrangement for Californians.

B. PAGA Litigation and Class Action Litigation Will Destroy California Businesses:

California's economic success is dependent on its ability to create an environment where job creation can flourish. *Dynamex* will neither help California's litigation environment nor promote businesses' ability to create jobs as it will drive up California employers' litigation costs.

Dynamex will undoubtedly serve to increase litigation costs of individual claims, class actions, and representative actions under the Labor Code Private Attorneys General Act (PAGA) against California businesses of all sizes. Businesses in Massachusetts have already seen a significant amount of litigation under the ABC test. Notably, Massachusetts does not have any statute comparable to PAGA that allows any employee to file a representative action for any Labor Code claim and stack penalty after penalty for each pay period. Employers will face a wave of litigation under PAGA with this decision that will destroy businesses or significantly reduce their economic growth.

These significant consequences to almost every industry in California were not before the Court when they made their decision in *Dynamex* and is why legislative action is necessary.

The Legislature, and Not the Courts, Should be Responsible for Crafting State-Wide Policy:

With one judicial opinion, nearly 30 years of established law has been overturned virtually overnight (and possibly retroactively as well). This decision from the Supreme Court takes California backwards into ideas about employment that have no relation to the modern workforce and that have never been considered by elected officials or agencies. The Industrial Welfare Commission, which was empowered to promulgate and amend the Wage Orders, including the Wage Order at issue in *Dynamex*, was defunded over 15 years ago. This means that, when the Wage Orders were finalized, the use of technology, platforms, and the flexible work arrangements that now exist in California's economy were never considered.

The Court was limited in the information it considered in its opinion, but the Legislature is not. Legislative discussions and hearings that invite all stakeholders from all sides of this discussion together could better identify a test for independent contractor versus employee that reflects California's economy today and provide a comprehensive solution that protects workers, yet also maintains California's innovation and growth.

The time to act is now, before work opportunities are destroyed, and before the trial lawyers start crushing businesses with an onslaught of litigation, which the business community is already experiencing in the short time since the decision was published. For all of these reasons, we respectfully request the Legislature and Governor's Administration to engage on this issue and suspend the application/impact of the *Dynamex* decision until all parties impacted by this decision can work together to develop a balanced test for determining independent contractor versus employee status that reflects the needs of California's economy and the workforce.

Sincerely,

California Chamber of Commerce
Acclamation Insurance Management Services
Allied Managed Care
American Council of Engineering Companies, California
Association of California Life and Health Insurance Companies
Building Owners and Managers Association
California Alternative Payment Program Association
California Ambulance Association
California Association of Licensed Investigators
California Association of Winegrape Growers
California Building Industry Association
California Business Properties Association
California Business Roundtable
California Coalition of Travel Organizations
California Farm Bureau Federation
California Forestry Association
California Hospital Association
California Manufacturers and Technology Association
California News Publishers Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California Trucking Association
Camarillo Chamber of Commerce
Caviar
Civil Justice Association of California
Computing Technology Industry Association – CompTIA
DoorDash
El Dorado County Joint Chamber Commission
Electronic Transactions Association
Elk Grove Chamber of Commerce
Engine
Family Business Association of California
Financial Services Institute
Flasher Barricade Association
Folsom Chamber of Commerce
Glamsquad
Greater Coachella Valley Chamber of Commerce
Green Diamond Resource Company
Handy
International Council of Shopping Centers
International Franchise Association

Internet Association
Instacart
Lodi District Chamber of Commerce
Lyft
Mendocino Humboldt Redwood Companies
Murrieta Chamber of Commerce
NAIOP of CA - Commercial Real Estate Development Association
National Association of Mutual Insurance Companies
National Federation of Independent Business
Neighborhood Music School
Official Police Garages of Los Angeles
Oxnard Chamber of Commerce
Palm Desert Area Chamber of Commerce
Personal Insurance Federation of California
Postmates
Rancho Cordova Chamber of Commerce
Roseville Area Chamber of Commerce
San Diego Regional Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Ana Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Sierra Pacific Industries
Simi Valley Chamber of Commerce
Southwest California Legislative Council
Taxicab Paratransit Association of California
TechNet
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
Uber
United Chamber Advocacy Network
Western Growers Association
Western Manufactured Housing Communities Association
Wildomar Chamber of Commerce
Wine Institute

cc: Diana Dooley, Office of the Governor
Kim Craig, Office of the Governor
Camille Wagner, Office of the Governor
David Lanier, Labor Secretary
The Honorable Ricardo Lara
The Honorable Tony Thurmond