Dynamex: Retroactive or Not?

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Introduction: The Question of Retroactivity

Back in April of this year, the California Supreme Court unanimously issued the decision in *Dynamex Operations West, Inc. v. Superior Court*.[1] The decision makes it much more difficult for California employers to classify any workers as independent contractors for purposes of the California Industrial Wage Orders.[2] The adopted ABC test in *Dynamex* was a marked shift from the thirty-year old multi-factor test issued in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, which arguably nobody saw coming.[3]

The significance of an employer's ability to classify a worker as an independent contractor exempts employers from the requirement to pay those workers minimum wages, overtime hours and providing basic working condition protections. These exemptions confer upon those employers considerable cost savings, which amount to greater revenues and profits. For those employers that do not depend heavily on the services of independent contractors, they will not be affected too greatly as a consequence of the decision. However, gig-economy employers (i.e., Uber, Lyft, Grubhub) that rely heavily on the services of independent contractors to drive their revenues and profits could incur crippling costs by operating in California. Smaller businesses that depend on independent contractors will likely suffer the same fate as those gig-economy employers.

Upon the issuance of the *Dynamex* decision, employers looked for ways to comply with the California Supreme Court's decision going forward and to figure out whether reclassification of its workers was necessary. Both plaintiffs' and defense attorneys readied themselves for the waves of litigation that would inevitably result as well. It is in this state of preparation that both sides contemplate the many important questions the supreme court left unanswered in their far-reaching and impactful decision. These questions include whether the adopted ABC test would apply to California labor code claims that do not arise under the wage orders and how to precisely apply the ABC test with some semblance of predictability. However, there is one question that arguably looms universally over employers, potential litigants, and plaintiff's and defense attorneys. That question is whether the *Dynamex* decision would be applied *prospectively only or retrospectively as well*. The answer to this question could mean the difference between the crippling of an employer and simply implementing a change in their operations going forward.

At the time of writing this article, the California Supreme Court has not clarified whether its ruling would apply retrospectively. In fact, they expressly declined to address the issue as further discussed below. This article seeks to inform the reader of the recent developments in the judicial arena that have addressed the issue of *Dynamex* retroactivity and where it could be headed. It also explores the arguments rendered for and against retroactivity. Until it can be conclusively determined whether *Dynamex* retrospectively applies, employers, potential litigants, and legal practitioners all must sit at the edge of their seats and observe how the various jurisdictions rule on the matter for guidance.

A Look Back at *Dynamex*

To understand why the issue of *Dynamex* retroactivity has caused such a stir amongst employers, legal practitioners, and potential litigants, we must look to the decision that gave rise to it.

The *Dynamex* case involved employee-plaintiffs who brought a class-action lawsuit against *Dynamex*, claiming that the company violated California's Industrial Wage Orders by misclassifying them as independent contractors.[4] The trial court certifying the plaintiffs' class noted the parties disagreement as to the proper legal standard that was applicable in determining whether a worker was correctly classified as an employee or an independent contractor for purposes of the plaintiffs' claims.[5] The plaintiffs argued that the broad wage order definition of "employ" and "employer" ("to suffer or permit to work") should apply. The company argued that the proper legal standard was the thirty-year-old test established in *Borello*.[6] The test established in *Borello* is a

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1 Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903 (2018).

2 *See* 4 Cal. 5th at 903.

3 *See* S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal. 3d 341 (1989).

4 *Dynamex*, 4 Cal. 5th at 914.

5 4 Cal. 5th at 920.

6 4 Cal. 5th at 920-21.

flexible multifactor test that calls for the balancing of several factors to determine who has the "right to control" the worker and the work being performed. The *Borello* test is and has been widely used for determining threshold matters of whether a worker was an independent contract or an employee for purposes of many different labor and employment laws, and is and has been depended upon by many employers to properly classify their workers. The trial court eventually certified the class, agreeing with the plaintiffs' position.[7] The California Court of Appeal agreed with the trial court that the *Borello* test was not controlling in cases where the violation of a wage order was claimed.[8]

The California Supreme Court held that for purposes of labor code claims that arise under the California Industrial Wage Orders, the *Borello* test was not controlling, thus rejecting the employer's position. The court also noted that the wage order's definition of "to suffer or permit to work" was too broad and considered a "term of art" that could include in its purview any type of worker, including traditional independent contractors.[9] Instead, the court adopted the ABC test, which presumes a worker is an employee unless the employer can properly classify a worker as an independent contractor by meeting each of the following three prongs:

> (A) The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
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> (B) The worker performs work that is outside the usual course of the hiring entity's business; and
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> (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.[10]

This test was a marked shift from the *Borello* standard because not only did the ABC test create standards that would prove very difficult for many employers to classify its workers as independent contractors, but it also placed the initial burden on the employer to meet these factors to rebut the presumption that a worker should be classified as an employee.[11]

Noticeably absent from the supreme court's voluminous 82-page decision was whether the ABC test would be retrospectively applied. This absence would later be argued to mean that the California Supreme Court did not intend to apply the test prospectively only.[12] By not ruling on the issue, many employers could be left open to liability for classifying workers as independent contractors, relying on the *Borello* test prior to *Dynamex*. It could also affect those employers who received a favorable judgment under *Borello*, but whose case is still open to a next-level appeal in which the plaintiff could subsequently argue that the wrong standard was applied, and that *Dynamex* was the proper test. It is clear that employers across California need to know the answer to this question in order to determine the extent of their potential liability.

The Attempt to Clarify *Dynamex* Application

Articles and legal commentary exploring whether the ABC test adopted in *Dynamex* is retroactive would cease to exist had the California Supreme Court granted the petition for rehearing the *Dynamex* decision that was filed on May 15, 2018. The petition for rehearing's purpose was to clarify whether the supreme court's decision in *Dynamex* was retroactive in application and sought modification for the decision to apply prospectively.[13]

The petition begins by arguing:

> Considerations of fairness and public policy may require that a decision be given only prospective application. Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's

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7 4 Cal. 5th at 914.

8 4 Cal. 5th at 924-25.

9 4 Cal. 5th at 916.

10 4 Cal. 5th at 916-17.

11 *See* 4 Cal. 5th at 916-17.

12 *See* Cornelia Dai, *Dynamex Operations West, Inc. v. Superior Court: Employees' Perspective*, 32 Cal. Lab. & Emp. L. Rev. 1, 3 (2018) (discussing why *Dynamex* is retroactive).

13 *See* Petitioner Dynamex Operations West, Inc. Petition for Rehearing, Dynamex Operations West, Inc. v. Superior Court, California Supreme Court, No. S222732 (filed May 15, 2018) ("Petition for Rehearing"), at 5, *available at* https://www.chamberlitigation.com/sites/default/files/cases/files/18181818/Petition%20for%20Rehearing%20–%20Dynamex%20v.%20Superior%20Court%20%28California%20Supreme%20Court%29_0.pdf.

> effect on the administration of justice, and the purposes to be served by the new rule.[14]

It then follows that retrospective application should be declined since doing so would violate the due process rights of many employers who reasonably relied on existing-case law (*Borello*) that was unforeseeably replaced by a new test (ABC).[15] California employers have long relied on the *Borello* decision to classify its workers, and no court, up until presently, used any other test for issues arising under the wage orders. Administrative agencies, specifically the Department of Labor, which administers the wage orders, also depended on the multi-factor *Borello* test when determining how to classify an independent contractor or employee.[16] The petition further supports its proposition by claiming that the implementation of the new ABC test was a substantive change in law because all other states who utilize the ABC test, expressly adopted it by statute.[17] Lastly, the petition notes that the ABC test will have a negative effect on the administration of justice by requiring re-litigation of independent contractor/employee issues in court.[18]

An amici curiae letter brief in support of the petition's rehearing was also submitted by the U.S. and California Chambers of Commerce, urging the California Supreme Court to modify its decision in *Dynamex* by having the ABC test prospectively applied.[19] The Chambers of Commerce made similar arguments to those argued in the petition, reaffirming that many employers' due process rights would be violated were the *Dynamex* decision applied retrospectively. The letter specifically stated:

> Giving the decision retroactive effect would threaten employers' due process rights by putting thousands of businesses at risk for significant liability for past actions they made in good faith compliance with long-standing California law [*Borello*] under circumstances where they had no reason to expect their arrangements with California workers would be subject to Massachusetts' ABC test.[20]

This will most likely be the main argument advanced by those who oppose retroactive application.

Despite the pleas for rehearing, the California Supreme Court finalized its decision in *Dynamex* on June 20, 2018 when it denied the petitioner's request to modify the order for prospective application.[21] If the decision back in April 2018 was not already inviting enough to a potential slew of wage and hour litigation, the denial to rehear the petition will likely open the floodgates, as evidenced by the cases currently being litigated calling for retroactive application of the ABC test. It makes little sense why the California Supreme Court did not grant the petition. The court surely must have predicted that a drastic increase of wage and hour litigation would turn on this very issue, which could lead to inconsistent holdings, thus creating a nightmare scenario for judicial efficiency.

The Question of Dynamex Retroactivity Makes Its Way Through the Judiciary

Since the *Dynamex* decision was handed down, plaintiffs and their attorneys have wasted no time, not only in taking advantage of the stringent requirements the new test has to offer, but also in attempting to hold employers liable for conduct taken prior to the *Dynamex* decision. As mentioned above, plaintiffs can also use the decision as a basis for appeal of cases decided before *Dynamex*. The aforementioned litigation will squarely center around whether *Dynamex* should be applied retrospectively. Both state and federal courts in California have had the opportunity to address the issue, which provides a glimpse of the direction the courts are headed and could form the basis for review by the California Supreme Court, should the issue ever make its way there again.

The Orange County Superior Court in July 2018 addressed whether an employer's liability under the new ABC test would be limited to the period after the decision.[22] In *Johnson v. VCG-IS, LLC*, a group of exotic dancers brought a Private Attorneys General Act (PAGA)

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14 Petition for Rehearing, *supra* note 13, at 5-6.

15 Petition for Rehearing, *supra* note 13, at 6.

16 Petition for Rehearing, *supra* note 13, at 7.

17 Petition for Rehearing, *supra* note 13, at 9.

18 Petition for Rehearing, *supra* note 13, at 10.

19 Amici Curiae Letter in Support of Petition for Rehearing, Dynamex Operations West, Inc. v. Superior Court, California Supreme Court, No. S222732 (June 29, 2018) ("Amici Curiae Letter"), at 1.

20 Amici Curiae Letter, *supra* note 19, at 11.

21 Philip A. Toomey, *CA Supreme Court Finalizes Independent Contractor Test Denying Dynamex Petition for Modification*, Martindale (June 28, 2018), *available at* www.martindale.com/legal-news/article_leech-tishman_2509543.htm.

22 *See* Ruling on Motion in Limine, Johnson v. VCG-IS, LLC, No. 30-2015-00802813-CU-CR-CXC, Cal. Super. Ct., County of Orange (July 18, 2018) ("In Limine Ruling"), at 1.

suit against their employer for wage and hour violations. One of the pertinent issues in the case involved whether the dancers were considered independent contractors.[23] Because the case was filed prior to the *Dynamex* decision, the parties submitted to the judge the question of whether *Dynamex's* ABC test was the proper standard instead of the *Borello* factors. Judge William Claster ruled on July 18, 2018 that *Dynamex* applied retroactively because of the general rule that judicial decisions are normally given retroactive effect, and the California Supreme Court did not expressly limit *Dynamex* to prospective application.

Judge Claster also suggested that the California Supreme Court intended for the decision to be retroactive when they denied the petition for rehearing/modification of the *Dynamex* order. The Judge ended his opinion by stating that it was up to the California Supreme Court to declare an exception to this general rule.[24] This line of reasoning is the same reasoning, among others, that plaintiffs' attorneys will likely argue for *Dynamex*'s retrospective application. Other arguments for retroactivity include that the new ABC test is not a major substantive shift from the *Borello* test since all aspects of the ABC test already exist in California common law, which presumes that a worker is an employee. This argument goes further by stating that the ABC factors already include the most important factors of the *Borello* test.[25]

Although Judge Claster brings sound reasoning to his decision, in 2017, the California Supreme Court did in fact establish an exception to the general rule of retroactive application of judicial decisions:

> Although as a general rule judicial decisions are to be given retroactive effect, there is a recognized exception when a judicial decision changes a settled rule on which the parties below have relied. . . . [C]onsiderations of fairness and public policy may require that a decision be given only prospective application. Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule.[26]

The petition for rehearing/modification based its arguments on this exception to the general rule but was not addressed in Judge Claster's opinion. It is uncertain from the order whether Judge Claster considered this exception to the general rule and the arguments advanced in the petition for rehearing/modification. Regardless, his decision will likely influence the decisions of others on the bench in other counties faced with this similar issue.

The Fourth District California Court of Appeal also had the opportunity to address the issue of *Dynamex* retroactivity. Although they declined to do so, they implicitly appeared to provide a preview of how they would rule on the matter.[27] In *Garcia v. Border Transportation Group, LLC*, a taxi cab driver brought several wage and hour violations against his employer.[28] The trial court ruled for the employer reasoning that the plaintiff was an independent contractor via the *Borello* test.[29] While the matter was on appeal, the *Dynamex* decision was handed down.[30] The *Garcia* appellate court reversed the trial court's judgement on October 22, 2018 on the basis that there was a triable issue of material fact under part C of the ABC test.[31] The court stated that it was not necessary to decide on whether *Dynamex* applied retroactively because the employer, in its supplemental briefing, implicitly assumed retroactivity.[32] However, the *Garcia* court noted in *dicta* that the California Supreme Court applied the ABC test to the class certification question before it and denied the petition for rehearing. It further noted that the decision merely extended principles stated in *Borello*, and that it represented "no greater surprise" than other decisions that routinely apply retroactively. This notation found in the footnote of the opinion seems to clearly point

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23 In Limine Ruling, *supra* note 22, at *1.

24 In Limine Ruling, *supra* note 22, at *2.

25 Dai, *supra* note 12, at 3.

26 Williams & Fickett v. Cty. of Fresno, 2 Cal. 5th 1258, 1282 (2017).

27 *See* Garcia v. Border Transportation Group, LLC., 28 Cal. App. 5th 558 (2018).

28 28 Cal. App. 5th at 563-64.

29 28 Cal. App. 5th at 564.

30 28 Cal. App. 5th at 561.

31 28 Cal. App. 5th at 572.

32 28 Cal. App. 5th at 572 n.12.

to the fact that the Fourth Appellate District believed *Dynamex* should apply retroactively and did not find any due process issues.[33]

The federal courts will also have its chance to address the issue as well. In fact, such a case is currently on appeal to the Ninth Circuit Court of Appeals. In *Lawson v. Grubhub*, the plaintiff was a driver for Grubhub, which provided meal delivery services via drivers the employer classified as independent contractors.[34] Grubhub is considered one of the many gig-economy employers that depend heavily on its independent contractor workforce to sustain its business. This is a situation where an employer could face great financial liability were *Dynamex* applied retroactively. In a bench trial, the magistrate judge determined that the plaintiff was an independent contractor and therefore had no rights to minimum wage, overtime, expense reimbursement, or workers compensation benefits.[35] The judge analyzed whether the plaintiff was an independent contractor or employee under the *Borello* test since the matter was submitted prior to the *Dynamex* decision. The plaintiff filed an appeal in the Ninth Circuit during March 2018.[36] After the *Dynamex* decision was issued the following month, the plaintiff requested that the Ninth Circuit remand the case back to the district court. The plaintiff's request was denied. The plaintiff then proceeded to request an indicative ruling from the district court pursuant to Rule 62.1 of the Federal Rules of Civil Procedure, which allows a district court that lacks authority to grant a timely motion for relief from judgment because the case is pending appeal to either:

1) Defer considering the motion;
2) Deny the motion; or
3) State either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.[37]

The district court unsatisfyingly declined to answer the question of retroactivity on the current record, calling it a complex issue, but determined that the plaintiff's motion did raise a substantial issue.[38]

Upon the denial for remand and the district court's refusal to answer the question of retroactivity in a post-judgment motion based on the record currently before it, the matter will now be decided by the Ninth Circuit. According to the docket, briefs and replies are currently being submitted by both parties, and oral arguments have not yet been scheduled. The outcome of these proceedings should provide a fair amount of guidance to the legal community. Until then, both sides of the bar will have to continue to put their best arguments forward, hoping the courts agree with them.

Conclusion

As mentioned previously, an answer from the Ninth Circuit regarding whether *Dynamex* should be applied retroactively will provide important influential guidance to the legal community. A definitive way an answer can be reached to this question is by having the California legislature pass legislation undoing the decision handed down by the California Supreme Court. The California Chamber of Commerce and gig-economy employers such as Uber, Lyft, DoorDash, TaskRabbit, and Postmates are lobbying to push that legislation through.[39] The converse is true as well. Labor advocates can push their own legislation codifying the *Dynamex* decision and making it apply retroactively.

On December 3, 2018, the first legislative session in California was held during which two new bills were introduced: one by Democrats and one by Republicans. Assemblywoman, Lorena Gonzales Fletcher (D-San Diego) introduced AB 5, which proposes to codify the *Dynamex* decision and make clear its application in state law.[40] On the other side of the table, Assemblywoman Melissa Melendez (R-Lake Elsinore) introduced AB 71, which proposes to codify the *Borello* test as the proper test when determining a worker's classification as an independent contractor or employee.[41] These two bills will be up against each other in the 2019-2020 legislative session.

If legislation efforts are not successful, the question could reach the California Supreme Court again in one of two ways. One is to wait for the different courts of appeal to become divided on the issue, so that the supreme court will be compelled to answer the question.

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33 28 Cal. App. 5th at 572 n.12.

34 *See* Lawson v. Grubhub, 302 F. Supp. 3d 1071, 1072-73 (2018).

35 302 F. Supp. 3d at 1093.

36 Lawson v. Grubhub, No. 18-15386, Ninth Circuit Court of Appeals (filed Mar. 8, 2018).

37 Lawson v. Grubhub, No. 15-cv-05128-JSC, 2018 U.S. Dist. LEXIS 201718, at *5-8 (N.D. Cal. Nov. 28, 2018).

38 2018 U.S. Dist. LEXIS 201718, at *19-20.

39 Josh Eidelson, *Gig-economy giants ask California to save them from a ruling that may turn their contractors into employees*, L.A Times (Aug. 6, 2018), www.latimes.com/business/la-fi-contract-workers-20180806-story.html.

40 Assemb. B. 5, 2018-2019 Leg., 1st Sess. (Cal. 2018).

41 Assemb. B. 71, 2018-2019 Leg., 1st Sess. (Cal. 2018).

This scenario of course is only viable if the courts of appeal across the state become divided on the issue. If not, then the answer would have become quite clear at that point. Another way the question could make its way back to the California Supreme Court is for the Ninth Circuit to certify the question to the court pursuant to California Rule of Court 8.548. This could happen relatively soon with the pending *Grubhub* appeal pending in the Ninth Circuit. For now, those interested in the question must sit and wait until the matter makes its way through the judicial system or the legislature to gain clearer perspective as to whether *Dynamex* will be applied prospectively or retrospectively.

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