



Significant Decision

No. 18-04

May 1, 2018

DYNAMEX OPERATIONS WEST V. SUPERIOR COURT OF LOS ANGELES; CHARLES LEE

**IN THE SUPREME COURT OF CALIFORNIA
(S222732)**

FILED: APRIL 30, 2018

In a radical departure from its own 1989 decision in *Borello & Sons*, the California Supreme Court has adopted a new legal standard that will make it more difficult for employers to classify workers as independent contractors.

Significance: Setting aside 30 years of precedent, the Supreme Court has dramatically changed the manner in which a worker's employment status is to be determined. Instead of weighing the traditional *Borello* factors in a multi-factored analysis, the Supreme Court has adopted the "ABC" test, in which an employer's failure to satisfy any one of the three elements will compel a finding that the worker is an employee rather than an independent contractor.

Facts: A delivery driver for Dynamex who filed a lawsuit seeking class-action status in a wage and hour dispute was first required to show that he was an employee entitled to such protections, and not an independent contractor. Dynamex requires drivers to provide their own cars, cell phones, and expenses; drivers are free to set their own schedule but must notify Dynamex of the days they wish to work; and drivers are permitted to make deliveries for other companies. Dynamex argued that the court should find that the driver is an independent contractor by applying the traditional test under *Borello*, which considers multiple factors including the worker's skill, the method of payment, the right of control, and the nature of business.

Holding: In an 85-page unanimous decision, the Supreme Court abolished the *Borello* factors altogether and instead held that the "ABC" test is to be used in the determination of employee vs. independent contractor. To classify someone as an independent contractor, businesses must show not only that the worker is free from the control and direction of the employer, but also that the worker performs work outside the hirer's core business, and further that the worker customarily engages in "an independently established trade, occupation or business."

Discussion: Under the ABC test, the court *presumes* all workers qualify as employees. A hiring entity can prove that the worker qualifies as an independent contractor only if it can show that:

- 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 the work and in fact; and
- 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 that involved in the work performed.

The hiring entity must show all three criteria. While each of A, B, and C were factors that a court could consider under *Borello*, the new test mandates that the employer prove all three of these elements; the employer's failure to prove even one element will result in a finding of employment. Part A encompasses the traditional common law standard of direction and control; the real game-changers are Parts B and C.

In Part B, the Court imposes a "reasonableness" standard, and looks to whether the worker "would ordinarily be viewed by others" as working in the business. The Court clarified that a hiring entity cannot satisfy Part B merely by showing that the worker performs work physically outside of the employer's place of business. "In light of contemporary work practices, in which many employees telecommute or work from their homes," the Court has instead required that the work itself falls outside of the hiring entity's usual course of business. In practice, Part B will likely expand the definition of employee to include almost any worker who engages in the same business as the hiring entity.

Part C requires that the business demonstrate that the worker has independently made the decision to go into business for himself. But the Court also held that the simple fact that the contract agreement does not prohibit a worker from engaging in an independent business is insufficient evidence to establish that the worker is customarily engaged in an independent trade.

Thus, Part A focuses on the common-law test of "right of control," which was arguably the most important factor under *Borello*; litigants may find that Part A is actually the least critical factor now. Instead, Parts B and C offer much easier paths for plaintiffs to successfully prove employment.

The Court included some illustrative examples:

Independent Contractors	Employees
• plumber hired by a retail store to repair a bathroom leak	• seamstress who works at home to make dresses for a clothing manufacturing company, using cloth and patterns supplied by the company
• electrician hired to install a new line	• cake decorator who works for a bakery on a regular basis on custom-designed cakes

It is probably not by chance that the Supreme Court issued its decision in this case (which has been pending since 2014) to coincide with the news cycle for International Workers' Day on May 1. The decision has obvious implications for "new economy" business models, such as Uber, Lyft, GrubHub, and other gig economy services that are premised upon workers acting as independent contractors, but the ruling will likely also extend to nearly every employment sector.

Finally, it should be noted that the ruling only applies to wage orders, which includes rules on minimum pay, basic working conditions, and meal and rest breaks. Technically, the decision does not directly apply to workers' compensation and it is possible that a business could classify a worker in different ways for different purposes. However, the most likely result is that other courts will apply this decision to workers' compensation cases in very short order.

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