LCW LIEBERT CASSIDY WHITMORE

March 19, 2020: Understanding the Legal Landscape for the Use of Independent Contractors

T. Oliver Yee, Partner

Borello **Multifactor Independent Contractor Test**

Historically, the "common law" employment test was the principal test in California for distinguishing independent contractors from employees. The California Supreme Court describes this test in its 1989 decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*.[i] Under *Borello*, the principal factor in determining the existence of an employment relationship is whether "the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."[ii] The *Borello* test also includes additional factors that courts may consider in determining independent contractor status. These factors include:

A) Whether or not the one performing services is engaged in a distinct occupation or business;
B) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
C) The skill required in the particular occupation;
D) Whether the principal or worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
E) The length of time for which the services are to be performed;
F) The method of payment whether by the time or by the job;
G) Whether or not the work is part of the regular business of the principal; and
H) Whether or not the parties believe they are creating the relationship of employer-employee.[iii]

One factor alone is not determinative, and the factors are not all equally significant.[iv] The significance of any one factor and its role in the overall calculus may vary from case to case depending on the nature of the work and the evidence.[v] However, whether the employer has a right to control a consultant's work is typically considered the most significant factor.[vi]

Dynamex **"ABC" Test**

On April 30, 2018, the California Supreme Court issued its decision in *Dynamex Operations West, Inc. v. Superior Court*.[vii] The case overruled *Borello* as applied to Industrial Welfare Commission ("IWC") Wage Orders and adopted a more streamlined legal test for determining whether a worker is an independent contractor or an employee.[viii] *Dynamex* involved a nationwide courier service that classified its delivery drivers as independent contractors.[ix] The delivery drivers drove their own vehicles, negotiated their own rates with the company, set their own schedules, and when not working for Dynamex, made deliveries for other companies.[x] However, Dynamex assigned the delivery routes to its drivers, received a percentage of each delivery fee, required drivers to notify Dynamex of intended workdays, and expected drivers to wear Dynamex uniforms.[xi] The California Supreme Court determined the workers were misclassified as independent contractors for IWC Wage Orders and abandoned the multifactor

Borello test in favor of a much narrower three-prong test (commonly referred to as the "ABC" test) for determining whether an individual is an independent contractor or employee.

The ABC test begins with the presumption that all workers are employees unless the hiring entity can establish *all* of the following three factors:

A) The worker is free from the control and direction of the hiring entity, both under the contract for performance of such 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 the work performed for the hiring entity.

If an employer is unable to satisfy all three elements, then it must treat the worker as an employee for purposes of IWC Wage Orders. However, the *Dynamex* decision was limited in scope and only applied the ABC test to the definition of "employee" under IWC Wage Orders.

AB 5 Codifies the California Supreme Court's Decision in *Dynamex*

AB 5 creates Labor Code section 2750.3, which codifies the ABC test adopted in *Dynamex* as listed above and expands its application beyond IWC Wage Orders to the Labor Code and Unemployment Insurance Code. There is no express exemption in AB 5 for public agencies.

Labor Code section 2750.3 does carve out a number of exemptions for occupations that remain subject to the old, multifactor *Borello* test. These exemptions include, insurance agents; medical professionals such as physicians, dentists, podiatrists, psychologists, and veterinarians; licensed professionals such as attorneys, architects, engineers, private investigators, and accountants; financial advisers; direct sales salespersons; commercial fisherman; some contracts for professional services for marketing, human resources administrators, travel agents, graphic designers, grant writers, fine artists, freelance writers, photographers and photojournalists, and cosmetologists; licensed real estate agents; "business service providers"; construction contractors; construction trucking services; referral service providers; and motor club third party agents.

General Impact of AB 5 on All California Employers

While the California Supreme Court's decision in *Dynamex* limited the application of the ABC test to IWC Wage Orders, AB 5 extends this test to the Labor Code and Unemployment Insurance Code. In other words, if a worker does not fall within one of the exemptions carved out in AB 5 and cannot meet all three prongs of the ABC test to qualify as an independent contractor, the Labor Code and Unemployment Insurance Code provisions applicable to employees will now apply to that individual. These provisions include workers' compensation coverage, paid sick leave under the Labor Code, and unemployment benefits. Because the ABC test is more employee-friendly than the previous test used for determining independent contractor status, it is likely that many workers previously characterized as independent contractors will no longer qualify as such under AB 5, and in turn, will be entitled to the benefits afforded to employees under the Labor Code and Unemployment Insurance Code.

Additional Considerations for Cities

AB 5 potentially creates unique challenges and issues for California cities. For example, in order for a city to meet element "B" of the ABC test, the individual must perform work that is "outside the usual course of the hiring entity's business." For private sector employers, the usual course of business may be clear-cut. Indeed, in the *Dynamex* case, the company at issue provides same-day courier service. However, what constitutes the "usual course of business" for cities may be a more challenging inquiry. Because of the broad nature of public services, the usual course of business of a city includes a wide array of services as opposed to a singular focused industry.

Cities are also exempt from certain provisions of the Wage Orders and the Labor Code, either because they are expressly excluded, or because a court has held that the provisions do not apply to public agencies.[xii]

Furthermore, it is unclear as to the extent the more restrictive standards set forth in AB 5 will apply beyond the Labor Code and Unemployment Insurance Code. At present, the definition of "employment" for the purpose of CalPERS membership is governed by the standards set forth in *Metropolitan Water District v. Superior Court (Cargill),* where the California Supreme Court concluded that the common law employment and multifactor standard applies.[xiii] *Cargill,* a 2004 decision, however, precedes *Dynamex* and AB 5.

Conclusion

Importantly, Labor Code section 2750.3 does not constitute a change of the law, but rather declares the state of the existing law prior to its adoption. Cities should evaluate all independent contractor arrangements in regards to compliance under the ABC test and Labor Code section 2750.3.

---

[i] *S.G. Borello & Sons, Inc. v. Dep't Indus. Relations* (1989) 48 Cal. 3d 341, 352.
[ii] *Id.* at 404.
[iii] *Id.* at 415.
[iv] *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 539.
[v] *Ibid.*
[vi] *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946.
[vii] *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903.
[viii] *Ibid*.
[ix] *Id.* at 917-19.
[x] *Ibid*.
[xi] *Ibid*.
[xii] *See, e.g., Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729, 736 ([T]raditionally, "absent express words to the contrary, governmental agencies are not included within the general words of a statute."); *In re Work Uniform Cases* (2005) 133 Cal.App.4th 328; *Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276.
[xiii] *Metropolitan Water District v. Superior Court (Cargill),* (2004) 31 Cal.4th 491.