

Employment Law Update

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California Supreme Court: “ABC” Test is Standard for Distinguishing Between Employees and Independent Contractors

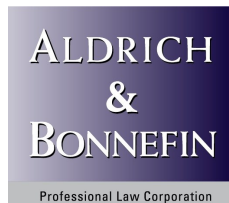
Since 1989, employers have used the seminal, multi-factor “economic reality” test set forth in *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399 (Cal. 1989), to determine whether someone is an employee or an independent contractor. For example, one *Borello* test factor is the alleged employee’s right to control the method and manner used to achieve the desired results. (Refer to Section III.J.3. of BCG Standard Procedures Manual #16, *Employment Law*, for a detailed discussion of the *Borello* standard.)

The California Supreme Court recently opined that the *Borello* standard is not an easily and consistently applied standard. *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018). Accordingly, the court replaced the *Borello* standard with the simpler, more structured “ABC” test. According to the court, the ABC test presumptively considers all workers to be employees, and permits classifying workers as independent contractors only if the employer demonstrates that the worker in question satisfies each of three conditions: (i) that the worker is free from the control and direction of the hiring business in connection with the performance of the work, both under the contract for the performance of the work and in fact; (ii) that the

worker performs work that is outside the usual course of the hiring entity’s business; and (iii) that 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 workers brought the *Dynamex* suit under Wage Order 9. That wage order sets forth the wages, hours and working conditions for transportation industry employees. For example, the wage order specifies when employers in the transportation industry must pay overtime. Therefore, one may think that the court’s adoption of the ABC test is limited to the transportation industry. However, as the court noted, other California wage orders contain the same employee standard as Wage Order 9. Of relevance to the financial industry, Wage Order 4, which sets forth the wages, hours and working conditions for professional occupations, contains Wage Order 9’s employees standard. Accordingly, the *Dynamex* decision’s ABC test will likely apply when determining whether a financial institution’s worker is an employee subject to Wage Order 4’s protections or just an independent contractor.

If financial institutions need more advice as to whether they have properly determined workers to be employees instead of independent contractors, and vice versa, contact Joel Cook at JCook@ABLawyers.com.



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