

Ninth Circuit to Ask California Supreme Court to Decide Retroactivity of 'ABC' Test, Withdraws Opinion

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Whether California's recently adopted "ABC" test, used in the employee-versus-independent contractor analysis in cases involving California's wage orders, must be applied retroactively should be decided by the California Supreme Court, a panel of the U.S. Court of Appeals for the Ninth Circuit has decided, withdrawing its controversial May 2, 2019, opinion. *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 2019 U.S. App. LEXIS 21687 (9th Cir. July 22, 2019). The Ninth Circuit said it will certify that question to the California Supreme Court.

The now-withdrawn opinion stemmed from the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, 416 P.3d 1 (Cal. 2018). The Supreme Court broadened the definition of "employee" in the state's Industrial Work Commission (IWC) wage orders when undertaking the employee-versus-independent contractor analysis by adopting the commonly known ABC test.

Under that standard, to establish that an individual is in fact an independent contractor, an employer must prove that:

A: The work must be free from the control and direction of the employer in connection with the performance of the work, both under the contract for performance of the work and in fact;

B: The worker performs work that is outside the usual course of the employer'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 standard set in *Dynamex* presumes that workers are employees subject to the requirements of the IWC wage orders and clearly places the burden on the employer to prove all three elements of the ABC test to establish independent contractor status. What the California Supreme Court did not decide in *Dynamex*, and what it will be asked to determine, is whether the ABC test should apply retroactively to matters that were still viable at the time of the decision. Given its past rulings on the retroactivity issue, it certainly is possible that the Supreme Court might concur with the Ninth Circuit's initial conclusion that the ABC test applies retroactively.

In the meantime, if you have any questions about the *Dynamex* decision, the employee-versus-independent contractor analysis, or any other wage and hour issue, please consult a Jackson Lewis attorney.

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