Updates
January 20, 2021

# California's Supreme Court Confirms the Retroactivity of the ABC Test Established in the 2018 Dynamex Decision

On January 14, 2021, the California Supreme Court decided *Vazquez v. Jan-Pro Franchising International, Inc.* The decision holds that the ABC test used to determine independent contractor versus employee status for purposes of California's Wage Orders, announced in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, applies retroactively. The California Supreme Court's decision in *Dynamex* is described here. In *Vazquez*, the California Supreme Court affirmatively answered the question of whether the *Dynamex* decision applied retroactively.

The issue of how to apply the "suffer or permit to work" definition in California's Wage Orders when distinguishing employees from independent contractors was a matter of first impression for California's highest court. As a result, the court stated that it did not depart from the general rule that judicial decisions are given retroactive effect.

Jan-Pro argued the *Dynamex* decision should not apply retroactively since it reasonably believed that the standard established in *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341 was the then-operable governing standard utilized in the independent contractor determination. The court rejected this argument, stating that *Borello* did not address the independent contractor/employee determination for purposes of an obligation imposed by a wage order.

Jan-Pro also argued an exception to the general rule of retroactivity should apply, because businesses could not reasonably have anticipated the ABC test would apply to their earlier contractor analyses. The court rejected this argument stating that the "suffer or permit to work" standard had been understood to embody the "broadest definition" of employment. As a result, the court found that the decision in *Dynamex* and the ABC test was "not beyond the bounds of what employers could reasonably have expected." Finally, the court stated that the retroactive application of *Dynamex* "will in practice affect a limited number of cases" and that it found 'no compelling justification for denying workers' the benefit of the standard set forth in *Dynamex*."

The *Vazquez* decision is another new piece of the puzzle for companies utilizing independent contractors in California, particularly given that California recently enacted AB 2257 which expanded and replaced the initial exemptions from the codified version of the ABC test initially adopted via AB 5. AB 2257 is described here. Add to this the fact that in 2020, California voters passed Proposition 22 allowing some gig economy companies to utilize drivers as independent contractors as described here. The landscape of contractor classification under California law continues to evolve.

Companies with questions about the *Vazquez* decision should contact experienced counsel to make sure that their company is current on all of the latest developments in this area of the law.



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