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LEGAL UPDATE

August 22, 2018

To: Superintendents, Member School Districts (K-12)

**From: Loren W. Soukup ^{LS}
Senior Associate General Counsel**

**Subject: New Test for Classification of Independent Contractors
Memo No. 17-2018**

The California Supreme Court issued a decision on April 30, 2018 in the case of *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, which created a new “ABC” test for classifying independent contractors. The case involved a wage order class action lawsuit filed against a courier and delivery service company, Dynamex, which had converted all of its courier drivers from employees to independent contractors to save on costs.

The Supreme Court threw out the previous six-factor independent contractor test set forth under *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 49 Cal.3d 341, as it applied to California Wage Orders, and adopted the new “ABC” test.

Under the new “ABC” test, a worker is presumed to be an employee and the employer has the burden to establish that all of the following three conditions apply in order to classify a worker as an independent contractor:

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 such work and in fact. Example: Construction company was able to establish that worker was free of the company’s control and direction where the worker set his own schedule, worked without supervision, purchased all materials used on his own credit card, and had declined an offer of employment proffered by the company because the worker wanted control over his own activities¹;

¹ *Great N. Construction, Inc. v. Department of Labor* (Vt. 2016) 161 A.3d 1207.



B) The worker performs work that is outside the usual course of the hiring entity's business. Example: Retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line²; and

C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed by the hiring entity. Example: Same-day pickup and delivery service did not establish that bicycle courier was engaged in an independently established business as there was no evidence that courier "held himself out as an independent businessman performing courier services for any community of potential customers" or that he "has his own clientele, utilized his own business cards or invoices, advertised his services or maintained a separate place of business and telephone listing."³

If an employer cannot establish all three factors, the worker will be deemed an employee, not an independent contractor.

While it is unclear whether this decision will apply to claims not arising from a California Wage Order, failure to meet the new legal test could result in back pay and fines for failure to pay federal Social Security and payroll taxes, unemployment insurance, workers compensation benefits, and for violation of various federal and state statutes and regulations governing retirement, wages, and hours. As such, we recommend that educational agencies reevaluate their current independent contractor relationships to ensure compliance with the "ABC" standard.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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² *Enforcing Fair Labor Standards in the Modern American Sweatshop* (1999) 46 UCLA L. Rev. 983.

³ *Boston Bicycle Couriers v. Deputy Dir. Of the Civ. Of Empl. & Training* (2002) 56 Mass.App.Ct. 473.