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LEGAL UPDATE

February 25, 2021

To: Superintendents/Presidents/Chancellors, Member
Community College Districts

From: Jennifer Henry, Associate General Counsel *J.H.*

Subject: California Supreme Court Makes its *Dynamex* Decision
Retroactive – More of the Employee vs. Independent
Contractor Saga
Memo No. 05-2021(CC)

In a Ninth Circuit federal lawsuit about worker misclassification, the California Supreme Court was asked to issue a decision on whether its contentious *Dynamex* decision should be applied retroactively. On January 14, 2021, the Supreme Court decided that *Dynamex* applies retroactively, to all pending independent contractor misclassification cases that were filed before the *Dynamex* decision (April 2018). (*Vasquez v. Jan-Pro Franchising International, Inc.* (2021) 10 Cal.5th 944.) The Court cited to the general rule that judicial decisions are given retroactive effect.

A Brief Summary of California’s Employee versus Independent Contractor Saga

Borello: In 1989, the California Supreme Court established a six-factor test to determine whether a worker can be classified as an independent contractor for purposes of the workers’ comp setting. These factors are: A) separate business location (which can be a residence); B) business license; C) can negotiate own pay rate; D) can set own hours (within reasonable business hours and deadlines); E) customarily engaged, or available, in the same type of work with other hiring entities; and F) customarily exercises discretion and independent judgment. (*S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations* (1989) 48 Cal. 3d 341 (1989).)

Dynamex: In 2018, the California Supreme Court ruled that for employers subject to Industrial Welfare Commission (IWC) orders (i.e. not applicable to local educational agencies (“LEAs”)), their workers were employees unless the employer could meet a new three-factor “ABC” test: A) free from control and direction of the employer; B) performs work outside the usual course of employer’s business; and C) customarily engaged in an independently established trade. (*Dynamex Operations West, Inc. v. Superior Court* 4 Cal. 5th 903 (2018).)



AB 5: In January 2020, a new law went into effect for all employers *including* LEAs, adopting the Dynamex ABC test for an employer to demonstrate that a worker was an independent contractor.

It included exemptions such as the “business to business” scenario in which the more flexible *Borello* test plus additional factors could be used. Here is the link to our Legal Update on AB 5: <https://sclscal.org/legal-update-memo-no-25-2019-ab-5-independent-contractors-k-12/>

AB 2257: AB 2257 went into effect September 2020, clarifying and amending AB 5 to add more exemptions such as content contributors, exchange programs, and referral agencies. Here is the link to our Legal Update on AB 2257: <https://sclscal.org/legal-update-memo-no-30-2020cc-ab-2257-revises-ab-5-regarding-independent-contractors-ccd/>

Implications of this Latest Development for California Public Employers

The *Dynamex* “ABC” test will be applied to all misclassification cases that were filed before *Dynamex* (April 2018) but are not yet final. Courts will also apply *Dynamex* to newly-filed actions for conduct from before *Dynamex*’s 2018 ruling that is still within the statute of limitations. Review any pending litigation at your LEA to determine if you are impacted by this decision.

If you need help assessing your independent contractor agreements, or in evaluating your liability in existing pending legal matters related to independent contractor status, please contact our office.

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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