CALIFORNIA SENATE REPUBLICANS

Dynamex Background

With the California Supreme Court's landmark decision in Dynamex Operations W. v. Superior Court, (2018) 4 Cal.5th 903, the independent contracting (IC) business model, a model that is a mutually beneficial to both businesses contracting for services and self-employed individuals providing services, faces an existential threat. While the decision was based upon a narrow set of facts that includes a questionable, if not illegal, business decision to reclassify an entire workforce over a weekend as independent contractors, its impact is broad in application and calls into question virtually every independent contracting arrangement in California that currently exists.

The turmoil created by this decision effects virtually every industry and its workforce in California from beauticians to real estate agents and from construction workers to Gig workers and everything in between. It effects those industries and companies where the IC model is a convenience as well as industries and companies that are dependent upon the IC model (i.e. those in Gig economy).

Prior to this decision, the determination of whether an employer was an independent contractor or employee was based primarily on an 11-factor "economic realities" test known as the "Borello" test, which largely focused on the degree of control the employer has over hours, equipment, and supervision. The test was established by a 1989 California Supreme Court decision in S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48Cal.3d 341. While this test was far from perfect and not without its critics, it was much more flexible and recognized many different situations where an IC relationship is appropriate and makes sense.

The Dynamex decision essentially threw out 29 years of precedence and this near 30-year old test while simultaneously creating an entirely new test. This new test, also known as the "ABC test" is predicated on just three factors, all of which must be met in order for a person to be an independent contractor. It is a one-size-fits-all, far more restrictive and stringent test that, as

alluded to above, makes it very difficult, if not impossible, for many companies and workers currently working under an IC model to continue doing so.

Beyond the impact that Dynamex has on independent contracting prospectively, it is also important to consider the huge financial liability that this decision has if applied retroactively. Unfortunately, those companies depending upon the rules under Borello are now being subjected to the retroactive application of the ABC test. This mean they are facing a financial catastrophe, i.e. four years of back wages, huge penalties and crippling PAGA lawsuits.

In order to save businesses that played by the rules from financial catastrophe, to protect the freedom of individuals to choose when they work, where they work, what they work on and how much they earn and to save the opportunity for companies to have an adaptable and flexible workforce, a more flexible approach for determining employment status must be adopted by the Legislature. By conforming to the Fair Labor and Standards Act "economic realities" test, which has the added benefit of easing compliance, Senate Republicans introduced SB 238 (Grove) earlier this year to offer such an approach.

SB 238 was a holistic approach to addressing the upheaval created by the Dynamex decision and the threat it poses to independent contracting in California. SB 238 was intended to conform California's test for determining employment status to the "economic realities test" established by the federal Fair Labor Standards Act (FSLA), which is predicated on 6 factors that are considered when determining whether an employee is economically dependent upon the employer. By conforming California rules for determining employment status with the rules under the FSLA, SB 238 would have protected employees from misclassification, allowed for independent contracting in those industries and workplace situations where independent contracting make sense, and make compliance a little easier for businesses.

For more on the Senator Grove's intent with this bill see her Orange County Register editorial published March 6th, 2019 (https://grove.cssrc.us/content/california-legislature-should-protect-not-limit-workers-freedom-choice)