



CALIFORNIA SENATE REPUBLICANS

SB 238 – Dynamex Bill Factors For Determining Employee Status

SUMMARY

SB 238 will conform California’s test for determining employment status for purposes of wage orders to the test established by the federal Fair Labor Standards Act. This “economic realities test” is predicated on 6 factors that determine whether an employee is economically dependent upon the employer:

1. The nature and degree of control by the principal.
2. The worker’s opportunities for profit and loss.
3. The amount of the worker’s investment in facilities and equipment.
4. The permanency of the relationship.
5. The required skill necessary for success.
6. The extent to which the services rendered are an integral part of the principal’s business.

EXISTING LAW

Existing law as established in the case of *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 (Dynamex) creates a presumption that a worker who performs services for a hirer is an employee. The law also requires a 3-part test, commonly known as the “ABC” test, to establish that a worker is an independent contractor for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission.

PROBLEM

The independent contracting model has been under assault in California for a number of years. It culminated on April 30, 2018 with the California Supreme Court’s landmark decision in *Dynamex Operations W. v. Superior Court*, (2018) 4 Cal.5th 903, where the Court, in throwing out 29 years of precedence and a near 30-year old test, created an entirely new test for determining whether an individual is an independent contractor or an employee.

Prior to this decision, the determination of whether an employer was an independent contractor or employee was based upon the 1989 California Supreme Court decision in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48Cal.3d 341, where the Court created an 11 point “economic realities” test. This 11-point test known as the “Borello” test largely focused on the degree of control the employer has over hours, equipment, and supervision.

The new ABC test is a one-size-fits-all, far more restrictive and stringent test consisting of just three factors that makes it very difficult, if not impossible, for many companies and workers currently working under an independent contractor model to continue doing so.

In fact, it puts the livelihood of nearly two million Californians who choose to work as independent contractors at risk. It negatively impacts contractors from all types of industries such as barbering and cosmetology, agriculture, education, health care, construction, technology, transportation, and art just to name a few.

It is particularly problematic to the new “Gig” economy that thrives on and requires the flexibility provided by the independent contracting model. This decision will also disproportionately affect the young, diverse and educated workforce who are increasingly choosing to be freelancers and independent contractors.

It also eliminates the choice that more and more Californians are making for their work and quality of life.

THE SOLUTION

SB 238 will allow hard working Californians to be independent contractors again. As such, they will no longer have to worry about the government forcing them to become employees. According to a 2018 Bureau of Labor Statistics Economic report, 79 percent of independent contractors prefer their work situation to traditional employment and a 2017 survey revealed that most full-time workers who left their jobs made more money as a freelancer within a year.

If California is really the land of opportunity, the Legislature needs to protect workers’ rights and freedoms to ensure they have the ability to choose when they work, where they work, what they work on, and how much they earn.