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Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

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CHANGES TO DETERMINATION OF INDEPENDENT CONTRACTOR OR EMPLOYEE IN WORKERS' COMPENSATION

A recent decision from the California Supreme Court has changed the calculus for determining what constitutes an independent contractor versus an employee with effects that may reach into the workers compensation realm. *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903, involves a same-day courier service that reclassified their drivers as independent contractors in 2004 as a cost savings measure. The decision followed state and federal regulatory agencies declaring the misclassification of workers as independent contractors a serious problem. The Court noted that businesses gain an unfair competitive advantage by misclassifying their workers as independent contractors by making the employee assume the fiscal and other responsibilities that normally are the employer's burden. This deprives the state and federal government of billions of dollars in tax revenue and deprives workers of labor law protections.

The lawsuit was brought in 2005 alleging a misclassification of its drivers as independent contractors. The Court in *Dynamex* addressed the standard for employee or independent contractor test for the purposes of California wage orders.

The Court in *Dynamex* took a look at historically relevant case law, with particular attention paid to *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). The *Borello* decision addressed the issue of

classification of farm workers as independent contractors or employees for the purposes of workers compensation benefits. The decision held that the salient issue is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired". The *Borello* court looked to the following factors in this determination:

- The right to discharge at will without cause;
- Whether the one performing the services is engaged in a distinct occupation or business;
- The kind of occupation, with reference to whether in the locality the work is usually done under the direction of the principal or by a specialist without supervision;
- Skill required in the particular occupation;
- Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- Length of time for which the services are to be performed;
- Method of payment, whether by the time or by the job;
- Whether the work is part of the regular business of the principal; and
- Whether the parties believe they are creating the relationship of employer-employee

The Court in *Dynamex* noted that the *Borello* decision emphasized the statutory purpose as the relevant factor in whether a worker should be considered an employee or an independent contractor when creating a determinative test. The Court noted that following the *Borello* decision, the legislature did not disagree with the statutory purpose standard adopted by *Borello*. This suggests that *Borello* is still controlling for workers compensation purposes.
In *Dynamex* the Court found that none of the prior tests were controlling for the purposes of California wage orders, and adopted the ABC test, which states that a worker is presumed to be an employee unless the employer proves all three of the following factors:

(A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
(B) The worker performs work that is outside the usual course of the hiring entity's business; and;
(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

The Court held that this test applied retroactively. The *Dynamex* decision spawned action from the State legislature, with representatives bringing bills AB-5, AB-71, and SB-238 as potential legislation.

AB-5 seeks to codify and clarify the *Dynamex* decision, applying the "ABC" test to all provisions of the Labor Code and Unemployment Insurance Code. The bill also includes statutory exceptions, such as licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, workers providing hairstyling or barbering services, electrologists, estheticians, workers providing natural hair braiding, licensed repossession agencies, and those providing work under a contract for professional services with another business entity or pursuant to a subcontract in the construction industry, would apply the *Borello* test in their stead.

AB-71 seeks to statutorily overturn *Dynamex*, going back to the multifactor test. This bill was most recently referred to the Assembly Labor and Employment Commission.

SB-238 also seeks to legislatively overturn *Dynamex*, but would limit the determinative factors to: (a) nature and degree of control by the principal; (b) worker's opportunities for profit and loss; (c) amount of the worker's investment in facilities and equipment; (d) permanency of the relationship; (e) required skill necessary for success; (f) extent to which the services rendered are an integral part of the principal's business. SB-238 failed to pass in committee, with reconsideration being granted.

AB-5 has passed the California Senate and Assembly and Governor Gavin Newsom has signed the bill which will go into effect on January 1, 2020. The passing of this bill will potentially result in a large expansion as to the classes of workers entitled to workers compensation benefits.