

# One Minute Memo®



## Definition of “Employment” Differs According to Claim Being Made

By David D. Kadue and Alison Loomis

Just in time for Halloween, we have another scary opinion from the California Court of Appeal.

Until relatively recently, California honored the tradition that service providers were independent contractors so long as they qualified as such under common law tests. Then a 2010 decision by the California Supreme Court, in *Martinez v. Combs* (not an independent contractor case), announced that courts could determine employment status on the basis of a Wage Order’s expansive definition of “employ”: “to engage, suffer, or permit to work.”

Now, in *Dynamex Operations West v. Lee*, the Court of Appeal tells us that individuals making a claim arising under the Wage Orders can rely on the “engage, suffer, or permit to work” standard, in lieu of the common law standard, to challenge their classification as independent contractors.

### The Trial Court Decision

Delivery drivers Charles Lee and Pedro Chevez sued Dynamex Operations West for unlawfully classifying them and 1,800 other drivers as independent contractors. To argue that they were really employees, they cited IWC Wage Order No. 9 as well as the California Labor Code. Their motion for class certification argued that, under *Martinez v. Combs*, they were employees in that Dynamex knew that they provided services and in that Dynamex had negotiated their rates. The trial court certified the class. Dynamex petitioned the Court of Appeal for a writ of mandate.

### The Appellate Court Decision

The Court of Appeal granted the petition in part, agreeing with Dynamex that the common law definition of employment should control any claim that fell outside the scope of Wage Order No. 9 (such as a claim for reimbursement of employee expenses), and that for any such claim the trial court should reevaluate whether class certification is warranted by using the common law test. That test would examine Dynamex’s right to exercise control over the contractor’s manner and means of providing services. As to claims arising under the Wage Order, however, the Court of Appeal denied the petition, determining that the trial court had correctly used the broader “engage, suffer, or permit to work” standard.

### What *Dynamex* Means for Businesses that Have Independent Contractors

*Dynamex* suggests that while some claims remain subject to the common law test for employment, other claims (such as a claim for unpaid minimum wages) are also subject to the broader “engage, suffer, or permit” definition of employment that appears in the Wage Orders.

*Dynamex* did not squarely answer the employer's protest that a mechanical reliance on a "engage, suffer, or permit" test would effectively eliminate the use of independent contractors in California. The Court of Appeal thus ignored the implication of the point that any principal that contracts with a service provider is thereby engaging (as well as suffering or permitting) someone to work.

One possible explanation of *Dyanmex's* reasoning is that the "engage, suffer, or permit" test does not wholly supplant the common law test for independent contractor status, but rather simply supplants one aspect of that test—the "right to control" aspect—while leaving employers free to rely on the various secondary factors that also traditionally co-determine the status of an independent contractor.

Among these factors are: (1) Is the contractor engaged in a distinct trade or occupation, providing services available to the general public, producing results for more than one principal at a time, or hiring and supervising assistants? (2) Is the work done without the principal's supervision? (3) Is the work highly skilled and specialized? (4) Who furnishes the tools, equipment, materials, supplies, and place of work? (5) Are the services provided on a long-term or repetitive basis? (6) Is the contractor paid based on time worked or on completion of the project? (7) Are the services an integral part of the principal's business? (8) What type of relationship do the parties believe they are creating? (9) What is the extent of the principal's actual control? Can the contractor terminate the relationship without liability?

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**Seyfarth Shaw LLP One Minute Memo® | October 28, 2014**

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