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High Court Applies "ABC" Test When Assessing Independent Contractor Status

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Seyfarth Synopsis: The California Supreme Court, in Dynamex Operations v. Superior Court, held that "engage, suffer or permit to work" determines employee status for Wage Order claims, requiring a defendant disputing employee status to prove (A) the worker is free from control and direction of the hirer in connection with performing the work, both under contract and in fact; (B) the worker performs work outside the usual course of the hiring entity's business; and (C) the worker customarily engages in an independently established trade, occupation, or business of the same nature as the work performed for the hirer.

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 California's Industrial Welfare Commission Wage Order No. 9. Their motion for class certification argued that, under *Martinez v. Combs* (2010), they were employees in that Dynamex knew that they provided services and had negotiated their rates. The trial court certified a 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 applying the common law. That test would examine Dynamex's right to exercise control over the contractor's manner and means of providing services. As to Wage Order-related claims, though, the Court of Appeal denied the petition, determining that the trial court had correctly used the broader "engage, suffer, or permit to work" standard.

The Issue Before the Supreme Court

In reviewing the case, the California Supreme Court defined the issue on appeal as whether, in a misclassification case, a class may be certified based on the expansive definition of employee as outlined in the Wage Order language construed in *Martinez v. Combs*, or on the basis of the common law test for employment set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989). In short, the Supreme Court focused on whether to continue using the *Borello* test and on what test, if any, to apply instead.

The Wage Order definition of employment is broader than the common law's. The Wage Orders define "employ" broadly to mean "to engage, suffer or permit to work." In contrast, *Borello* focuses instead on a multi-factor balancing test that depends on each situation's unique facts, a test that more readily recognizes the existence of an independent contracting relationship.

The Supreme Court Decision

On April 30, 2018, the Supreme Court upheld, and expanded upon, the Court of Appeal's ruling: For Wage Order claims, the "engage, suffer or permit" standard determines if a worker is an employee or an independent contractor. The Supreme Court also held that, to evaluate whether a worker is an employee under this language, courts should use the so-called ABC test that other jurisdictions have used.

The ABC test presumes that a worker hired to perform services is an employee of the hiring business, subject to the hirer's ability to provide all three of the following elements:

(A) The worker is free from the hirer's control and direction in connection with performing the work, both under contract and in fact.

(B) The worker performs work that is outside the usual course of the hirer's business.

(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

The Supreme Court conceded that the phrase "suffer or permit" cannot be interpreted literally in a manner that would encompass workers—such as independent plumbers or electricians—who have traditionally been viewed as genuine independent contractors and who work only in their own independent business.

What *Dynamex* Means for Businesses that Have Independent Contractors

Businesses now have more guidance in understanding the meaning of "suffer or permit to work." Indeed, the ABC test encompasses factors already present in the common law *Borello* test.

For all non-Wage Order claims, the common law test still applies. And the scope of the decision by its nature is limited to those defendants who have hired the plaintiff.

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