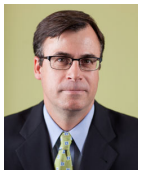
The Trucking Industry Absorbs yet another blow at the hand of the California Supreme Court

Thoughts on the Dynamex Decision



by Paul B. Mello & William D. Taylor

Many California courts, politicians and regulators seem intent on attacking trucking and transportation companies. The California Supreme Court ‘s April 30, 2018 *Dynamex Operations West Inc. v. Superior Court* (Case No. S222732) decision is the latest example of this assault on the industry. Much has already written about this decision and it’s ramifications in California when testing whether independent contractor drivers should be considered to be employees of the motor carriers with whom they contract. Once again, as is to often the case, the Court failed to give consideration to the fundamental reality that independent contractors prefer to be independent, operating their own business enterprises without wanting or needing to be deemed employees.

In *Dynamex*, the California Supreme Court modified the test for determining whether a worker is an independent contractor for purposes of California wage orders. The Court expanded the definition of "employee" and rejected its long-standing independent contractor test. Under this new standard, workers are **presumed to be employees**, meaning that more workers will be subject to minimum wage, overtime pay, and other wage and hour laws.

In expanding the definition of an employee, the Court adopted the California's Industrial Welfare Commission's definition of employment, which defines "employ" as “engage, suffer or permit” to work. The Court concluded that the wage order’s "suffer or permit to work" definition must be interpreted broadly to treat as “employees,” and thereby provide the wage order’s protection to, **all** workers who would ordinarily be viewed as **working in the hiring business**. In doing so, the Court moved away from its more flexible analysis in the 1989 decision, *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations,* 48 Cal. 3d 342 (1989). Under the multi-factor *Borello* test, the most significant factor in determining the existence of an employment relationship is whether the putative employer has the right to control the manner and means by which the worker performs the work.

Rather than relying of the longstanding *Borello* test, the Court instead adopted the so-called **“ABC” test**, which is utilized in other jurisdictions in a variety of contexts to distinguish

employees from independent contractors. Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes:

(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; ***and***
(B) that the worker performs work that is outside the usual course of the hiring entity's business; ***and***
(C) that 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.

Under the ABC test the burden is on the employer to establish that the worker is an independent contractor by establishing each of the three factors. Failure to prove any one of these prerequisites means that the worker is an employee for purposes of the wage order

In applying its test to the instant transportation case, the Court upheld the lower court's certification of a class of delivery drivers. First (after skipping part A of the ABC test), the Court found that there was a sufficient commonality of interest as to whether part B of the ABC test was met because the hiring entity was a delivery company and the question of whether the work performed by the delivery drivers within the certified class is outside the usual course of its business was clearly amenable to determination on a class basis. Second, with regard to part C of the ABC test, the Court found that it was "equally clear" that there was a sufficient commonality of interest as to whether the drivers in the certified class were customarily engaged in an independently established trade, occupation, or business to permit resolution of that issue on a class basis because the class of drivers certified by the trial court was limited to drivers who performed delivery services only for Dynamex.

Like many other law firms who are focused on digesting, prognosticating and advising clients and industry representatives regarding the ultimate impact of the *Dynamex* decision on various industries, and particularly, the transportation industry, in which independent contractor relationships are prevalent and long-standing, attorneys at Hanson Bridgett have been atthe forefront of assisting motor carrier clients with the dynamics of operating in California. In particular, and pre-*Dynamex*, Hanson Bridgett attorneys have assisted clients in implementing the so called “Broker Model“ (sometimes referred to as the “Settlement Model“), which now has even greater significance as an important strategy to defend against Dynamex’s ultimate ABC scrutiny. The ultimate goal of the Model is to take the “sole-proprietor” out of the leasing equation.

If a motor carrier who currently contracts with individual or non-FMCSA licensed entity independent contractors is interested in learning more about this option and how it works, please contact members of Hanson Bridgett’s Transportation and Logistics Law Team.

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