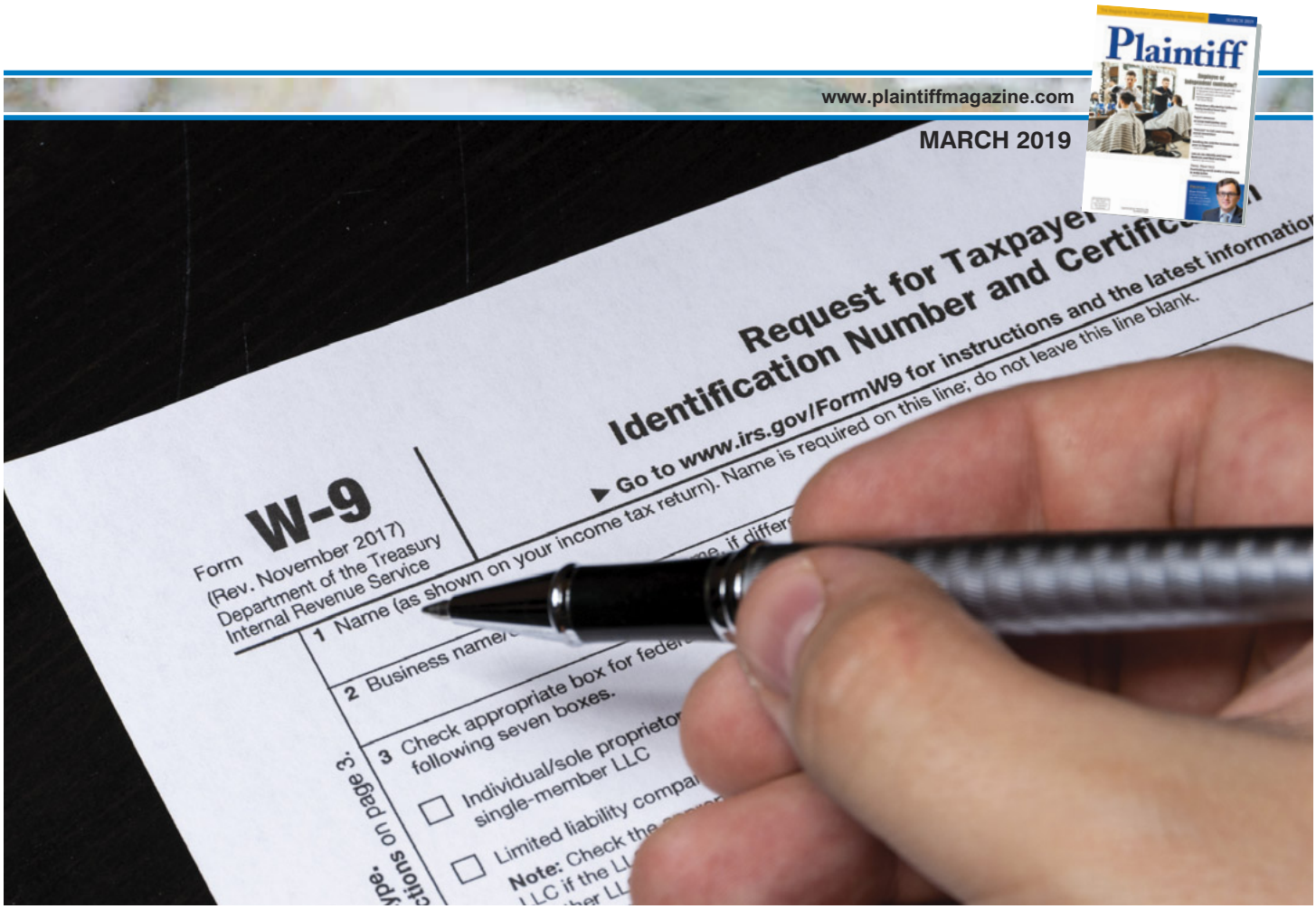

Employee or independent contractor?

The California Supreme Court's ABC test in *Dynamex* nears the one-year mark and there is confusion as to when that standard applies

By Bill Jhaveri-Weeks

The California Supreme Court created waves in employment law in April 2018 when it adopted a new test for distinguishing employees from independent contractors under California's wage orders in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. The wage orders set forth requirements for minimum wages, maximum hours, and meal- and rest-breaks, among others. From the perspective of worker advocates, the decision was a victory, making it clearer that certain low-skilled workforces, especially in the so-called "gig" economy, are covered by the basic protections in the wage orders. As *Dynamex* approaches its one-year anniversary, this article recaps the decision itself, describes cases that have applied it or will soon do so, and discusses competing legislative proposals that would either solidify *Dynamex*'s ABC test or reject it.

The *Dynamex* decision

California's wage orders afford protections to "employees" but not independent contractors. The California Supreme Court had previously held that the term "to employ," as used in the wage orders, encompasses three alternative definitions, any one of which will establish an employer-employee relationship: 1) to exercise control over wages, hours, or working conditions; 2) to suffer or permit to work; or 3) to engage, thereby creating a common law employment relationship. (See *Martinez v. Combs* (2010) 49 Cal.4th 35.) Although the first and third definitions are familiar, well-worn standards, the phrase "suffer or permit to work" presents confusion: When a business hires a plumber to fix its office sink, the business "permits" him or her to

work, but does not "employ" the plumber, who is a classic independent contractor. In *Dynamex*, the Court provided needed guidance about the meaning of the "suffer or permit" standard.

The Court adopted a simple test known as the "ABC test," which is in use in other states. Under the test, all workers are presumed to be employees, and will be deemed to be independent contractors only if "the hiring business demonstrates that the worker in question satisfies each of three conditions: (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 the 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 that involved in the work performed." (*Dynamex*, 4 Cal.5th at 955-56.) The Court admired the simplicity of the ABC test, noting that other tests with a long list of factors to be balanced, such as California's common law "*Borello*" test for employment, have the disadvantage of requiring workers and employers alike to guess about how a court would balance those factors. The *Dynamex* Court also opined that the ABC test would be less susceptible to employer efforts to deny wage and hour protections to workers whom the wage orders were meant to protect.

The *Dynamex* holding is explicitly limited to the wage orders. The Court pointed out that the question of how to define "employment" under any given statute requires an analysis of the language and purpose of that statute.

Cases applying *Dynamex*

The ABC test has the virtue of simplicity, and it also lends itself well to class certification. On the other hand, the *Dynamex* decision has given rise to complexity in other ways. It has led courts to apply different definitions of "employment" for different causes of action in the same case, different definitions of "employment" for an employer and its alleged joint employer, and different preemption outcomes for transportation workers depending on whether the ABC test or the common law *Borello* test is at issue.

With respect to class certification, the fact that an employer's failure to satisfy just one of the three prongs will result in misclassification works in favor of commonality and predominance. For example, in *Johnson v. Serenity Transportation, Inc.*, 2018 WL 3646540, at *11 (N.D. Cal. Aug. 1, 2018), the Court certified a class of mortuary drivers, observing, with respect to prong B, that "whether Plaintiffs provide services within Serenity's usual course of business is subject to common proof because Serenity defines itself as a mortuary transportation service and all drivers perform the same work: mortuary delivery services." Prong C also supported certification: "because drivers perform the same work, the question of whether drivers are customarily engaged in an independently established trade, occupation, or business can also be resolved on a class-wide basis." In contrast, the common law *Borello* test requires a totality-of-the-circumstances balancing of many factors, which presents more opportunity for defendants to argue that individualized issues will predominate. (See, e.g., *Rosset v. Hunter Eng'g Co.*, 2018 WL 4659498 (Cal.Ct.App. Sept. 27, 2018) (unpublished case in which *Borello* factors applying differently among proposed class members supported denial of certification).)

In light of *Dynamex's* limiting of the ABC test to the wage orders, Courts have found that different tests apply to claims that do not arise under the wage orders. This gives rise to the unappealing possibility that workers could be deemed employees for purposes of overtime protection but independent contractors for purposes of, for example, the right to reimbursement of business expenses under Labor Code section 2802. In *Garcia v. Border Transportation Group, LLC*, (2018) 28 Cal.App.5th 558, the plaintiff was a cab driver bringing claims under the applicable wage order as well as non-wage order claims. The trial court, pre-*Dynamex*, had ruled that he was an independent contractor under the common law *Borello* test. The Court of Appeal held that *Dynamex* compelled reversal with respect to the wage order claims, because the defendant, a cab company, had not met its burden to show that the plaintiff cab driver was customarily engaged in an independently established trade (prong C of the ABC test). However, the Court stated that the *Borello* test would apply to the plaintiff's non-wage order claims, which the Court then addressed in an unpublished portion of its opinion. The Court did limit that conclusion, noting: "we express no opinion on the appropriate test on different records in other situations." (*Id.* at 571 & n.11.)

Similarly, a court considering the employee-independent contractor question under the Labor Code's Domestic Workers Bill of Rights ("DWBR") followed *Dynamex's* admonition that such analysis might differ depending on the language and purpose of the statute in question. In *Duffey v. Tender Heart Home Care Agency, LLC*, (2019) 3 Cal.App.5th 232, the plaintiff was a caregiver claiming she had been misclassified as an independent contractor and was owed overtime under the DWBR. Because the case did not arise under the wage orders, and because the DWBR does not include the phrase "suffer or permit," the court did not apply the ABC test. Looking at the language and purpose of the DWBR, the court articulated a test that incorporated the *Borello* factors and the "control over wages, hours or working conditions" test, reversing the lower court's grant of summary judgment to the employer on the employee-independent contractor issue.

When defining the term "employ" in the wage orders in the context of whether a company was plaintiff's joint employer, a Court of Appeal panel –

perhaps surprisingly – concluded that *Dynamex* did not apply. In *Curry v. Equilon Enterprises, LLC*, (2018) 23 Cal.App.5th 289, the plaintiff was a worker at a Shell gas station claiming unpaid overtime and missed break periods. Shell leased its gas stations to smaller operating companies, and the question was whether Shell, in addition to a small operating company, was the plaintiff's "employer" under the applicable wage order. Although the Court was construing the same phrase as *Dynamex* ("suffer or permit"), it concluded that "it does not appear that the Supreme Court intended for the 'ABC' test to be applied in joint employment cases." The logic behind the conclusion is certainly subject to counterarguments. In "an abundance of caution," the Court went on to analyze the ABC factors, and found that Shell had not "employed" the plaintiff. Among other things, the court concluded that, under prong B, the plaintiff was performing work "outside the usual course of [Shell]'s business" because Shell was "in the business of owning real estate and fuel," while the plaintiff was working for the smaller operating company in the business of operating fueling stations.

Recent decisions have concluded that the ABC test and the *Borello* test have different preemption outcomes for transportation workers covered by the Federal Aviation Administration Authorization Act ("FAAAA"). In *California Trucking Assoc. v. Su* (9th Cir. 2018) 903 F.3d 953, the Ninth Circuit held that the FAAAA does not preempt the *Borello* test, because the *Borello* test does not relate directly to motor carrier services. That case did not implicate the wage orders, so the Court concluded that *Dynamex* had no impact on the decision, although the court noted that "the ABC test may effectively compel a motor carrier to use employees for certain services because, under the ABC test, a worker providing a service within an employer's usual course of business will never be considered an independent contractor." Based upon this language, a district court later concluded that the FAAAA *does* preempt the ABC test, because by compelling motor carriers to use employees rather than independent contractors, the ABC test directly "relates" to a motor carrier's services. (*Alvarez v. XPO Logistics Cartage LLC* (C.D. Cal. Nov. 15, 2018) 2018 WL 6271965.)

Thus, the admirably simple ABC test has resulted in some complexity in the initial wave of decisions applying *Dynamex*.

Upcoming gig economy cases

In the realm of the smartphone-based "gig" economy, a number of cases present upcoming occasions for courts to apply the ABC test.

Before *Dynamex*, Uber and Lyft litigated two of the most closely watched cases testing the employee-independent contractor distinction in the gig economy. The Lyft case was settled, and the Uber case continues after the court rejected a proposed settlement – both companies continue to classify their drivers as independent contractors, and it appears that both will be on the front lines again in testing the effect of *Dynamex*.

In *Diva Limousine, Ltd. v. Uber Technologies, Inc.* (N.D. Cal. Jan. 9, 2019) 2019 WL 144589, a livery company sued Uber for unfair competition, arguing that under the ABC test, Uber was gaining an advantage by unlawfully classifying its drivers as independent contractors. The case is before Judge Chen, like the prior Uber misclassification case.

Lyft has been sued again by drivers claiming misclassification. (See *Whitson v. Lyft, Inc.*, 18-cv-6539-VC (Complaint filed Oct. 26, 2018).) Both cases are being heard by the judges who, respectively, presided over the original Lyft and Uber cases.

In *Lawson v. Grubhub, Inc.* 2018 (N.D. Cal. Nov. 28, 2018) WL 6190316, the Court had ruled against a Grubhub worker on the independent contractor issue after a PAGA bench trial. The case was on appeal when *Dynamex* was issued, and the district judge has since issued an opinion stating that if *Dynamex*'s ABC test applies retroactively – a question with far-reaching implications – there would be strong grounds for vacating the judgment. Briefing before the Ninth Circuit is scheduled to be complete in March 2019.

These cases will determine whether *Dynamex* transforms the gig economy, unless the Legislature steps in first.

Legislative action? In which direction?

After *Dynamex* came down, the gig economy companies moved quickly on the lobbying front, sending a joint letter from Uber, Lyft, Instacart, DoorDash, Postmates, TaskRabbit, and many others to Governor Brown seeking action against the decision. (See *Bloomberg*, "Gig Firms Ask California to Rescue them From Court Ruling" (Aug. 5, 2018).) Advocates on either side of the issue will be supporting competing bills introduced in the California Assembly in December 2018. Bill AB 5 would expressly adopt the *Dynamex* ABC test into the Labor Code, while also clarifying the reach of the decision in ways that are yet to be hashed out. Bill AB 71 would reject the ABC test altogether and establish the *Borello* test as the general test for independent contractor status.

From the perspective of worker advocates who have been troubled by private employers' use of smartphone technology to harness massive workforces without abiding by the protections of California labor laws, *Dynamex* is a significant step in the right direction. However, as described above, the application of *Dynamex* in its first year of existence has led to some practical inconsistencies that would benefit from legislative improvement, including a statement that the ABC test applies consistently to Labor Code claims and the wage orders alike.


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