



Appellate Reports

Cal Supreme Court says *Dynamex* decision on employees vs. independent contractors is retroactive

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Classification of workers as employees or independent contractors; *Dynamex*; whether the *Dynamex* decision is retroactive: *Vazquez v. Jan-Pro Franchising International, Inc.* (2021) __ Cal.5th __ (Cal. Supreme)

In *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, the California Supreme Court held that under one of the definitions of “employ” set forth in all California wage orders – namely, to “suffer or permit to work,” – any worker who performs work for a business is presumed to be an employee who falls within the protections afforded by a wage order. The Court further held that such a worker can properly be found to be “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; (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.” (*Id.* at pp. 916-917.)

This standard, also used in other jurisdictions to distinguish employees from independent contractors, is commonly referred to as the “ABC test.”

In *Vazquez*, the Court held that its decision in *Dynamex* applied retroactively, “that is, to all cases not yet final as of the date our decision in *Dynamex* became final.” In reaching this conclusion, the Court relied primarily on the fact that *Dynamex* addressed an issue of first impression. It did not change a settled rule on which the parties below had relied. No decision of this court prior to *Dynamex* had determined

how the “suffer or permit to work” definition in California’s wage orders should be applied in distinguishing employees from independent contractors. Particularly because the Court had not previously issued a definitive ruling on the issue addressed in *Dynamex*, it saw no reason to depart from the general rule that judicial decisions are given retroactive effect.

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