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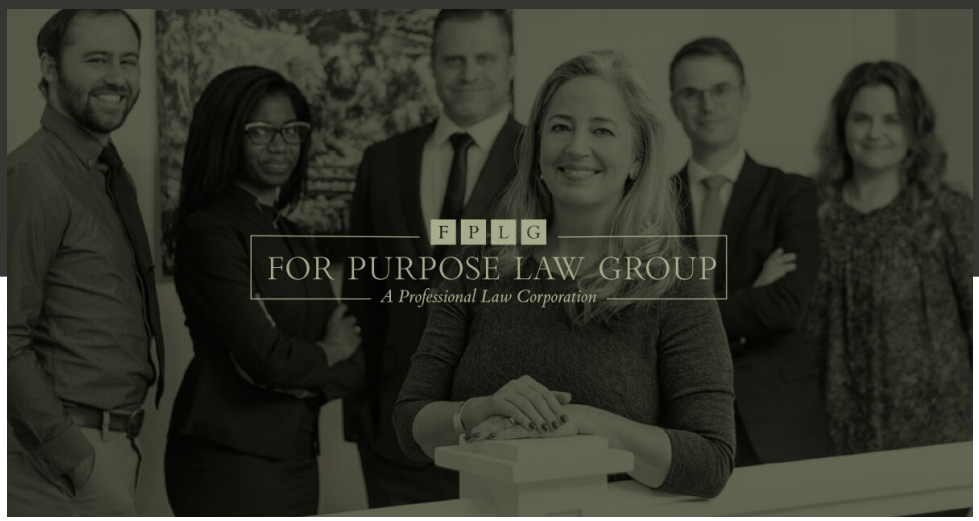
California Employers in a Post Dynamex World

05.23.18 | Linda J. Rosenthal, JD



A recent California Supreme Court ruling has the potential to ***significantly*** impact all California employers, including nonprofit organizations.

Appropriately classifying workers as either employees or as independent contractors has never been easy. We've written about it in the past. Nonprofits and start up businesses are often tempted to simply pay those who provide services for the organization as independent contractors – simply because it's easier to do, and in the case of nonprofits – the burden of keeping track of payments is often placed on the shoulders of a volunteer.

Now, however, this kind of skin-deep evaluation of appropriate classification can lead to ***BIG*** problems.

The Old Classification Test

Previous to the Court's decision in *Dynamex Operations v. Superior Court*, the primary method to evaluate appropriate classification was known as the *Borello Test*. Basically, the analysis hinged on whether the employer had control over, or the right to control, the worker both as to the ***work done*** and the ***manner and means in which it was performed***. Further, there was a plethora of "additional" considerations that could come into play, including:

- Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
- Whether or not the work is a part of the regular business of the principal or alleged employer;
- Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
- The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;

- Whether the service rendered requires a special skill;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- The alleged employee's opportunity for profit or loss depending on his or her managerial skill;
- The length of time for which the services are to be performed;
- The degree of permanence of the working relationship;
- The method of payment, whether by time or by the job; and
- Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

As you can imagine, employers (and the lower courts) were all over the place on how these criteria should be weighed.

The NEW Classification Test

So along came the *Dynamex* case, wherein the California Supreme Court completely rejected the previous test in favor of a more stringent three-factor approach modeled after those in place in Massachusetts and New Jersey, often referred to as the "ABC" test.
Under this new test, ***all workers are presumptively considered employees*** and an individual will be considered an independent contractor ***only if*** the hiring entity can prove ***all three of the following:***

(A) The worker is ***free from the control and direction of the hiring entity*** in connection with the performance of the work, both under contract and for the performance of the work and in fact; **AND**

(B) The worker performs the work that is ***outside the usual course of the hiring entity's business***; **AND**

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

To summarize… what the court held in Dynamex is that ***most workers that are classified as independent contractors are actually employees under California law.***

Limited (For Now) to Wage Orders

As things currently stand, the *Dynamex* opinion is limited to "wage orders" — which are features of California's particular legal and regulatory regime. At least for now. However the Court left open whether this test would also apply to other statutes, such as those governing claims for failure to pay workers' business expenses (Cal. Labor Code sect. 2802).
In a post *Dynamex* world, it's more important than ever for California employers to correctly classify their workers (and it's more likely than not that the worker you're trying to classify is an employee). After all, misclassifying workers can have a potentially large impact on all California employers because if a worker should be classified as an employee, the ***employer bears responsibility for paying federal social security and payroll taxes, unemployment insurance taxes and state employment taxes as well as providing workers compensation insurance.***

Further, employees, unlike independent contractors, are protected by an extensive body of laws regulating the work place, including wage and hour and discrimination laws, among many, and significant penalties exist for misclassifying employees as independent contractors, including the potential for costly tax audits by the EDD.