
# Classification and the importance of *Dynamex*

## California's new test for independent contractors is crucial to protecting more workers, and we hope the ruling soon goes further

**By Katie Bain, Katie Debski and Amber Bissell**

Employees in California have numerous protections, from the right to be free from discrimination, harassment, or retaliation, to the right to take time off from work for a serious medical condition or the birth of a child. California law also protects employees by ensuring they get paid for their hours worked, including overtime, that they get reimbursed for business expenses, and are provided with meal and rest periods. However, the vast majority of these laws do not apply to independent contractors, which is a big problem for those workers who have been misclassified by their employers.

Perceived as a victory for workers, in April 2018, the California Supreme Court issued a decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, which significantly simplified the test for whether or not a worker is an independent contractor from the previously used *Borello* test. *Borello* had applied a subjective and ambiguous list of 11 factors which left much open to interpretation and also impeded class certification.

*Dynamex* was limited to misclassification claims brought under the wage orders, so *Borello* still applies to many other types of misclassification claims. Under *Dynamex*, the Court held that there is a presumption of an employment relationship whenever an employer "suffers or permits" an individual to work. The employer can only defeat that presumption if it satisfies all three prongs of the ABC test (a simplified test which has been adopted in other states):

(A) that the worker is free from the control and direction of the hiring entity 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 the work performed.

The California Legislature is also considering codifying this test, and Assembly Bill 5 is currently being discussed in the Capitol (along with some other bills that


attempt to override the ruling and codify *Borello*). AB 5[1] would add Section 2750.3 to the Labor Code, establishing the ABC test as the method for determining whether someone is misclassified as an independent contractor for the purpose of all Labor Code claims, not just those brought under the wage orders.

So how would AB 5 practically impact California workers and what are the benefits of being classified as an employee versus an independent contractor?

For some Californians, being misclassified as an independent contractor may appear harmless or even desirable. However, when an employer characterizes a worker as an independent contractor, there may only be an illusion of autonomy, control, and freedom. In practice, misclassification as an independent contractor allows an employer to potentially exploit their workers by, for example, demanding that they use their own equipment and bear the costs associated with their jobs, but still subject them to specific working hours, duties, expectations, and timelines, to which a genuine independent contractor would not be subject.

Common in the tech industry, these independent contractors may work long hours, be subject to harsh non-competiton and indemnification agreements, and are at the beck and call of their employer. Oftentimes an independent contractor may sit next to an employee, doing the very same job, but lacking the same benefits.

Despite working as an employee would, these so-called independent contractors are not imbued with the same privileges and protections (monetary and non-monetary) that an employee receives. An employee's taxes, retirement, health insurance, workers' compensation insurance, disability and unemployment benefits, among others, are often adversely impacted when they are classified as an independent contractor. Additionally, independent contractors are not protected to nearly the same extent as employees from discrimination, harassment, or retaliation, and are often deprived of the right to take off time for a disability or for the birth of a child. Most importantly, an independent contractor does not have the same options for recourse when an employer acts in bad faith.

The *Dynamex* decision will better protect misclassified employees, and AB 5 would go an important step further to offer those protections in a broader range of circumstances under the California Labor Code (e.g., certain types of whistleblower claims, business expense reimbursement and indemnification, etc.). We hope, however, that Dynamex's important holding and policy considerations soon apply to an even wider variety of claims to encompass the employment issues our clients confront every day. This article outlines the benefits of having the status of an employee in light of the *Dynamex* decision and possible AB 5 legislation, and ideally, what will eventually be adopted for employment claims across the board.

## The Fair Employment and Housing Act

The Fair Employment and Housing Act, or FEHA, is the primary anti-discrimination law in California . . . for *employees*. Independent contractors are not protected under the majority of FEHA, leaving them little recourse if their employer violates FEHA. The law, codified at Government Code section 12940 et seq, makes it illegal:

> For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.[2]

Notably, the code only applies to employers, and only provides protection to employees and applicants for employment, which means independent contractors are typically out of luck if they experience discrimination in a work relationship. The same is true for the retaliation protections under FEHA, which makes it unlawful: "For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."[3]

The term "any person" under the retaliation code section has been interpreted by courts to be consistent with FEHA's discrimination provision which only allows for employers, and not individuals, to be held liable.[4] Thus, independent contractors who experience discrimination or retaliation at their places of employment have no legal recourse under FEHA.

The only section of FEHA that applies to independent contractors is the prohibition against harassment, which makes it unlawful for any person to harass any person providing services pursuant to a contract:

> For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract.[5]

While it is helpful that independent contractors cannot be harassed at their jobs, the law ultimately fails independent contractors, especially when considering


that if an independent contractor complains to his or her supervisor or the company's Human Resouces department about the harassment and then experiences retaliation as a result, including possible termination of his or her contract, he or she would have no legal recourse for the retaliation.

### The Pregnancy Disability Leave Law and California Family Rights Act

California's Pregnancy Disability Leave Law (PDLL)[6] and California Family Rights Act (CFRA) provide protections for employees who need time off from work due to pregnancy, child birth, baby bonding, serious medical conditions, or to care for family members with serious medical conditions. However, both laws apply only to employees, so independent contractors have no protections if they need time off work for these reasons. Unfortunately, this means that an independent contractor can be terminated from their job due to their pregnancy or need for medical leave and would have absolutely no legal recourse.

### The California Labor Code

One of the primary incentives for employers to misclassify workers as independent contractors is to get around complying with the California Labor Code. The Labor Code provides employees with numerous protections, including the right to be paid a minimum wage[7], the right to take meal and rest periods[8], the right to overtime compensation[9], and the right to be reimbursed for business expenses necessarily incurred in the course of their duties[10]. Employers who treat their workers as independent contractors avoid all of these laws, and can therefore pay the contractors whatever amounts they want.

Moreover, employees have the right to file a complaint with the Division of Labor Standards Enforcement (DLSE), a free forum where they can have their wage claims adjudicated with or without an attorney helping them, while independent contractors have few options other than to file breach of contract claims in court, which is expensive and usually requires the assistance of legal counsel (although a misclassified independent contractor can argue at the DLSE that he or she was misclassified and seek related statutory penalties).

Our firm often gets calls from employees with minor wage and hour violations that would make little sense to file in court on an individual basis, as the expenses of litigation would far outweigh the employee's potential recovery, but we are able to direct them to the DLSE where they can have their disputes heard and remedied without any out-of-pocket expense. Independent contractors have no similar option (unless they can first establish at the DLSE that they were misclassified).

The Labor Code also provides protections for employees who complain of illegal conduct in the work place,[11] as well as those who complain of unsafe work conditions.[12] Specifically, Labor Code section 1102.5 makes it illegal for employers to retaliate against whistleblower employees who complain about conduct made illegal by a state or federal law or regulation, and Labor Code section 6310 makes it illegal for employers to retaliate against employees complaining of safety issues in the workplace. Neither of these laws applies to independent contractors, which means that they have no incentive to complain about illegal or unsafe work conditions, as they will have no protection if they experience retaliation as a result.

### Other employee protections

Some workers do not understand the full tax and public benefits ramifications they suffer when they are misclassified as independent contractors. Independent contractors are ineligible for unemployment and state disability benefits, and have to pay self-employment taxes which can be a large financial burden on the worker. Moreover, they are not covered by the employer's workers' compensation insurance, so if they are injured at work and don't carry their own insurance, they have no protection.

Our firm handled a case where this was an issue, as our client was injured doing construction work as an "independent contractor" (under the new *Dynamex* standard, there would have been no question that he was an employee), and his employer did not carry workers' compensation insurance. Our client was seriously injured and had no recourse, as the employer was running a small, unprofitable business and could not afford to pay for our client's treatment or wage loss incurred from missing work due to his injuries. This was devastating to our client as he had a wife and two small children he supported and he suffered permanent physical injuries that would forever prevent him from doing the physical labor he had done his entire life up to that point. Had the company carried workers' compensation insurance and correctly classified our client as an employee, he would have had all of his medical expenses covered and would have received compensation for his wage loss.

### The Unruh Civil Rights Act

There are also laws that may appear to help independent contractors, but ultimately may fail to remedy the situation. For example, California's Unruh Civil Rights Act makes it unlawful for businesses to deny "full and equal accommodations" on the basis of "sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status."[13]

The Unruh Act has been used to obtain protection for independent contractors experiencing discrimination in business relationships, but it does not apply to employment relationships, which has created some confusion for people bringing claims. If someone is classified as an independent contractor but is treated more like an employee, the Unruh Act would not apply.


In one case, a physician, who was classified as an independent contractor, was permitted to bring a discrimination claim under the Unruh Act.[14] However, in another similar case, the Court held that the physician was essentially treated the same as an employee and dismissed his case under the Unruh Act.[15]

In the first case, *Payne v. Anaheim Memorial Medical Center*, the court explained, "Payne alleged . . . that Anaheim Memorial operates the hospital as a business, and makes its facilities available to physicians for use in surgery and other treatment of patients. He further alleges that Anaheim Memorial breached the provisions of the act when it failed to address racist conduct which impaired the access of minority physicians and patients to that facility. We think those allegations, if proven, are sufficient to state a claim."[16]

However, in the second case, *Johnson v. Riverside Healthcare System, LP*, the Court held that Johnson was too much like an employee to bring a claim under the Unruh Act: "California law continues to require a plaintiff asserting a claim under § 51 to demonstrate that his relationship with the offending organization was "similar to that of the customer in the customer-proprietor relationship."[17] Thus, the Unruh Act cannot be relied upon to provide contractors with the same protections they would have as employees, and the new ABC test could go a long way to prevent situations like that in the *Johnson* case from continuing to occur, were this test adopted for these types of claims.

## Uber and Lyft drivers

One of the most controversial and largescale independent contractor classification issues arises with ride-sharing companies like Uber and Lyft (not to mention Uber Eats, Postmates, Door Dash, etc.). Uber reported that it has 148,000 drivers in California as of December 2017[18], and Lyft had 163,000 drivers in California as of May 2016 when they settled a class action claim related to misclassification.[19] Under the prior *Borello* test, companies like Uber and Lyft had stronger arguments supporting their decision to classify drivers as independent contractors. However, under *Dynamex* (which has been applied retroactively) and the pending legislation AB5, these types of companies will have a difficult time getting around the ABC test, (particularly part B, requiring that the worker performs work that is outside the usual course of the hiring entity's business) which will have a huge impact on these companies and numerous California workers.

It will be interesting to see how *Dynamex* impacts Silicon Valley. Many tech startups, and even larger well-established companies, hire "independent contractors" (either on their own or through a staffing agency), allowing them to work from home, from their own computers, and on their own schedules. However, their substantive work is dictated primarily by their employer and goes to the core of that employer's business. Such a situation illuminates the downfalls of *Borello's* balancing test when considering the model of many tech companies. As the *Dynamex* decision points out, there is nothing that prevents an employer from offering this type of workplace flexibility while also properly classifying such workers as employees and affording all the related benefits and legal protections.

## Conclusion

As plaintiffs' employment lawyers, we believe the *Dynamex* decision will better protect misclassified employees, and are hopeful that AB 5 passes so that *Dynamex* can have a broader reach. While there are some legitimate independent contractor situations (for example, if our firm were to hire an IT person to fix our computers), many of the people being classified as independent contractors in California are actually employees. Employers are using the independent contractor classification to avoid the expense associated with having employees (payroll taxes, adherence to wage and hour laws, and the requirement to carry workers' compensation insurance, to name a few), and the result is that workers are left without many of the legal protections to which they are entitled. *Dynamex* is a good first step to stop employers who abuse the system to cut costs, and it will ensure that more workers are correctly classified as employees so that they can enjoy more of the protections that California laws have to offer.

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**Endnotes on next page**


[1] http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5
[2] Cal. Govt. Code section 12940(a)
[3] Cal. Govt. Code section 12940(h)
[4] *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal.4th 1158, 1167-1168
[5] Cal. Govt. Code section 12940(j)(1)
[6] Cal. Govt. Code section 12945(a)
[7] Cal. Labor Code sections 1182, 1194, 1194.2, 1197
[8] Cal. Labor Code sections 226.7 and 512
[9] Cal. Labor Code sections 510 and 1194
[10] Cal. Labor Code section 2802
[11] Cal. Labor Code section 1102.5
[12] Cal. Labor Code section 6310
[13] Cal. Civ. Code section 51(b)
[14] *Payne v. Anaheim Mem. Med. Ctr., Inc.* (2005) 130 Cal.App.4th 729, 745-746
[15] *Johnson v. Riverside Healthcare System*, *LP* (9th Cir. 2008) 534 F 3d 1116, 1126
[16] *Payne, supra,* 130 Cal.App.4th 746
[17] *Johnson, supra,* 534 F 3d 1126
[18] https://www.sfchronicle.com/business/article/Uber-drivers-in-Bay-Area-made-1-07-billion-last-13105699.php
[19] https://www.usatoday.com/story/tech/2016/05/11/lyft-agrees-27-million-settlement/84257158/