9th Circuit Applies Strict Independent Contractor Test, Dynamex, Retroactively

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Last year, we questioned whether California's new restrictions on independent contractors would apply retroactively. Yesterday, the Ninth Circuit decided that the landmark ruling in *Dynamex Operations West, Inc. v. Superior Court* should be applied retroactively.

The new test established in *Dynamex* upended the *Borello* test, a multi-factor test that had been in use since 1989. The "ABC test" established in *Dynamex* makes it much harder for a hirer to classify a worker as an independent contractor, requiring the hirer to prove that the worker is: a) free from the control and direction of the hirer; b) the worker performs work outside of the usual course of the hirer's business; and c) the worker is customarily engaged in an independently established trade of the same nature as the work performed. With the Ninth Circuit holding that *Dynamex* should be applied retroactively, an employer must now face the possibility that its once valid and correct classification of a worker is now improper.

Generally, judicial decisions are given retroactive effect. It has been an open question as to whether the Supreme Court's *Dynamex* test would apply retroactively after the Supreme Court denied a petition for rehearing to consider that very issue. Considering the magnitude of this decision, employers should not only make sure that new workers are classified correctly according to *Dynamex*, but should revisit existing independent contractor agreements to verify they conform to the standards established by *Dynamex*.

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