Finding a Third Path in Bridging the Employee/Contractor Divide

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By **Katherine A. Roberts and Katharine M. Miner** | March 26, 2019 at 07:42 PM

Less than one year after the California Supreme Court's decision in *Dynamex Operations West v. Superior Court* upended long-settled questions on independent contractor and employee classifications, stakeholders on both sides of the debate are gearing up for a legislative fight to define *Dynamex*'s reach.

Dynamex overturned nearly 30 years of precedent, replacing the multi-factor *Borello* analysis with the much narrower "ABC" test. Under the "ABC" test, workers are presumed to be employees unless the employer can demonstrate the worker: (a) 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; (b) performs work that is outside the usual course of the hiring entity's business; and (c) is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. An example given by the court is that a plumber or electrician hired to do work at a retail clothing store would be an independent contractor, but a seamstress who works from home for a clothing manufacturer would be an employee.

Because *Dynamex's* "B" and "C" elements require a much higher degree of business autonomy than that possessed by most independent contractors in gig, tech, and other industries, *Dynamex* placed contractor relationships in legal limbo and caused panic across California's business community. Reclassifying workers as employees, and providing the attendant protections and benefits required under California law, may prove too onerous or unfeasible for certain industries. As a result, many independent contractor jobs may fundamentally change or disappear.

Advocates for labor and industry wasted no time staking out their positions in response to *Dynamex*. When the current legislative session began on Dec. 3, 2018, labor advocates introduced Assembly Bill 5, which seeks to codify *Dynamex*'s "ABC" test. Assembly Bill 5 touts *Dynamex* as a win for workers, the middle class, and the state, as the recipient of otherwise-uncollected tax revenue. California businesses and their advocates, on the other hand, introduced Assembly Bill 71, which would provide a legislative mandate restoring the *Borello* test. In a June 2018 letter to the California legislature, industry warned that *Dynamex* will "destroy" millions of independent contractor jobs and the businesses that rely on them.

Instead of rehashing their familiar positions, both sides may want to consider a new approach. Since the explosion of the tech and gig economies, new work relationships have emerged which do not fit neatly into binary employee/independent contractor classifications. As noted in an article by the Hamilton Project at the Brookings Institution, *A Proposal for Modernizing Labor Laws for Twenty-First-Century*

Work: The "Independent Worker," many gig and tech industries involve "triangular" relationships between workers, intermediaries, and customers. These workers, such as those driving for well-known ride companies or delivering groceries, retain a significant amount of autonomy over their work lives, choosing whether, when and for whom to work. However, they are not independent business people, making significant capital investments, engaging customers on their own and setting their own rates.

This evolution in work relationships is a reality. Corresponding changes in the legal framework defining and regulating those relationships could serve all interests in this debate well. Consideration of the economic realities of new industries and types of work, and the practicality of enforcing existing regulations on these categories of employers and workers is critical to developing a fitting legislative response. To that end, some, such as the Hamilton Project, have proposed a third classification of worker who would receive some of the benefits and protections bestowed on employees, but maintain the flexibility of an independent contractor desired by many of these workers. Such an out of the box solution might best serve the interests of everyone – those seeking to protect workers, the workers seeing to maintain flexibility, and the employers who while needing a workforce, also need to stay in business.

This third classification might offer some but not all benefits of employment to workers who are not independent contractors under *Dynamex*, but also are not in traditional employer/employee relationships. Benefits offered might include worker's compensation, payroll tax and wage withholdings and discrimination and harassment protections. Likewise, employers could choose to offer health insurance, SDI and other pooled benefits. These changes would increase employers' costs but would likely not fundamentally change the nature of the work.

Regulations that require retrospective calculations and apportionment of liability, however, are less practical. Meal and rest periods, overtime, and unemployment insurance are fraught with accounting and time-keeping complications not just for employers but for workers as well. For example, if a worker is free to work for multiple employers in the same day, setting her own schedule with each, which employer should be responsible for her meal and rest breaks? And, what if the gig workers does not want that break? Overtime and regular-rate calculations create similar dilemmas. Many wage and hour regulations are also not sufficiently aligned with the nature of the flexible work to justify their imposition. A worker who is unrestricted in determining when and how many hours she works does not offer the same compelling justification for overtime pay as the employee whose work schedule and hours worked are largely controlled by her employer. Similarly, offering unemployment insurance to workers whose work is indefinite by nature is impractical.

Many industries and employers may prefer to hark back to the independent contractor status test under *Borello*. Following the *Dynamex* ruling, and with a Democratic supermajority in the legislature, such hopes are far-fetched. A more realistic best-case scenario for employers is a compromise that avoids the worst, potentially industry-destroying consequences of *Dynamex*, but offers workers some of the benefits of a typical employee-employer relationship. Further, well-drafted legislation defining a new category of worker could create more certainty for employers.

In sum, a creative solution that reconciles labor's demands for greater worker protections with the needs of California's businesses and preferences of workers may be the best path forward for all stakeholders post-*Dynamex*.

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