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# *The California Supreme Court Holds* Dynamex *Is Retroactive*

By Jeffrey Wohl

The California Supreme Court has held that its ruling in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), which made it harder to establish that a worker is an independent contractor rather than an employee under the California Wage Orders, applies retroactively. *Vazquez v. Jan-Pro Franchising Int'l*, No. S258191, 2021 Cal. LEXIS 1 (Jan. 14, 2021). Although, because of the running of the statute of limitations, the immediate effect of *Vazquez* will be limited, for those cases in which it applies, the ruling is important. *Vazquez* also sets forth the court's definitive analysis of when its decisions should be given retroactive effect, which is very significant as employers consider future court rulings and how they may affect current employment practices, especially when it comes to wage-and-hour law.

## Dynamex

In *Dynamex*, the California Supreme Court ruled that the "ABC test" is used to determine whether a worker is deemed an employee or an independent contractor under the California Wage Orders. Under the ABC test, a worker is presumed to be an employee unless the hiring entity can show *all* of the following:

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

B. the worker performs work that is outside the usual course of the hiring entity's business; *and*

C. 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.

In so ruling, the court rejected the more forgiving standard it used in *S.G. Borello & Sons v. Dept. of Industrial Relations*, 48 Cal. 3d 341 (1989). In *Borello*, the court applied the common-law multi-factor approach to decide whether farmworkers treated as independent contractors were entitled to workers' compensation benefits.

Following *Dynamex*, the California Legislature enacted Assembly Bill 5, which extended the ruling in *Dynamex* to virtually all of California's employment laws, and not just the Wage Orders, with a number of occupational exceptions. Those exceptions were further expanded by the passage by California voters last fall of Proposition 22, which exempts transportation workers in the so-called "gig economy" from AB 5 and *Dynamex*.

### *Vazquez*

*Vazquez* came to the California Supreme Court as a certified question from the U.S. Court of Appeals for the Ninth Circuit, which wanted a definitive ruling whether *Dynamex* should be afforded retroactive effect. The complaint in *Vazquez* was brought by a franchisee of the defendant, who alleged he should be deemed the defendant's employee. The Ninth Circuit did not know whether *Dynamex* should apply because the plaintiff's claims arose before *Dynamex* was decided. Although the California Supreme Court answered the Ninth Circuit's question—*Dynamex* is retroactive—it did not address the Ninth's Circuit's analysis regarding the application of *Dynamex* to a franchise arrangement.

In *Vazquez*, the court reaffirmed that as a general proposition, cases interpreting a statute or regulation are retroactive, because they do not make new law, but rather give meaning to existing law. In *Dynamex*, the court interpreted the meaning of "employ" under the California Wage Orders, which define "employ" as to "engage, suffer, or permit to work." After reviewing prior relevant California decisions, the court held that the "suffer or permit" standard had been described as "the broadest definition" of employment, intended to extend the coverage of a statute or regulation to "the widest class of workers that reasonably fall within the reach of a social welfare statute." Consistent with that intention, the court held, a worker should be presumed to be an employee unless the hiring entity can rebut the presumption by satisfying all three prongs of the ABC test. In *Vazquez*, the court reasoned, because *Dynamex* was interpreting the "suffer or permit" standard embodied in the Wage Orders, it should be given retroactive effect.

Although California case law recognizes exceptions to retroactivity, the court held none of them applied to *Dynamex*. The court noted that *Dynamex* did not overrule any of its precedents or any prior decision by the California Court of Appeal. *Borello* did not count, the court reasoned, because that case decided a different issue—what standard for employment should be used under the workers' compensation statute, not the Wage Orders. Moreover, the court held that *Dynamex* did not disturb settled employer expectations because not only did the case not overturn precedent, but years before *Dynamex* the court had on two occasions made clear that the correct interpretation of the "suffer or permit" standard was undecided. *See Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 531 (2014); *Martinez v. Combs*, 49 Cal. 4th 35, 73 (2010).

The court also rebuffed the argument that employers reasonably could not have anticipated that in interpreting the "suffer or permit" standard, it would adopt the "ABC test," rejecting "the contention that litigants must have foresight of the *exact* rule that a court ultimately adopts in order for it to have retroactive effect." (Emphasis in original.) On the contrary, the court said that its prior decisions put employers on fair notice that a broad interpretation likely would be placed on "suffer or permit."

Finally, the court also found no unfairness in applying *Dynamex* retroactively, because of the policy considerations favoring the protection of employees under wage-and-hour law as well as "those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices."

### Significance of *Vazquez*

As the court acknowledged, because of the operation of the statute of limitations, the immediate effect of *Vazquez* is limited: since *Dynamex* was decided more than two years ago, only those cases with timely claims preceding the decision can take advantage of its retroactive effect. Of course, for those cases, the ruling is very important, because the pro-employment ABC test will be applied to them.

Still, more broadly, *Vazquez* is significant for all employers in California, because it sets forth the Supreme Court's most current and definitive pronouncement of when its decisions should be given retroactive effect. *Dynamex* was not the only case, especially in the wage-and-hour context, that has unsettled employer understandings and expectations of the law. With the very real threat of unforeseen decisions given retroactive effect and producing unexpected substantial liabilities, *Dynamex* should serve as a reminder to employers that the law can take unexpected turns and twists. Diligent monitoring of current legal developments is essential to a robust compliance program.

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