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NEWSLETTER

California Adopts Stricter Test for Independent Contractors

On April 30, 2018, the California Supreme Court, in the case *Dynamex Operations West, Inc. v. Superior Court*, adopted a new, stricter test for determining whether workers are employees or independent contractors under California wage orders. Under the new standard (the "ABC test"), workers are presumed to be employees unless the employer demonstrates each of the following factors:

A. The worker is free from the control and direction of the hirer in connection with the performance of the work, both under contract for the performance of such 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.

The previous standard used for classifying workers as employees or independent contractors was based upon a multifactor test that considered, among other factors, the level of control exercised over the worker, the right to discharge without cause, the worker's skill, whether the company or the worker supplied the tools to perform the work, the length of time for which the services are to be performed, the method of payment (by the time or by the job), and the nature of the business.

Under the Court's ruling, workers in California are presumed to be employees and it is the employer's burden to satisfy the three "ABC" factors in order to lawfully classify the worker as an independent contractor instead of an employee.

Under Part A of the test, the Court held that a worker, who is subject, either as a matter of contract or in actual practice, to the type and degree of control a business typically exercises over an employee, is considered an employee, even if the employer does not control the precise manner or details of the work.

Under Part B of the test, the Court held that workers whose services are provided within the usual course of the company's business will be considered employees. As an example of the test in Part B, the court stated that a plumber hired by a retail store to repair a bathroom leak is not performing work that is part of the store's usual business and would therefore be considered an independent contractor of that store. However, when a clothing manufacturer hires a work-at-home seamstress to make dresses from cloth and patterns supplied by the company (even though the worker determines when to perform the work), or when a bakery hires a cake decorator to work on a regular basis on its custom-designed cakes, the worker is part of the company's usual business operation and would probably be considered an employee.

Under Part C of the test, the company will need to show that the worker is independently engaged in a trade or business. This generally means that the person has taken the usual steps to establish and promote his or her independent business, such as through incorporation, licensure, business locations and phones, and advertisements.

As a result of this opinion, employers should carefully consider the new ABC standard when determining whether a worker should be classified as an employee or as an independent contractor.

This is a brand new standard which will require every company to reevaluate everyone to whom they pay compensation to determine how they should be treated for overtime and tax reporting purposes.