DYNAMEX RETROACTIVE? YES, BUT …

On April 30, 2018, the California Supreme Court handed down a key decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. This ruling, a landmark in the state's labor law, set out the requirements for companies to classify workers as independent contractors. It was later made into law in 2019 by AB 5.

Nearly three years later, in January of 2021, the Supreme Court in *Vasquez v. Jan-Pro Franchising International, Inc.* (2021) ___ Cal.5th ___, went even further, confirming in a unanimous ruling that the *Dynamex* holding applies retroactively. This has significant implications for all companies doing business in California. Essentially, the decision and the follow-up legislation are backed by organized labor, have their eye on the so-called "gig economy" and make it much, much harder for workers to be classified as independent contractors rather than employees.

A little background. In 2018, the *Dynamex* holding replaced the so-called Borello standard, which established a multi-factor test for determining whether a worker was an employee or an independent contractor, largely based on the company's control over the worker. *Dynamex* adopted a new "ABC test" which, rather than requiring a worker to prove they're an employee, assumes they are unless the employer can demonstrate that the worker is: (A) not under the company's control; (B) doing work that's outside the company's usual course of business; and (C) is customarily engaged in an independently established trade, occupation or business.

Following this decision, and the enactment of AB5, a key question remained unanswered – would the new ruling and test be applicable retroactively? In other words, could the test be applied (and lawsuits be filed) against companies for activities prior to the issuance of the *Dynamex* decision in 2018? In *Vasquez*, the court responded with a firm "Yes". Actually, however, it's more of a "Yes, but …"

Dynamex will now apply to cases that were filed, but not decided, in April 2018 as well as claims involving events prior to April. There are, however, a number of factors that limit its impact. First, under Proposition 22, which voters approved in November of last year, app-based drivers (Uber, Lyft, etc.) are exempt. Second, for a variety of reasons, whether *Dynamex* and *Vasquez* apply to a given work or workers is very fact-based – many jobs are not affected, depending on the job that's being done and the nature of the case.

And finally there's the limitations period. In California, the statute of limitations for labor-related lawsuits is, in general, three years. So, even if *Dynamex* is applicable, because the decision was

handed down on the last day of April, 2018, the retroactive window is getting closer and closer to being fully closed, and at the end of April, 2021, it will close for good.

There may or may not be a flurry of last-minute filings prior to the end of April, but as always, if you suspect the employee/independent contractor issue may be a live one for you, consult with counsel. In fact, before deciding to categorize someone working for your organization, you should consult with counsel to make sure the person qualifies as an independent contractor either under the ABC test or an exception to the rule.

If you have questions, contact the head of our labor and employment practices group, Gregory J. Norys, at (559) 248-4820 or gnorys@ch-law.com.

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