

**California Trucking Association's
Dynamex Litigation Strategy Webinar:
How You Can Help**

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**Ogletree
Deakins**
Employers & Lawyers, Working Together

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Agenda

- Overview of the Dynamex Decision and New Test
- CTA's Lawsuit
- How Can You Help
- Other Cases

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Overview

- In April 2018, California adopts an ABC test for determining whether a worker is an employee or an independent contractor under the California wage orders.
- The new ABC test replaces the 29-year-old *Borello* test, which is a multi-factor test based primarily upon a company's "right to control" the worker.

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The *Dynamex* Case – How Did We Get Here?

- Dynamex is a nationwide package and document delivery company that operates business centers in California.
- Plaintiffs were two individual delivery drivers who alleged, on behalf of themselves and other similarly situated drivers, that they were misclassified as independent contractors rather than employees.
- Filed suit in California Superior Court alleging claims under the Industrial Welfare Commission Wage Order 9 and various Labor Code provisions.

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The *Dynamex* Case – How Did We Get Here?

- Trial court certified a class who did not themselves employ other drivers and did not do delivery work for other delivery businesses.
- Trial court relied upon the three alternative definitions of “employ” and “employer” set forth in Wage Order 9 as those definitions were discussed in the California Supreme Court case, *Martinez v. Combs* (2010) 49 Cal.4th 35.
- Trial court rejected application of the multi-factor *Borello* test as the only appropriate standard for distinguishing employees and independent contractors.

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The *Dynamex* Case – What Is the New Test?

- Court looked to past Supreme Court cases interpreting the wage orders in favor of a broad interpretation of the wage order’s definition of “suffer or permit to work” in order to “provide the wage order’s protection to, all workers who would ordinarily be viewed as working in the hiring business.”

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The Dynamex Case – What Is the New Test?

- “[I]t is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California’s wage orders, to interpret that standard as:
 - (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order’s coverage; and
 - (2) requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test.”
- Court looked to apply some limiting test and settled on the ABC test from Massachusetts.

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The Dynamex Case – What Is the New Test?

- Under the ABC test adopted by the court, a worker is properly considered an independent contractor *only* if the company hiring the worker establishes **all** of the following:
 - (A) the worker is free from the control and direction of the hiring company “in connection with the performance of 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 company’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.
- Failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor.

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The Dynamex Case – Prong B

- Prong B: The worker performs work that is outside the usual course of the hiring company’s business.
 - Expected to be the hardest prong to meet
 - Expands those within the definition of employee to include almost any worker who engages in the same business as the hiring entity
 - Most B prong tests allow two different ways to provide the worker is an independent contractor:
 - Outside the usual course of business

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CTA's Lawsuit

- Filed October 25, 2018 in the federal Southern District of California.
- Named as defendants Cal Attorney General Xavier Becerra, Director of DIR Andre Schoorl, and Labor Commissioner Julie Su
- Asks for a court order declaring that the application of Prong B of the ABC test is preempted by the FAAAA because it directly affects the services, routes, and prices of CTA's members
- Also asks for a court order declaring that the application of the ABC test violates the Commerce Clause of the U.S. Constitution because it unreasonably burdens interstate commerce.

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Our Judge – Roger T. Benitez

- Nominated by President George Bush to the federal bench in 2003.
- Formerly a California superior court judge.
- Has previously issued rulings striking down state laws as unconstitutional



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CTA Lawsuit – Next Steps

- Defendants have been served but have not appeared in the case yet.
- Working with expert(s) to gather and present evidence to the court demonstrating that the ABC test will impact CTA members' services, routes, and prices by effectively eliminating their ability to use independent owner/operators
- Preparing to file a motion for preliminary injunction.

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CTA Lawsuit – How Can You Help

- Seeking additional information from carriers regarding the impact on their services, routes, and prices because they are no longer able to use independent owner-operators.

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Other Pending Cases

- *Western States Trucking Association v. Schoorl*, Eastern District of California, Case No. 2:18-cv-01989-MCE-KJN
- *B&O Logistics, Inc. v. Cho*, Central District of California, Case No. 2:18-cv-05400

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