

# Are Your Employment Arrangements Allowed Under AB 5 and *Dynamex*?

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# Learning Objectives

- ▶ Gain an understanding of the key elements of the *Dynamex* decision and Assembly Bill 5 (Gonzalez) and how this changes California labor law
- ▶ Walk away with questions to consider as you analyze your current employment arrangements and changes that may need to be made
- ▶ Learn about the current legislative and political landscape in California and possible opportunities to build on AB 5 and protect the long term care profession

# Previous Standard: The *Borello* Test

## ► Multi-Factor Test under *Borello* :

-Focuses on the right to control the work

-Other factors:

- whether the one performing services is engaged in a distinct occupation or business;
- the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- the skill required for the occupation;
- whether the worker supplies the instrumentalities, tools, and the place of work
- the length of time for which the services are to be performed;
- the method of payment, whether by the time or by the job;
- whether the work is a part of the regular business of the principal; and
- whether the parties believe they are creating the relationship of employer-employee

# *Dynamex*: What changed?

## ► *Dynamex* and the “ABC” Test:

Worker is presumed an “employee” unless:

- A. The worker 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. 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

# What's the difference?

- ▶ The new ABC Test under *Dynamex* will likely be very difficult to pass
- ▶ In particular, Section B will be the toughest to pass for most workers
  - ▶ Including in the healthcare industry
- ▶ We are seeing many independent contractor class action lawsuits

# Independent Contractors

- ▶ *Vasquez v. Jan-Pro Franchising Int'l* (9th Cir. 2019)
- ▶ *Vasquez* initially held the California Supreme Court's decision in *Dynamex* applies retroactively
- ▶ But in July 2019, the Ninth Circuit granted the defendant's petition for rehearing and withdrew its opinion
- ▶ The Court then stated that an order certifying the question to the California Supreme Court will be filed in due course to determine whether *Dynamex* applies retroactively

# AB 5: Codification of *Dynamex*

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- ▶ Signed on September 18, 2019
- ▶ Effective January 1, 2020
- ▶ Generally, codifies the ABC Test under *Dynamex*



# AB 5: Codification of *Dynamex*

- ▶ Why is AB 5 important?
  - ▶ AB 5 excludes certain situations from the ABC Test, and instead applies the prior *Borello* test
- ▶ Under AB 5, the *Borello* Test still applies to:
  - ▶ Certain persons and organizations licensed by the Department of Insurance
  - ▶ Physicians, surgeons, dentists, podiatrists, psychologists, veterinarians
  - ▶ Lawyers, architects, engineers, private investigators, accountants
  - ▶ Securities broker-dealers, investment advisers
  - ▶ Certain direct sales salespersons
  - ▶ Certain commercial fishermen

# AB 5: Codification of *Dynamex*

- ▶ Under AB 5, the *Borello* Test still applies to:
- ▶ Contracts for “professional services,” if the hiring entity satisfies certain criteria
- ▶ “Professional services” means services that meet any of the following:
  - ▶ Certain marketing services
  - ▶ Certain administrators of human resources
  - ▶ Certain travel agent services
  - ▶ Graphic design
  - ▶ Grant writer
  - ▶ Fine artist

# AB 5: Codification of *Dynamex*

- ▶ “Professional services” means services that meet any of the following:
  - ▶ Services provided by agents licensed by the DOT to practice before the IRS
  - ▶ Payment processing agent through an independent sales organization
  - ▶ Certain photographers
  - ▶ Certain writers
  - ▶ Certain services provided by estheticians, electrologists, manicurists, barbers, or cosmetologists (but several sub-requirements for this)

# AB 5: Codification of *Dynamex*

- ▶ Hiring entity with a contract for “professional services” must satisfy the following criteria for the *Borello* Test to apply:
  - ▶ The individual maintains a business location, which may include the individual’s residence, that is separate from the hiring entity. Nothing in this subdivision prohibits an individual from choosing to perform services at the location of the hiring entity;
  - ▶ If work is performed more than six months after the effective date of this section, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession;
  - ▶ The individual has the ability to set or negotiate their own rates for the services performed;

# AB 5: Codification of *Dynamex*

- ▶ Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours;
- ▶ The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work; AND
- ▶ The individual customarily and regularly exercises discretion and independent judgment in the performance of the services

# AB 5: Codification of *Dynamex*

- ▶ *Dynamex* does not apply to a bona fide business-to-business contracting relationship under certain conditions.
- ▶ Instead the *Borello* Test will apply if ALL of the following are met:
  - ▶ The service provider is free from the control and direction of the contracting business entity in connection with the performance of the work;
  - ▶ The service provider is providing services directly to the contracting business rather than to customers of the contracting business;
  - ▶ The contract is in writing;
  - ▶ The service provider has the required business license or business tax registration;
  - ▶ The service provider maintains a business location that is separate from the business or work location of the contracting business;
  - ▶ The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed;

# AB 5: Codification of *Dynamex*

- ▶ The service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity;
- ▶ The service provider advertises and holds itself out to the public as available to provide the same or similar services;
- ▶ The service provider provides its own tools, vehicles, and equipment to perform the services;
- ▶ The service provider can negotiate its own rates;
- ▶ Consistent with the nature of the work, the business service provider can set its own hours and location of work; AND
- ▶ The service provider is not performing the type of work for which a contractor's license is required

# Retroactive?

- ▶ Is AB 5 retroactive?
- ▶ *Dynamex* and the ABC Test already apply to the Wage Orders and violations of the Labor Code relating to the Wage Orders
- ▶ AB 5 goes into effect January 1, 2020 for all other provisions of the Labor Code (e.g., Labor Code Section 2802 claims)
- ▶ The exemptions are retroactive



# AB 5: Codification Of *Dynamex*

- ▶ In addition to other remedies available, an action for injunctive relief to prevent the continued misclassification of employees as independent contractors may be prosecuted by the Attorney General and certain city attorneys
- ▶ Obviously, these new rules are very complicated, and the courts will likely need to interpret them over time

# Potential Impact for SNFs and ICFs

- ▶ Physical, occupational, and speech therapists?
- ▶ Dietitians?
- ▶ Social workers?
- ▶ Nurses via nurse registry companies?
- ▶ Nurse practitioners?
- ▶ Billing companies?
- ▶ Janitorial services?
- ▶ Gardening services?
- ▶ Cleaning services?
- ▶ Others?

# Potential Impact for SNFs and ICFs

- ▶ Potential business-to-business exemption?
- ▶ If ABC Test applies, what is the “business” for the B-prong of the ABC Test?

# Business to Business Exemption Revisited

- ▶ Two bona fide business entering into a written contract for services:
  - ▶ **The service provider is free from the control and direction of the contracting business entity in connection with the performance of the work;**
  - ▶ **The service provider is providing services directly to the contracting business rather than to customers of the contracting business;**
  - ▶ The contract is in writing;
  - ▶ The service provider has the required business license or business tax registration;
  - ▶ The service provider maintains a business location that is separate from the business or work location of the contracting business;
  - ▶ **The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed;**

# Business to Business Exemption Revisited

- ▶ **The service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity;**
- ▶ **The service provider advertises and holds itself out to the public as available to provide the same or similar services;**
- ▶ The service provider provides its own tools, vehicles, and equipment to perform the services;
- ▶ The service provider can negotiate its own rates;
- ▶ **Consistent with the nature of the work, the business service provider can set its own hours and location of work; AND**
- ▶ The service provider is not performing the type of work for which a contractor's license is required

# Joint Employer Liability

# Joint Employer Liability Post-*Dynamex*

- ▶ What if another company you do business with misclassifies their workers as independent contractors (as opposed to employees)?
- ▶ Joint employer liability?

# Joint Employer Liability Post-*Dynamex*

- ▶ *Curry v. Equilon* (California Court of Appeal 2018)
  - ▶ Class action in which Plaintiffs alleged Shell (owner) and ARS (operator) are joint employers and that Shell was therefore liable for wage and hour violations
  - ▶ ARS was a LLC that had a contract and lease with Shell to operate 15 gas stations throughout San Diego County and employed over 100 people at those stations
  - ▶ Curry was recruited by an ARS employee to manage a gas station
  - ▶ There was no dispute that Curry was employed by ARS
  - ▶ Curry brought class action against Shell alleging she and other workers were misclassified as exempt
  - ▶ Curry alleged that Shell controlled her wages, hours or working conditions, and was thus jointly liable



# Joint Employer Liability Post-*Dynamex*

- ▶ Summary judgment granted in favor of Shell
- ▶ On appeal, court affirmed
- ▶ Court declines to apply *Dynamex* and the ABC Test
- ▶ Court relied on *Martinez v. Combs* and separately examined each of the three alternative definitions and concluded that:
  - ▶ Shell did not exercise control over Curry's wages, hours, or working conditions
  - ▶ Shell did not suffer or permit Curry to work
  - ▶ Shell did not meet the "to engage" standard under the common law employment test

# Joint Employer Liability Post-*Dynamex*

- ▶ It explained that the essence of the common law test “is the **control of details**,” i.e., whether the principal has the right to control the manner and means by which the worker accomplishes the work
- ▶ In addition, the court explained that there are a number of **additional factors** in the equation, including
  - ▶ whether the worker is engaged in a distinct occupation or business
  - ▶ whether, considering the kind of occupation and locality, the work is usually done under the principal’s direction or by a specialist without supervision
  - ▶ the skill required
  - ▶ whether the principal or worker supplies the instrumentalities, tools, and place of work
  - ▶ the length of time for which the services are to be performed
  - ▶ the method of payment, whether by time or by job
  - ▶ whether the work is part of the principal’s regular business
  - ▶ whether the parties believe they are creating an employer-employee relationship.

# Joint Employer Liability Post-*Dynamex*

- ▶ After examining each of the relevant factors, court found that Shell, along with ARS, provided Curry a place to work and the equipment with which she performed her job
- ▶ However, providing a portion of Curry's work location and equipment was insufficient to raise a triable issue of material fact as to Shell being Curry's employer due to the many other factors reflecting Shell is not Curry's employer
- ▶ Court determined that one "could not reasonably conclude that Shell controlled the manner and means by which Curry accomplished her work because Shell did not supervise Curry, Shell did not have input on Curry's skills, Shell did not have control over the length of time Curry performed her job, Shell did not pay Curry, Shell was not in the business of operating service stations, and Shell and Curry did not believe they were creating an employer-employee relationship
- ▶ It thus concluded that Curry's claims failed under the "to engage" definition of employer

# Joint Employer Liability Post-*Dynamex*

- ▶ *Salazar v. McDonald's Corp.* (9<sup>th</sup> Cir. 2019)
  - ▶ Class action in which Plaintiffs alleged McDonald's (franchisor) and franchisee are joint employers and that McDonald's is therefore liable for wage and hour violations
  - ▶ Haynes Family Limited Partnership operated 8 McDonald's franchises. To maintain franchise, Haynes had to meet certain standards, such as serving McDonald's products. McDonald's required Haynes to use its computer systems, and managers took courses with McDonald's (including on topics like meal and rest break policies)
  - ▶ Haynes selects, interviews, hires, and trains employees. Haynes sets wages (paid from Haynes bank account) and schedules. Haynes also supervises, disciplines, and fires employees
  - ▶ There was no dispute that Plaintiffs were employees of the franchisee

# Joint Employer Liability Post-*Dynamex*

- ▶ Summary judgment granted in favor of McDonald's because it did not “retain or exert direct or indirect control over hiring, firing, wages, hours, or material working conditions” and did not “suffer or permit plaintiffs to work, [or] engage in an actual agency relationship” with the franchisee
- ▶ On appeal, Court affirmed

# Joint Employer Liability Post-*Dynamex*

- ▶ Court applied *Martinez v. Combs*
- ▶ Court held that *Dynamex* was irrelevant to the case since no party argued that Plaintiffs are independent contractors
- ▶ 9<sup>th</sup> Circuit agreed that McDonald's did not control "day-to-day" aspects, and franchisors need freedom to impose standards for marketing their trademarked brand in a uniform way
- ▶ Also held that McDonald's did not meet "suffer or permit" definition
  - ▶ The definition pertains to the fact of employment itself, not on whether McDonald's caused Plaintiffs' employer to violate wage and hour laws by giving bad tools or advice (e.g. providing ISP systems with settings that failed to prevent wage and hour violations)
- ▶ Under "common law" definition, McDonald's did not meet principal test of "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired"

# Joint Employer Liability Post-*Dynamex*

- ▶ Application to SNFs and ICFs?

# Strategic Considerations

- ▶ Strategies for reducing risk
  - ▶ Review any existing agreements to determine compliance
  - ▶ Review agreements annually
  - ▶ What should businesses document going forward?
- ▶ Communications with employees, independent contractors, and companies you do business with
  - ▶ Clear expectations
  - ▶ Limitations on risk



# Legislation in 2020

- ▶ Urgency legislation will be introduced with more clarifications/exemptions
- ▶ CAHF in conversations with Legislative Leadership and Chair of Senate and Assembly Health Committee
- ▶ CAHF, CHA and Healthcare Coalition may seek to introduce our own legislation related to AB 5 and health care professionals
- ▶ Challenging political landscape – Democratic supermajority, Labor is strong and deeply rooted in Newsom Administration

# Closing Remarks

- ▶ Final thoughts
- ▶ Questions?

# Thank You For Attending

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