Dynamex Applied Retroactively To Dancers' PAGA Suit

By **RJ Vogt**

Law360 (July 19, 2018, 6:25 PM EDT) -- An Orange County, California, judge said Wednesday the state Supreme Court's groundbreaking Dynamex ruling that carved out a more rigid test for differentiating employees from independent contractors can apply retroactively to a Private Attorneys General Act suit launched by Imperial Showgirls dancers over alleged labor code violations.

In April's Dynamex Operations West Inc. v. Superior Court of Los Angeles County decision, California's high court **rejected a classification test** used in the Golden State for almost three decades, adopting a different standard known as the ABC test that presumes workers are employees instead of independent contractors for purposes of state wage orders — which govern items such as overtime and minimum wage — and places the burden on employers to prove workers aren't employees.

Wednesday's ruling came after Imperial Showgirls and the dancers who have alleged since 2015 that the company violates wage and hour provisions in the state labor code had asked Judge William D. Claster in May to clarify whether Dynamex would be applied in deciding their dispute, which involves the issue of whether the dancers are independent contractors.

The judge held Wednesday that Dynamex, which had been going on for 13 years by the time the Supreme Court issued its landmark decision, was intended to apply retroactively because "it did not state that its decision applied only prospectively."

"Given the age of the claims in the Dynamex case, and given the court's longstanding acknowledgment of its authority to make such a statement ... the lack of such a pronouncement suggests that the decision should apply retroactively," Judge Claster wrote.

"Although not necessarily determinative, the court's later decision to deny requests to modify its decision to state that Dynamex will only be applied prospectively supports this conclusion," he added.

Wednesday's ruling could have far-reaching ramifications in other cases, including **a dispute before the Ninth Circuit** between online meal delivery service Grubhub Inc. and a former driver. In June, both parties to that case filed dueling letters over whether a lower court's finding that the driver was an independent contractor should be reconsidered in light of Dynamex. Tuesday, the appellate court said it would consider remanding the driver's

case if the district court indicates it would entertain similar arguments.

Shannon Liss-Riordan of Lichten & Liss-Riordan PC, who represents both the Imperial Showgirls dancers in Orange County and the driver in the Ninth Circuit case, told Law360 Thursday that Judge Claster's ruling is a good sign for clients like hers.

"The courts are not going to be receptive to these types of arguments, that Dynamex isn't retroactive," Liss-Riordan said. "I'm definitely bringing Judge Claster's ruling to the attention of the Ninth Circuit and the district court in the Grubhub case."

In addition to dealing with Dynamex's retroactive applications, Judge Claster's order Wednesday also considered what kinds of claims Dynamex could cover.

Imperial Showgirls, known as VCG-IS LLC; its owner, VCG Holding Corp.; and consulting company International Entertainment Consultants Inc. had argued that Dynamex only applies to claims seeking to enforce California's wage orders — and thus would not apply to their dispute with the dancers, whose PAGA claims are premised on labor code violations.

But Judge Claster said Wednesday that the labor code "requires compliance with the wage orders."

"The court's holding that the ABC test should be applied to determine employee status under the wage orders can only mean that that test also had to be applied to labor code claims seeking to enforce the wage order requirements," the judge said. "The court concludes that Dynamex's ABC test should be utilized to determine the employee/independent contractor issues in this case. The fact that the case is brought under PAGA does not compel a different result."

The judge went on to note that, for purposes of gratuities, the labor code's definition of who qualifies as an employee is different, "arguably broader," than the definition found in the wage orders. As a result, Judge Claster held that "there is no basis to apply the Dynamex analysis in determining issues relating to the gratuities issue in this case."

Liss-Riordan said her clients' gratuity-based claims — over the defendants' practice of forcing them to share gratuities with the house and tip out other nontipped employees — could benefit from the judge's ruling.

Liss-Riordan also spoke to the final issue Judge Claster considered: whether Dynamex applied to the determination of joint employer status as to VCG Holding, which owns the club where the dancers worked, and IEC, the consulting company. The judge said it did not apply, citing Curry v. Equilon Enterprises LLC, when **a California state appeals court concluded** that the Supreme Court did not intend to apply the ABC test to joint employment issues.

According to Liss-Riordan, however, the Curry decision was issued before Dynamex. She also said that in the dancers' case, "we can still prove joint employer under prior case law."

“But that is an interesting issue that’s going to continue to percolate in California,” she added. “It appears to me that there’s no reason for Dynamex not to apply to joint-employer.”

Counsel for Imperial Showgirls, VCG Holding and IEC did not immediately respond to request for comment Thursday.

The dancers are represented by Shannon Erika Liss-Riordan of Lichten & Liss-Riordan PC and Kashif Haque, Samuel A. Wong and Jessica L. Campbell of Aegis Law Firm PC.

Imperial Showgirls and VCG Holding Corp. are represented by Rassa Ahmadi, Sean Shahabi and Michael Hood of Jackson Lewis PC. The affiliate International Entertainment Consultants Inc. is represented by Shane Cahill and Douglas Melton of Long & Levit LLP.

The case is Oriana Johnson et al. v. VCG-IS LLC et al., case number 30-2015-00802813, in the Superior Court of the State of California, Orange County.

The Grubhub case is Raef Lawson v. Grubhub Inc., case number 18-15386, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Joyce Hanson and Vin Gurrieri. Editing by Bruce Goldman.