Dancers Are Employees Under Dynamex, Calif. Judge Rules

By **RJ Vogt**

Law360 (August 31, 2018, 6:15 PM EDT) -- A California judge ruled Thursday that Imperial Showgirls dancers suing the club in a wage and hour suit should be classified as employees, applying the state Supreme Court's groundbreaking Dynamex ruling to find that the dancers performed work, such as "lap dances," within the usual course of their employer's business.

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.

Judge William D. Claster said **in July** that the Dynamex ruling applied retroactively to the dancers' Private Attorneys General Act suit, which they launched in 2015 to allege Imperial Showgirls violates wage and hour provisions in the state labor code.

That decision led to Thursday's ruling, in which Judge Claster examined whether "the worker performs work that is outside the usual course of the hiring entity's business" as required by the second prong of the ABC test. He found that dancers are central to Imperial Showgirls' business, granting their summary adjudication bid.

"There can be no real dispute that Imperial Showgirls operates an adult entertainment establishment whose primary purpose is to permit patrons to watch and pay for particular services, such as 'lap dances,' from exotic dancers like the two plaintiffs in this case," the judge wrote. "Imperial Showgirls holds itself out as a 'strip club' and the exotic dancers who perform there, including plaintiffs, are central to the defendant's business — both literally and figuratively as plaintiffs point out."

Imperial Showgirls, known as VCG-IS LLC; its owner, VCG Holding Corp.; and consulting company International Entertainment Consultants Inc. had claimed that the dancers who sued were properly classified as independent contractors and were therefore exempt from state and federal minimum wage and overtime pay requirements.

But Judge Claster's ruling Thursday rejected the argument that dancers couldn't allege wage and hour violations because they independently and freely contracted to perform for Imperial Showgirls customers who pay them directly. He said the Dynamex ruling did not hold that the right to contract is superior to California's public policy of consistently enforcing wage and hour laws.

"To the contrary, [Dynamex] noted that wage orders are not only for the benefit of workers

themselves, but are implemented industry-wide and are 'intended for the benefit of those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices,'" the judge wrote, quoting the state high court.

Judge Claster added that he would give the defendants a chance to show that the misclassification of the two named plaintiffs in the case does not extend to other Imperial Showgirls dancers, but noted that he didn't think they were likely to succeed.

"Given the Court's ruling on Part B of the ABC test that defendants will be unable to prove that the two plaintiffs, as exotic dancers, are working outside the usual course of Imperial Showgirls' business, it is difficult to conceive of how defendants will be able to show that other aggrieved employees as defined by plaintiffs in the case are any different," the judge said.

Shannon Liss-Riordan of Lichten & Liss-Riordan PC, representing the dancers, told Law360 that Thursday's tentative ruling was adopted as a final ruling in open court on Friday, when Judge Claster rejected the defendants' request that it not be adopted. She said she and her clients "are very pleased with this ruling."

"The California Supreme Court said loud and clear in Dynamex that the misclassification question needs to be a simpler one," Liss-Riordan said. "It adopted the ABC test in order to create bright lines. The court's order today ... reflects that. We expect the Dynamex decision will begin to have a profound impact on the rights of workers in California and make it easier for them to establish that they are entitled to the protections of the California Labor Code."

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

The dancers are represented by Shannon Erika Liss-Riordan and Matthew Thomson 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, County of Orange.

--Additional reporting by Vin Gurrieri. Editing by Breda Lund.