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MCLE Self-Study:

THE NEW ABC'S OF CALIFORNIA EMPLOYMENT LAW

By Shannon Liss-Riordan and Anastasia Doherty

INTRODUCTION

THE "ABC" TEST COMES TO CALIFORNIA

In April of 2018, the California Supreme Court issued the unanimous, 82-page landmark opinion, *Dynamex Operations West, Inc. v. Superior Court*,[1] announcing the adoption of the ABC test to distinguish employees from independent contractors. The Court explained that the Massachusetts version of the ABC test[2] best forwarded the remedial purpose of California law. Unlike multi-factor employment tests, including the test that had previously been used under *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*,[3] the three-pronged, conjunctive version of the Massachusetts ABC test is less easily manipulated and increases predictability.[4] The *Dynamex* Court explained that multi-factor tests create uncertainty for hiring businesses and workers regarding whether a worker has been correctly classified and leave open a loophole in employment protections, because hiring businesses may more easily manipulate workers' circumstances with an eye towards passing the multi-factor test.

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In contrast, the ABC test places the burden on the alleged employer to meet all three prongs in order to justify classifying a worker as an independent contractor. This includes the strict version of prong B adopted in Massachusetts, which requires the alleged employer to demonstrate that the worker performs work that is outside the usual course of the hiring entity's business.[5] Because of the strength of prong B, Massachusetts courts have routinely held that a worker's employment status may be decided as a matter of law on summary judgment[6] and have regularly certified misclassification cases as class actions.[7]

Employers have scrambled to cabin the impact of the *Dynamex* decision. First, they argued that it should not be retroactive, an argument that the California Supreme Court rejected in January in *Vazquez v. Jan-Pro Franchising International, Inc.*[8] The Court applied the usual rule that judicial decisions clarify what the law is and are given retroactive effect and declined to create an exception based upon arguments that the "change" in the law violated due process concerns.[9]

Employers have also attempted to limit the application of the ABC test, in particular arguing that the test does not apply to claims brought under California Labor Code § 2802, which requires that employees be reimbursed for necessary business expenses. While case law on this question is somewhat mixed,[10] the question is largely moot, as the California legislature later passed Assembly Bill No. 5 (AB 5).[11] AB 5 codified *Dynamex* and statutorily adopted the ABC test for California's Wage Orders, Labor Code, and Unemployment Insurance Code claims, with the exception of specific legislative carve-outs.[12] Now that retroactive application of *Dynamex* has been confirmed, AB 5 should also apply retroactively, since the *Vazquez* Court has held that it merely clarifies existing law.[13]

Employers have scrambled to cabin the impact of the Dynamex decision.

Nonetheless, employers persist in attempting to defeat or limit the application of the ABC test to California workers. Some emerging legal battles are outlined below.

CAMPAIGNS AGAINST THE ABC TEST

PROPOSITION 22 AND OTHER LEGISLATIVE INITIATIVES

A number of "gig economy" companies, including Uber, Lyft, DoorDash, Postmates, and Instacart, who were unsuccessful at obtaining a legislature carve-out for their workers, bypassed the legislature and judiciary by taking the issue directly to California voters with Proposition 22 (Prop 22).[14] The ballot measure was the most expensive in California history (costing proponents over $200 million). The bill's sponsors also spammed app-users with push-notifications, cautioning customers that reclassifying gig workers as employees would cause prices to sky rocket and deprive drivers of all flexibility (a myth that several courts have rejected).[15] Prop 22 declares certain "app-based" drivers to be independent contractors, so long as certain specific wage and hour protections are provided for the drivers.[16] Notably, companies will be unable to take refuge in the law if they do not provide these protections.[17]

Uber has argued that Prop 22 applies retroactively and thus moots pending misclassification claims. In *James v. Uber Technologies, Inc.*, the court rejected this argument and certified a class of all Uber drivers in California who opted out of arbitration; the court held that Prop 22 may simply serve to cut off the class liability period as of its effective date, December 16, 2020.[18] The court noted that statutes are presumptively limited to prospective-only application, absent a clear intent to apply retroactively.[19] Proposition 22 contains no express retroactivity provision.[20]

Worker advocates are now on guard that gig companies will try to replicate Prop 22 in other areas of the country, to assure independent contractor status for their workers under state law. Similar efforts have begun in Massachusetts, New York, New Jersey, Illinois, and Colorado.[21] In Massachusetts, where the current version of the ABC test has been the law of the land since 2004, a "Proposition 22 clone" was recently introduced, sparking driver protests.[22]

Two strategies are needed to counteract these Prop 22 cloning efforts: first, advocating for the adoption of the ABC test as the federal standard for determining employee status[23]; and, second, beating bills back in the state

legislatures that threaten to undermine employee protections by carving out a new quasi-employee category that strips workers of the protections they are currently entitled to under state law.

On the regulatory front, the Biden administration has already put on hold the Final Rule proposed by the Department of Labor on January 7, 2021, regarding "Independent Contractor Status Under the Fair Labor Standards Act," which would have adopted a company-friendly five-factor employee status test.[24] The administration has also rescinded the DOL letter advising that a worker providing services for a "virtual marketplace company" was properly classified as an independent contractor, which was widely regarded as validating independent contractor misclassification in the gig economy.[25] Its rescission, along with pausing the Final Rule, indicates the current administration understands the significant role that independent contractor misclassification plays in cabining worker rights.

LEGAL CHALLENGES

Another strategy companies have pursued is to overturn AB 5 through legal challenges. Uber and Postmates challenged the statute by bringing a constitutional challenge to the bill, arguing that the bill violated their drivers' and their companies' rights.[26] They sought and were denied a preliminary injunction enjoining the enforcement of AB 5.[27]

In contrast, the California trucking association was successful in obtaining a preliminary injunction enjoining enforcement of AB 5 against trucking companies.[28] There, finding a likelihood of success, the court held AB 5 was preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA).[29] However, in a more recent California appeal court decision, the court held that the ABC test was not preempted by the FAAAA.[30]

LIMITING THE APPLICATION OF THE ABC TEST THROUGH FRANCHISING AND FISSURED EMPLOYMENT (THE JOINT EMPLOYMENT QUESTION)

Large companies have increasingly deployed "fissured employment" hiring structures to evade their employer obligations under the law.[31] These larger companies are arguing that the ABC test should not apply to determine their employment relationship to the worker, because the ABC test (1) cannot apply in the franchise context, and (2) does not apply to joint employment.

1. The Franchise Context

When it adopted the ABC test, the California Supreme Court favorably cited cases that had held franchisees to be employees.[32] Further still, the California Legislature explicitly rejected a carve-out to AB 5 that would have exempted the franchisee-franchisor relationship.[33] The Ninth Circuit also rejected this very argument under California law in *Vazquez v. Jan-Pro Franchising International, Inc.*,[34] holding that *Dynamex's* ABC test applied to determine whether plaintiff-franchisees had been misclassified as independent contractors.[35]

Nevertheless, the International Franchise Association (IFA) has brought a constitutional challenge against AB 5, arguing that franchises may not be subject to California's ABC test under the Supremacy Clause of the Constitution, because the test is preempted by the FTC Franchise Rule and Lanham Act.[36] However, these regulations were designed to protect against franchise scams, not to limit worker rights. Indeed, the FTC Franchise Rule[37] governs a franchisor's *disclosure* requirements to a potential franchisee and prohibits deceptive conduct with respect to such disclosures in the sale of a franchise. It does not address the substantive relationship between franchisors and franchisees.[38]

2. Joint Employment

Whether the ABC test applies in the joint employment context should not be a close call, given that the Court in *Dynamex* adopted the ABC test to clarify the "suffer or permit" test articulated in *Martinez v. Combs*,[39] which was itself a joint employment case. However, two California Court of Appeal decisions have undermined application of the ABC test (and conflict with the Ninth Circuit's decision in *Jan-Pro*).[40] In both cases, workers employed by Equilon Enterprises, Inc. (Shell), through intermediaries, sought to hold Shell liable for wage and hour violations at Shell-branded stations, and the courts refused to apply the ABC test.[41]

This result contravenes the reasoning of *Dynamex*, which sought to simplify the analysis and broaden the protections of California wage law. The ABC test should be applied to each alleged employment relationship, even if the hiring entity does not directly contract with the worker, as the Massachusetts Supreme Judicial Court has held under the Massachusetts version of the test.[42] Further, the Ninth Circuit held the ABC test to apply in *Vazquez*, despite the defendant's

protest in that case that it did not directly contract with the workers.[43]

CONCLUSION

The California Supreme Court announced in *Dynamex* that it was adopting the Massachusetts ABC test in order to simplify the analysis of when workers can and cannot be classified as independent contractors. Still, many companies have spent the last few years attempting to restrict its application and muddy the waters so as to continue to avoid employment protections for their workers. The courts have rejected many of these attempts, but plaintiffs' attorneys have their work cut out for them fighting through the maze of issues that have arisen and furthering the Court's vision in *Dynamex* that determining which workers are entitled to employee rights should be a simpler matter.

To expand worker protections, advocates must not only push back against these frivolous arguments, but also protect against end-runs by promoting legislative adoption of the ABC test on the state and federal level.

ENDNOTES

1. *Dynamex Ops. W. v. Superior Court*, 4 Cal. 5th 903 (2018).
2. Mass. Gen. Laws Ann. ch. 149, § 148(B) (West 2021); preempted on another point by *Carey v. Gatehouse Media Mass. I, Inc.*, 92 Mass. App. Ct. 801 (2018).
3. *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations.*, 48 Cal. 3d 341 (1989).
4. *Dynamex*, 4 Cal. 5th 903, 964.
5. *Id.* at 965.
6. *See, e.g.*, *Carey*, 92 Mass. App. Ct. 801; *Awuah v. Coverall North Am.*, 707 F.Supp.2d 80 (D. Mass. 2010) (cited in *Dynamex*, 4 Cal. 5th at 963); *Chaves v. King Arthur's Lounge*, 2009 WL 3188948 at *1 (Mass. Super. Ct. July 30, 2009).
7. *See, e.g., DaSilva v. Border Transfer of MA, Inc.*, 2017 WL 5196382 (D. Mass. Nov. 9, 2017); *Vargas v. Spirit Delivery & Distrib. Servs., Inc.*, 2017 WL 1115163, at *12 (D. Mass. Mar. 24, 2017); *Reynolds v. City Express, Inc.*, 2014 WL 1758301, at *12 (Mass. Super. Jan. 8, 2014); *De Giovanni v. Jani-King Int'l, Inc.*, 262 F. R. D. 71, 84-88 (D. Mass. Sep. 21, 2009).
8. *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 10 Cal. 5th 944, 1212 (2021).
9. *Id.* at 1212-1216.
10. In *Dynamex*, the Court declined to address this question specifically because it was not briefed by the parties. Although some courts have opined in *dicta* that *Dynamex* may not apply to § 2802 claims, *see Garcia v. Border Transp Grp, LLC*, 28 Cal. App. 5th 558, 561 (2018), at least one California Superior Court has held that *Dynamex* does apply to § 2802 claims. *See Johnson v. VCG-IS, LLC*, Case No. 30-2015-00802813-CU-CR-CXC, Ruling on Motion in Limine (Super Ct. Cal. July 18, 2018). The *Johnson* court explained that it would make little practical sense to apply different tests to these claims, as it would impair *Dynamex*'s goal to clarify the applicable test and broaden protections, and because Wage Orders do not contain a private right of action.
11. AB 5 was chaptered as 2019 Cal. Stat. 296 (West). The statute amended section 3351 and added section 2750.3 to the California Labor Code; and amended sections 606.5 and 621 of the California Unemployment Insurance Code, relating to employment.
12. AB 5 exempts from *Dynamex*, and instead applies the *Borello* test to, a number of additional occupations, including, but not limited to, podiatrists, veterinarians, psychologists, repossession agents, commercial fisherman, and other occupations. *See* Cal. Lab. Code § 2750.3(b).
13. *See In re Marriage of McClellan*, 130 Cal. App. 4th 247, 255 (2005); *James v. Uber Techs., Inc.*, 2021 WL 254303, at *17 (N.D. Cal. Jan. 26, 2021) ("As a preliminary matter, the Court concludes that Prop 22 does not apply retroactively.").
14. Prop 22 is codified at Cal. Bus. & Prof. Code §§ 7448-7467. The text of Prop 22 can be found at https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf.
15. Suhauna Hussain, *Uber, Lyft push Prop 22 message where you can't escape it: your phone*, L.A. Times, Oct. 8, 2020, https://www.latimes.com/business/technology/story/2020-10-08/uber-lyft-novel-tactics-huge-spending-prop-22; *Olson v. State of California*, 2020 WL 905572 at *14 (C.D. Cal. Feb. 10, 2020), appeal pending No. 20-55267 (9th Cir.); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp.3d 1133, 1154 (N.D. Cal. 2015) .
16. Cal. Bus. & Prof. Code §§ 7448-7452.
17. *See James v. Uber Techs., Inc.*, 2021 WL 254303, at *17 (N.D. Cal. Jan. 26, 2021).

18. *Id.*
19. *See*, *e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).
20. *James*, 2021 WL 254303 at 17-18.
21. Josh Eidelson, *The Gig Economy is Coming for Millions of American Jobs After California's Uber Lyft Vote*, Bloomberg Law, Feb. 17, 2021, https://www.bloomberg.com/news/features/2021-02-17/gig-economy-coming-for-millions-of-u-s-jobs-after-california-s-uber-lyft-vote; Edward Ongweso Jr., *Uber is Expanding Its War on Labor to Canada With a Prop 22 Clone ("Ongweso")*, Vice, March 11, 2021, https://www.vice.com/en/article/88apja/uber-is-expanding-its-war-on-labor-to-canada-with-a-prop-22-clone.
22. Ongweso, *supra*, n. 21.
23. The "Pro Act," Protecting the Right to Organize Act 2021, H.R. 842, 117th Cong. (2021-2022), recently passed in the House of Representatives, adopts an ABC test for the NLRA. Another bill introduced by Sen. Patty Murray, the Worker Flexibility and Small Business Protection Act, H.R. 8375, 116th Cong. (2019-2020), would adopt the ABC test for the FLSA.
24. Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal, 86 Fed. Reg. 47 (March 12, 2021) (29 CFR Parts 780, 788 and 795).
25. Formerly known as FLSA2019-6, the U.S. Department of Labor, Wage and Hour Division, has removed an earlier opinion letter that interpreted gig economy workers who offer services in a virtual marketplace as independent contractors. That letter can no longer be found on the Department's website. *See* Benesh, *Department of Labor Withdraws Gig Economy Opinion Letter that Supported Independent Contractor Classification*, JDSupra.com, Feb. 23, 2021, at https://www.jdsupra.com/legalnews/department-of-labor-withdraws-gig-2161674/.
26. *Olson v. State of California*, 2020 WL 905572, at *14 (C.D. Cal. Feb. 10, 2020), *appeal pending* No. 20-55267 (9th Cir.).
27. *Id.*
28. *California Trucking Ass'n v. Becerra*, 433 F.Supp. 3d 1154, 1164-1165 (S.D. Cal. 2020), *appeal pending*, No. 20-55106, 20-55102 (9th Cir.).
29. *Id. See* 49 U.S.C. § 14501.
30. *See*, *People v. Superior Court*, 57 Cal. App. 5th 619 (2020).
31. "Fissured employment" occurs when large hiring entities shift labor costs and liabilities to smaller, intermediate employers. *See* David Weil, *Enforcing Labor Standards in Fissured Workplaces: The US Experience*, The Economic and Labor Relations Review v. 22, no.2, pp. 36–37 (July 2011), *available at* http://www.fissuredworkplace.net/assets/Weil.Enforcing-Labour-Standards.ELRR-2011.pdf.
32. *Dynamex*, 4 Cal.5th at 963 (citing *Awuah v. Coverall North America, Inc.*,707 F.Supp.2d 80, 82 (D.Mass. 2010); *Coverall N. America v. Div. of Unemployment*, 447 Mass. 852, 857 (2006).
33. *See*, *e.g.*, Coalition Letter to California State Legislature, IFA, Aug. 27, 2019. The IFA also attempted and failed to obtain a legislative carve-out for franchise agreements from the Massachusetts ABC test in 2009. *See* Mass. H.B. 1844 (186th Session).
34. *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 986 F.3d 1106, 1124 (9th Cir. 2021).
35. *See*, *People v. Superior Court of L.A.*, 57 Cal. App. 5th 619 (2020).

    Another panel in the Ninth Circuit held that *Dynamex* did not apply in a wage and hour dispute brought against a franchisor. *See Salazar v. McDonald's Corp.*, 939 F. 3d 1051 (9th Cir. 2019), *as amended upon denial reh'g*, 944 F. 3d 1024. However, in that case, the plaintiffs were classified as employees, and the issue was whether the franchisor could be held liable as a joint employer. In *Jan-Pro*, the plaintiffs were classified as independent contractors and alleged that the defendant franchisor was responsible for their misclassification, despite the fact that the plaintiffs contracted directly with intermediary "master franchisees."
36. *International Franchise Ass'n et al. v. State of California et al.*, Case No. 3:20-cv-02242 (S.D. Cal. Nov. 17, 2020).
37. 16 C.F.R. §§ 436.1-436.11.
38. 16 C.F.R. §§ 436.2, 436.9.
39. *Martinez v. Combs*, 49 Cal. 4th 35 (2010).
40. *Curry v. Equilon Enters., LLC*, 23 Cal. App. 5th 289 (2018), *as modified on denial of reh'g* (May 18, 2018), *review denied* (July 11, 2018), and *Henderson v. Equilon Enters., LLC*, 23 Cal. App. 5th 289 (2018), *review denied* (Feb. 11, 2020).
41. *Curry* was decided just days before California Supreme Court issued its decision in *Dynamex*; the plaintiff promptly petitioned for rehearing but the court denied the petition and instead issued a modified opinion (without briefing from the parties), which added a brief section containing only a cursory mention of *Dynamex*. *Curry*, at 314, 316. *Henderson* merely followed *Curry*, considering itself bound in light of the close factual similarity of the cases. *Henderson* at 1121.
42. *Depianti v. Jan-Pro Franchising Int'l, Inc.* 465 Mass. 607 (2013), was favorably cited in *Dynamex*, 4 Cal. 5th at 595-96.
43. *Vazquez*, 986 F.3d at 1124.