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Legal Developments for Independent Contractors in California and Beyond

By Kathryn Evans
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May 5, 2021 update: The Department of Labor has withdrawn the final rule that would have applied the economic reality test to the FLSA. The final rule never went into effect, and has not yet been replaced by a new rule.

Most laws that protect workers' rights do so only for "employees," but not "independent contractors." While it may seem intuitive, the difference between the two types of workers is not always clear. The legislatures that wrote the various local, state, and federal laws have included a variety of definitions of the two terms—some clearer than others—and the judges who interpret those laws have developed several different tests to determine whether a particular worker is a protected "employee" or not. The classification has a wide range of consequences for a worker, such as whether her employer must provide health insurance, sick days, and minimum-wage-level wages; what protections she has from discrimination in the workplace; and whether she can apply for Unemployment Insurance or Workers' Compensation in the event she is terminated or injured on the job.

The California Supreme Court Sets the Test for Independent Contractors

California has a set of wage orders that set the minimum wage, maximum working hours, and other rules for working conditions for employees in various industries. For purposes of the wage orders, to "employ" means to "suffer or permit to work." In *Dynamex Operations West, Inc. v. Superior Court*, a group of delivery drivers sued their employer, claiming that they were misclassified as independent contractors and therefore improperly excluded from the wage order for transportation employees. In that case, in 2018, the California Supreme Court adopted a test known as the "ABC Test" for determining whether a worker is an employee for the purposes of wage orders. Under the ABC Test, a worker is considered an employee unless the hirer can prove:

(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

(B) that the worker performs work that is outside the usual course of the hiring entity's business; and

(C) that 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.

On January 14, 2021, the state's supreme court again weighed in on the issue, in *Vazquez v. Jan-Pro Franchising International, Inc.* There, the high court stated that its *Dynamex* decision applies retroactively. This means that California courts should apply the ABC Test in any lawsuit that asks whether a worker is an employee or independent contractor for purposes of a state wage order, even if the worker is suing the employer for something that occurred before the *Dynamex* decision was announced in 2018. For example, the *Vazquez* lawsuit was originally filed in 2008, but took so long to work its way through the various stages of litigation that the case was still pending for appeal before the federal Ninth Circuit Court of Appeals in 2018 when the California Supreme Court decided *Dynamex*. In 2019, the Ninth Circuit applied the *Dynamex* decision to *Vazquez*, as judicial decisions interpreting language in statutes usually apply retroactively, but it then withdrew that decision and asked the California Supreme Court to decide the question of retroactivity. Now that the California court has issued its opinion, the case will return to the federal court to apply the ABC Test to Mr. Vazquez and his fellow plaintiffs.

California's Third Category: App-Based Drivers

Not all of the action in California has occurred in the courts. In September of 2019, the state legislature passed Assembly Bill 5, which codified the ABC Test into law, not only for wage orders, but also for Unemployment Insurance and the Labor Code, which contains laws ranging from safety regulations to overtime pay to protection for whistleblowers. That bill was replaced just one year later with Assembly Bill 2257, which retained the ABC Test but changed who was exempted from that test.

Ride share apps like Uber and Lyft, which have been fighting for years to have their drivers excluded from employment laws, responded to these legal developments in California with a record-breaking $200 million campaign to pass Proposition 22, the arguably misleadingly-titled "Protect App-Based Drivers and Services Act." The proposition, which voters passed in November 2020 by 58%, created a new category of workers, strictly for app-based rideshare and delivery drivers, with their own laws about wages, hours, healthcare subsidies, safety, and discrimination. While some drivers supported the proposition as a means to prevent app companies from exercising more control over when and how drivers do their work, others feared it would not sufficiently protect their rights. For example, although the law claims to set an earnings floor at 120% of the state or local minimum wage, a UC Berkeley study found that it really only guaranteed $5.64 per hour in a state with a $13 minimum wage. Since the proposition went into effect, some grocery store chains in California have fired their "employee" delivery drivers in favor of using cheaper drivers through apps like DoorDash and Instacart.

Soon after Proposition 22 passed, a group of drivers and the Service Employees International Union asked the California Supreme Court to declare the new law unconstitutional. The high court refused to decide the question, but left the option open for the drivers and the union to bring a lawsuit in a state trial court, which could work its way back up to the Supreme Court in a number of years.

Independent Contractors in Federal Law

The definition of "employee" for federal worker protection laws is also in flux. For example,

the Fair Labor Standards Act (FLSA), which sets the federal minimum wage, defines an employee as “an individual employed by an employer.” Courts have interpreted this definition using different tests. The U.S. Department of Labor (DOL), the executive agency tasked with implementing the FLSA, attempted to standardize the interpretation of the law with a new regulation announced in January 2021. According to DOL’s final rule, the FLSA should be interpreted using the “economic reality” test, which says that workers who are economically dependent on another individual or entity are employees, while workers who are in business for themselves are independent contractors. The two “core factors” which courts should look to in determining whether a worker is economically independent are “(1) the nature and degree of the worker’s control over the work, and (2) the worker’s opportunity for profit or loss.” Courts may also consider other factors, such as the amount of skill required beyond on-the-job training provided by the employer, the duration of the employment relationship, and whether the work is part of “an integrated unit of production.” This new rule was set to go into effect on March 3, 2021, but has been paused for sixty days according to President Biden’s Executive Order suspending new rules.

While it is not clear whether the DOL’s final rule will be reversed by the new administration, President Biden included misclassification of workers as one of the issues on his 2020 campaign platform, and expressed approval of the ABC Test. In 2019, then-Senator Harris supported her state of California’s Assembly Bill 5, indicating that she agrees with President Biden on the issue. She also co-sponsored the Workplace Democracy Act, which would have adopted the ABC Test for the National Labor Relations Act (NLRA), but the bill did not advance beyond introduction in the Senate. On February 4, 2021, Democratic members of the House and Senate re-introduced the Protect the Right to Organize Act (PRO Act), which also includes a provision adding the ABC Test to the NLRA. The PRO Act passed in the House in February 2020 but never made it to a vote in the Senate.