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News & Types: Employment, Labor & Benefits Update

California Redefines Independent Contractor

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Practices: Employment, Labor & Benefits

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EXECUTIVE SUMMARY

The California courts recently ruled in favor of employees who claimed they were not independent contractors as alleged by their employers. Both cases concerned Industrial Welfare Commission Wage Order No. 9, specific to the transportation industry, which regulates the working conditions of "employees." In its April 2018 ruling in *Dynamex Operations West, Inc. v. Superior Court* (2018), the California Supreme Court adopted the "ABC" test after examining the Wage Order No. 9 definitions of "persons employed in the transportation industry" to decide whether the plaintiffs were "employees" within the scope of the order. The same test was then applied, for purposes of wage order-based claims, in the most recent ruling by the Court of Appeal in *Garcia v. Border Transportation Group, LLC*, No. D072521 (Cal. App. Oct. 22, 2018).

Similar to classifying employees as exempt or non-exempt, it is crucial for every employer to properly classify and differentiate an independent contractor from a regular employee. No matter how carefully a company prepares an independent contractor agreement, if the person hired does not meet all of the requirements under the ABC test, the employer may be held liable for employment obligations arising under California wage orders, such as minimum wage levels, rest and meal breaks, and overtime payments. The ABC test as defined by the California Supreme Court in *Dynamex* provides that unless the employer establishes each of the following, the worker is presumed to be an employee, not an independent contractor: (A) the worker is free from control and direction of the company; (B) the worker performs work that is outside the usual course of the company's business; and (C) the worker is customarily engaged in an independently established business of the same nature as the work being performed (*Dynamex*, supra, 4 Cal.5th at p.957).

In its October ruling in *Garcia v. Border Transportation Group*, the California Court of Appeal ruled that a taxi driver ("Garcia") was not an independent contractor when the ABC test was applied for purposes of his claims arising out of California's wage orders. For his other employment-related claims, the *Garcia* court ruled that the long-standing, and more flexible *Borello* test would still be applied to determine whether he was an employee or contractor. Garcia used his own vehicle for work, but the vehicle had to be white and marked "Calexico Taxi"

in accordance to the taxi company's rule. He was also required to pay about $520 to the taxi company per week for leasing a vehicle permit, in addition to $350 per month for optional radio dispatch service. However, after his car broke down, Garcia needed to lease a vehicle from the taxi company for additional $65 per 12-hour shift. After he was charged an additional $65 for returning the vehicle an hour late one day, Garcia stopped working for the company. He claimed he was "prevented from renewing his lease" after the incident. Out of eight causes of action which Garcia asserted, the following five applied to the wage order and were upheld by the court: unpaid wages; failure to pay minimum wage; failure to provide meal and rest breaks; failure to furnish itemized wage statements; and an unfair competition claim. The Court of Appeal determined that Garcia satisfied (A) and (B), but not (C) of the ABC test. The *Garcia* court recited the *Dynamex* court's approval of an earlier Washington case, in which the court held that a "taxi driver was employee under Part C because he had not solicited, advertised, or otherwise held himself out to the community as being in a separate business; had not established himself as a separate business; did not own his taxi, records, or customer lists; have a special business license; or have anything else indicative of an independent business; and could not continue his business after leaving the entity." (*Garcia*, supra, 2018 Cal. App.) Similar to the Washington case, Garcia did not solicit customers for the benefit of his own business, but rather advertised the name "Calexico Taxi" on behalf of his employer. In addition, he neither owned his taxi after his car broke down, nor owned a business license since he had to pay a monthly permit leasing fee to the employer.

Action Steps: While the *Garcia* decision is still new and may be subjected to further review in the California Supreme Court, in order to avoid being held liable for wage and hour claims, businesses wishing to hire independent contractors will need more than a good written contract. Businesses must establish corporate guidelines which clearly spell out the prerequisites required of an independent contractor, and be sure to satisfy all of the "ABC" test elements.