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CLIENT ALERT

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# Ninth Circuit Changes Course and Asks the California Supreme Court to Decide Whether the *Dynamex* Decision is Retroactive

On April 30, 2018, the California Supreme Court issued its landmark *Dynamex* decision, applying a new "ABC" test to determine whether workers are classified improperly as independent contractors for claims brought under the California Labor Code based on the California Wage Orders. The *Dynamex* decision dramatically changed the previous classification test, created a presumption of employee status, and made it significantly more difficult to prove a proper classification of independent contractor.

A number of issues remained after the *Dynamex* decision. How is the new "ABC" test actually applied in specific circumstances? Will it be applied more broadly than the Wage Order application involved in the decision itself? Will it be applied retroactively or prospectively? Courts are wrestling with these issues, and legislation (AB 5) is proceeding through the California legislature that seeks to codify the *Dynamex* decision, expand its scope and, in its current form, to make the legislation retroactive.

As for the issue of retroactivity, that issue was coming down against employers. The California Supreme Court had declined a request to clarify its *Dynamex* decision on this issue. In May of this year, the Ninth Circuit federal court issued an opinion (*Vazquez v. Jan-Pro Franchising International*), holding that *Dynamex* applies retroactively. Undeterred, Jan-Pro Franchising filed a Petition for Rearing with the Ninth Circuit.

On July 22, 2019, the Ninth Circuit issued an Order, withdrawing its previous decision, and indicating that it will be certifying to the California Supreme Court the question of whether *Dynamex* applies retroactively. The retroactivity issue is still alive.

This will be an uphill battle, but there are good arguments for prospective application of the *Dynamex* decision, and hope springs eternal. Stay tuned.

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