NELSON HARDIMAN
HEALTHCARE LAWYERS

Client Alert: California AB 5 Codifies the Dynamex Independent Contractor Test and Expands the Definitio of Employee

Last month, in the wake of continued concerns over large gig-economy companies classifying workers as independent contractors, the State of California codified Dynamex and added a broader definition of "employee," which includes any "indivi providing labor or services for remuneration who has the status of an employee rather than an independent contractor, unless hiring entity demonstrates that the individual meets all of the specified conditions, including that the individual performs work t outside the usual course of the hiring entity's business."

The bill also prohibits employers from reclassifying an individual who was an "employee" on January 1, 2019, to an "independ contractor" due to the bill's enactment.

Our May 2018 client alert "California Supreme Court Announces New, Stricter Test for Evaluating the Independent Contractor Relationship" provided an update on the new "ABC" test set forth in Dynamex Operations, Inc. v. Superior Court.

This test uses three factors to determine whether independent contractors could remain as such – or whether they needed to characterized as employees and requires that an individual providing labor or services for remuneration be considered an "employee" rather than an "independent contractor" unless the hiring entity demonstrates that **ALL** of the following conditions satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both u the contract for the performance of the work and in fact;

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

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as involved in the work performed.

Employment status classification is somewhat more complicated for licensed professional healthcare workers, as physicians, surgeons, dentists, podiatrists, psychologists, and others performing healthcare services to or by a healthcare entity are expre excluded from the" ABC" test. The statute provides that such professionals are to continue to be governed by the California Supreme Court test established in Borello (1989).

Also under Borello, other professionals could still be classified as independent contractors, but only if **ALL** of the following are

(A) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity;

(B) If work is performed more than six months after the effective date of this section, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in his or her profession;

(C) The individual has the ability to set or negotiate his or her own rates for the services performed;

(D) Outside of project completion dates and reasonable business hours, the individual has the ability to set his or her own hou

(E) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or hold

himself or herself out to other potential customers as available to perform the same type of work; and

(F) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services

How does this apply to healthcare facilities?

Classification continues to be a challenge. As a basic rule of thumb, even if a professional uses their independent discretion, i show up “9 to 5” at the hiring entities’ place of business, and the professional does not hold themselves out to the public other through the hiring entity, they are probably better classified as employees but factors vary considerably from circumstance to circumstance.

Also of note, the statute does not provide any exemption for nurse practitioners, nurse anesthetists, pharmacists, occupational/physical/speech/respiratory therapists, medical technicians or physician’s assistants – some of whom may curre be serving as independent contractors for hospitals or medical staffs.

Practically speaking, the statute will have minimal impact on hospitals, which traditionally classify their workers as employees other than physicians, of course). Nevertheless, certain healthcare professionals – such as nurse anesthetists – may actually employees of an anesthesia professional group contracting with the hospital. This may raise the issue of the hospital’s contra arrangements with non-physicians, which will require a case-by-case assessment for compliance with the new law.

AB 5 takes effect on January 1, 2020, and we encourage our clients to evaluate worker status now across their entire workforce and consider reclassifications before the end of this year.

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