

California Labor Code section 2750

Summary: In *Dynamex Operations West Inc. v. Superior Court*, 4 Cal 5th 903 (2018), the California Supreme Court introduced the ABC Test for determining whether a worker should be classified as an employee or an independent contractor. The California Supreme Court applied this test to Industrial Welfare Commission wage order claims and left open whether this test applied in any other context. Under California Labor Code section 2750.3, effective January 1, 2020, the California Legislature codified and expanded the application of *Dynamex Operations*. This article discusses the ABC Test and under what circumstances it does apply, under what circumstances it may apply, and under what circumstances it does not apply.

Dynamex Operations West Inc. v. Superior Court

In *Dynamex Operation, supra*, 4 Cal 5th 903, on appeal from the granting of class certification, the California Supreme Court introduced the ABC Test for determining whether a worker should be classified as an employee or an independent contractor. The question before the California Supreme Court was whether certain drivers were employees or independent contractors with respect to Industrial Welfare Commission wage order claims.

The Industrial Welfare Commission had promulgated wage orders that regulate wages, hours, and working conditions in California, such as minimum wage, overtime pay, rest period, and meal periods.¹ The California Division of Labor Standards Enforcement enforces the provisions of these wage orders.

In *Dynamex Operations, supra*, 4 Cal 5th 903, the California Supreme Court held that, with respect to such wage orders, a worker is presumed to be an employee unless the hiring entity establishes all of the following conditions:

- (A) that the worker is free **from the control and direction** of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact,
- (B) that the worker performs work that is **outside the usual course of the hiring entity's business**, and

¹ See e.g., [Industrial Welfare Commission Order No. 2-2001 Regulating Wages, Hours and Working Conditions in the Personal Service Industry](https://www.dir.ca.gov/iwc/WageOrders2017/iwcarticle2.pdf), effective December 1, 2001 amended and republished effective January 1, 2017, located at <https://www.dir.ca.gov/iwc/WageOrders2017/iwcarticle2.pdf>.

(C) that the **worker is customarily engaged in an independently established trade**, occupation, or business.

[emphasis added] *Id.* at 964. The California Supreme Court did not express a view on whether the ABC Test applied to labor violations in any other context, such as violations under the California Labor Code. *Id.* at 916, n 5.

Further, the California Supreme Court did not address the issue of whether the application of the ABC Test was retroactive. *See Garcia v Border Transp. Group, LLC*, , 572, n 12 (2018).

Labor Code section 2750.3

California Labor Code section 2750.3, subdivision (a) provides that under the California Labor Code, the California Unemployment Insurance Code, and wage orders of the Industrial Welfare Commission, a worker is presumed to be an employee rather than an independent contractor unless the hiring entity demonstrates:

- (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under 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 that involved in the work performed.

Effective January 1, 2020, this statute thus codifies the ABC Test in *Dynamex Operations, supra*, 4 Cal 5th 90, and expands it to the California Labor Code and the California Unemployment Insurance Code. Effective July 1, 2020, under California Labor Code section 3351 subdivision (i), the ABC Test will also apply to claims under the Workman's Compensation Act.

California Labor Code 2750.3, subdivision (b) provides that if a court determines that the test cannot be applied in a particular context for reasons other than statutory exceptions to employment status, then the test, previously enumerated by the California Supreme Court in *S. G. Borello & Sons, Inc. v Department of Industrial Relations*, 48 Cal 3d 341, 347(1989) and discussed hereinbelow, would apply (hereinafter, the "Borello Test").

California Labor Code 2750.3, subdivision (c) excludes several classes of professional occupations from the application of the ABC Test, leaving intact the Borello Test for those workers. This includes:

1. Licensed physicians and surgeons, dentists, podiatrists, psychologists, and veterinarians;
2. Licensed lawyers, architects, engineers, private investigators, or accountants;
3. Licensed securities broker-dealers or investment advisers and their registered representatives;
4. Licensed commercial fishermen;
5. A direct salesperson who is compensated by sales or other output rather than by an hourly rate; and
6. Certain other enumerated professional services not otherwise listed above, but only if certain enumerated conditions are met.

California Labor Code 2750.3, subdivision (d) excludes several classes of workers from the application of the ABC Test where another statute provides for the determination of a worker's status, such as real estate agents and brokers.

California Labor Code 2750.3, subdivision (e) excludes business to business contracting relationships from the application of the ABC Test, leaving intact the Borello Test, but only if certain enumerated conditions are met.

California Labor Code 2750.3, subdivisions (f)-(h) exclude certain relationships between (i) construction industry contractors and workers working for a subcontractor; (ii) referral services and workers working for service providers who utilize the referral service; and (iii) a motor club and workers working for third-parties providing motor club services.

California Labor Code 2750.3, subdivision (i)(1) provides that subdivision (a) does not change the law with respect to wage orders of the Industrial Welfare Commission. That is, the California Legislature deemed the ABC Test current law with respect to such orders.

California Labor Code 2750.3, subdivision (i)(2) provides that the exclusions under subdivisions (b) – (h) are to be applied retroactively to claims to the extent that they relieve an employer from liability.

California Labor Code 2750.3, subdivision (i)(3) provides, other than (1) and (2) above, all other provisions only apply to work performed after January 1, 2020.

S. G. Borello & Sons, Inc. v Dept. of Indus. Relations

In *S. G. Borello & Sons, supra*, 48 Cal 3d 341, the California Supreme Court established the Borello Test in determining whether a worker was entitled to workman's compensation. The California Supreme Court noted that the determination of where there is an employer/employee relationship was a multi-factor test based on a multitude of factors and that the application of the factors was not to be mechanically applied but should be applied based on context, such as the remedial purpose of the statute to which the determination is being applied. See *id.* at 352-53.

The California Supreme Court looked to the common law and other jurisdictions for factors that were indicative of an employer/employee relationship. In addition to the right of the hiring entity to control the worker and to discharge the worker at will without cause, the California Supreme Court identified the following additional indicia of an employer/employee relationship:

1. Whether the worker is engaged in **an occupation or business distinct from the hiring entity**;
2. **The kind of occupation**, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
3. **The skill required** for the particular occupation;
4. Whether **the worker supplies the instrumentalities, tools, and the place of work** to in performing the work;
5. **The length of time** for which the work is to be performed;
6. **The method of payment**, whether by the time or by the job;
7. Whether the work is **part of the regular business of the hiring entity**;
8. **The type of relationship the parties intended** to create;

9. **The worker's investment in equipment** or materials required to perform the work and **the worker's employment of others** to assist in the work;
10. **The worker's opportunity for profit or loss** depending on his managerial skill; and
11. **The degree of permanence** in the working relationship.

[emphasis added] *Id.* at 350-51, 354-55. Further, the California Supreme Court looked to the purpose of the Workman's Compensation Act, which sought:

1. to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society,
2. to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production,
3. to spur increased industrial safety, and
4. in return, to insulate the employer from tort liability for his employees' injuries.

Id. at 354. Applying all of the above, the California Supreme Court concluded that agricultural laborers were employees and not independent contractors, establishing the Borello Test not only for the Workman's Compensation Act but for other statutory schemes as well. *Id.* at 360.

Retroactive Application

The application of the ABC Test to Industrial Welfare Commission wage order claims is likely retroactive. First, the Court of Appeals in *Garcia, supra*, 28 Cal App 5th 558 suggested that the test is to be applied retroactively. *Id.* at 572, n 12 [noting that there is a presumption that judicial decisions are retroactive]. Second, the California Legislature, under California Labor Code 2750.3, subdivision (i)(1), noted the application of the ABC Test to Industrial Welfare Commission wage order claims and violations of the Labor Code relating to such wage order claims to be existing law. Third, even before the enactment of California Labor Code section 2750.3, the California Division of Labor Standards Enforcement had indicated that the application of the ABC Test is the standard for Industrial Welfare Commission wage order claims.²

² See *e.g.*, California Division of Labor Standards Enforcement Opinion Letter, with the reference line Application of the "ABC" Test to Claims Arising Under Wage Orders, issued May 3, 2019, located at <https://www.dir.ca.gov/dlse/opinions/2019-05-03.pdf>.

The application of the ABC Test to contexts other than Industrial Welfare Commission wage order claims is not likely retroactive. First, the Court of Appeals in *Garcia, LLC, supra*, 28 Cal App 5th 558 concluded that the Borello Test was the proper standard for non-wage order claims. *Id.* at 571. Second, this is consistent with California Labor Code 2750.3, subdivision (i)(1) where the California Legislature, by omission, did not deem the application of the ABC Test in other contexts to be existing law. Finally, California Labor Code 2750.3, subdivision (i)(3) provides that, except as provided for in the statute, California Labor Code 2750.3 did not apply retroactively.

The United States Court of Appeals for the Ninth Circuit has certified the following question to the California Supreme Court:

Does the Court's decision in *Dynamex Operations West Inc. v. Superior Court*, 4 Cal. 5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (Cal. 2018), apply retroactively?

Vazquez v Jan-Pro Franchising Internation, Inc., 939 F3d 1045 (9th Cir 2019). This may definitively answer these questions.

Conclusion

Employers should note that the presumption is that a worker is an employee unless the employer can establish the three criteria of the ABC Test. These criteria are broader and less subjective than the Borello Test and will encompass workers not previously considered employees. Employers should reevaluate their entire staff to determine whether each worker is appropriately classified under the ABC Test to avoid potential violations of the California Labor Code and the Industrial Welfare Commission wage orders.

However, Employers should also be aware the consequences of classifying a worker as an employee when it is not required to do so, regardless of the ABC Test or Borello Test analyses, will result in bringing that worker under common law and statutory schemes not addressed by California Labor Code section 2750.3, including vicarious tort liability.

Finally, employers should be aware that misclassification with respect to the ABC Test does not necessarily lead to liability in other contexts, such as vicarious tort liability, as the Borello Test should be applied to such claims.