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Appellate Court Clarifies 'Dynamex' ABC Test Doesn't Apply to Joint Employment Arrangements

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The Fourth District Court of Appeal recently issued a helpful decision for entities, both in and out of the "gig economy," that have been scrambling to reassess their contracting relationships in the wake of *Dynamex Operations West v. Superior Court,* (2018) 4 Cal.5th 903. In *Curry v. Equilon Enterprises LLC,* (2018) 23 Cal.App.5th 289, the appellate court held that the far-reaching "ABC" test set out by the state Supreme Court in *Dynamex* does not apply in the context of a joint employment claim. This outcome is helpful to employers that engage contract labor through other companies, rather than directly with the individuals providing the services.

Curry involved a gas station manager who alleged she was jointly employed by Equilon Enterprises LLC, doing business as Shell Oil Products US and ARS, the company that leased gas stations from Shell. The court analyzed this claim under the California Supreme Court's prior decision in another joint employment case, *Martinez v. Combs,* (2010) 49 Cal.4th 35. That case set forth the three possible definitions of "employ" under the Industrial Welfare Commission Wage Orders to mean: (a) to exercise control over the wages, hours, or working conditions; (b) to suffer or permit to work; or (c) to engage, thereby creating a common-law employment relationship.

The *Curry* court determined that Shell did not control Sadie Curry's wages, hours, or working conditions, and that Shell did not control the details of Curry's work to a degree sufficient to create a common-law employment relationship. Lastly, in applying the "suffer or permit to work" standard, the court addressed the question of whether to use the ABC test set forth by the state Supreme Court in *Dynamex*. That test places the burden on a purported employer to establish: (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 (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Although the first factor has long been a touchstone of the legal analysis that goes into distinguishing independent contractors from employees, the second factor—whether the services performed are within the usual course of the hiring entity's business—is a new, bright-line test that would exclude a large swath of contracted services from the category of legitimate independent contractors. That factor gave rise to serious concerns that both public and private entities would be unable to contract out work that, while central to their course of business, has traditionally been performed by non-employees.

The *Curry* court concluded the policy considerations driving *Dynamex* to apply the ABC test to the facts in that case did not apply to the type of joint employment relationship in the instant case. *Dynamex* involved a class of individual delivery drivers who claimed the delivery company they worked for had misclassified them as independent contractors. In *Curry*, in contrast, the issue was whether an employee of a putative employer was jointly employed by a secondary entity that contracted with the employee's primary employer.

The *Dynamex* court recognized that misclassifying workers as independent contractors is a serious problem in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers, which would give unfair competitive advantage to the business. The court also recognized that wage orders "were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions."

However, the *Curry* court observed, in the joint employer context, the alleged employee is already considered an employee of the primary employer. Thus, the policy purpose for presuming the worker to be an employee and requiring the secondary employer to disprove the worker's status as an employee is unnecessary because taxes are being paid and the worker has employment protections. It is worth noting, in an abundance of caution, the court did apply the ABC test to the facts of the case. However, the court ultimately concluded Curry was not an employee of Shell. When addressing the second factor, the court somewhat remarkably concluded that Curry was not engaged in work within Shell's usual course of business, because Curry was engaged in managing gas stations whereas Shell was in the business of "owning real estate and fuel."

The appellate court case clarified, at least for the time being, one of the most important questions regarding the ABC test (i.e., whether an entity may still legitimately contract work out to another company if the services are part of the entity's core business). However, numerous questions as to the scope of *Dynamex* remain. For example, it is uncertain whether the courts will ultimately apply the ABC test to claims of employee status under other sections of the Labor Code. It is also unclear whether California's legislature, or the state's administrative agencies (such as CalPERS) will ultimately adopt the broader definition of "employee"—questions that could have major impacts on private and public-sector employers alike.

Although the full extent of *Dynamex*'s applicability may not be settled for some time, *Curry* provides some comfort—and direction—to users of contract labor. Companies may still be able to contract out functions that are part of their core business, as long as they do so through another entity rather than contracting directly with individuals.

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