



# Is *Dynamex* Terminal Cancer?

*Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018)

Shoreline Yacht Club  
386 Shoreline Drive  
Long Beach CA 90802

May 30, 2018

Panel:

- Paul Marron, Marron Lawyers – Moderator
- Steve Rice, Marron Lawyers
- Derek Myers, Chauvel & Glatt
- Jim Hanson, Scopelitis
- Bob Millman, Littler Mendelson

## The *Dynamex* Decision: “ABC” Test Must Be Used

In evaluating claims for Wage Order violations, must now use the “ABC” Test, *which presumptively considers all hired workers to be employees and permits IC classification only if business can show:*

- A. Worker is free from **control and direction of the hirer** in connection with the performance of the work, both under the contract and in fact. (Primary factor in *Borello*.)
  - ***and*** -
- B. Worker performs **work that is outside the usual course of the hiring entity’s business**. (Secondary, but major, *Borello* factor)
  - ***and*** -
- C. Worker is customarily **engaged in an independently established trade, occupation or business** doing the type of work performed for the hiring entity. (Secondary *Borello* factor)

***MUST SHOW ALL THREE***

## The *Dynamex* Decision: “outside the usual course of the hiring entity’s business”

The *Dynamex* court then considered only the “B” factor of its new test: **The work done is outside the usual course of the hiring entity’s business:**

- “Dynamex's entire business is that of a delivery service. Unlike other types of businesses in which the delivery of a product may or may not be viewed as within the usual course of the hiring company's business, here the hiring entity is a delivery company...”
- Dynamex “obtains the customers for its deliveries, sets the rate that the customers will be charged, notifies the drivers where to pick up and deliver the packages, tracks the packages, and requires the drivers to utilize its tracking and recordkeeping system.”

# The *Dynamex* Decision: “an independently established business”

The *Dynamex* court also briefly mentioned the “C” factor, for “guidance”:

- Factor “C”: Worker “independently has made the decision to go into business for himself or herself” and “generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like.”
- Emphasized *Dynamex* previously classified drivers as its employees.
- *“Under the suffer or permit to work standard, an individual worker who has been hired by a company can properly be viewed as the type of independent contractor to which the wage order was not intended to apply only if the worker is the type of traditional independent contractor — such as an independent plumber or electrician — who would not reasonably have been viewed as working in the hiring business. Such an individual would have been realistically understood, instead, as working only in his or her own independent business.”*
- Court *did not address* whether drivers excluded from the class action by the trial court [those who hired sub-drivers or worked for multiple companies] would meet “C” factor.

## Questions to be Presented to Panel

There will be an open question period following the panel presentation. Please hold all questions for that time. A question form is attached to the handout for your convenience.

1. What is the difference between the ABC Test and the current *Borello* Test and when does each test apply?
2. Does the *Borello* test remain viable for claims made under both Wage Orders and general labor law?
3. Does *Dynamex* kill the independent contractor model in the drayage industry?
4. Does Federal Aviation Administration Authorization Act (FAAAA) preempt the ABC Test in the drayage industry and, if so, how will FAAAAA preemption help motor carriers?
5. What can trucking companies operating with independent contractors do to overcome the *Dynamex* decision?
6. Can I have an employee operation working side by side by any new model I set up?
7. What are some other business models, aside from the employee or independent contractor model, that trucking companies can adopt that do not violate prong "b" of the ABC test?
8. What are the potential legislative fixes to the ABC test?

