

NEW CALIFORNIA SUPREME COURT DECISION ON INDEPENDENT CONTRACTOR STATUS

Because of the importance of a recent California Supreme Court decision affecting independent contractor classification, Stradling will be holding three 90-minute Executive Briefings to discuss the practical implications of the decision on the following dates:

- *June 5 from 8:00 am to 9:30 am at Belmond El Encanto, 800 Alvarado Pl, Santa Barbara*
- *June 6 from 8:00 am to 9:30 am at our Newport Beach office, 660 Newport Center Drive, 16th Floor*
- *June 7 from 8:00 am to 9:30 am at our Santa Monica office, 100 Wilshire Blvd., 4th Floor*

*To attend, please email Esma Djokovic at EDjokovic@SYCR.com
Attendance is limited*

On April 30, 2018, the California Supreme Court issued an 82-page opinion establishing a new test for determining whether individuals are properly classified as independent contractors under the California wage orders. The case is *Dynamex Operations West, Inc. v. Superior Court*.

At the beginning of its opinion, the Supreme Court made a statement previewing that the decision was not going to be good for employers, and that the Court was engaging in social engineering, as evidenced from the following: "Although in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have

in mischaracterizing some workers as independent contractors."

The Court went on to hold that in order for an individual to be properly classified as an independent contractor, the employer must establish all three elements of the following ABC Test: (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 for the hiring entity."

If an employer cannot prove all three elements, the individual will be determined to be an employee and not an independent contractor for purposes of the wage orders.

A major challenge is the current lack of certainty in the standards to apply in evaluating each of these three elements in real life situations. While prior court decisions may be relevant to some extent, and while future court decisions may be necessary to provide further clarity, that the ABC Test is intended to limit the scope of who is an independent contractor is shown by the examples of independent contractor relationships provided by the Court: a retail store hiring an outside plumber to repair a leak or outside electrician to install new electrical lines. The Court also gave the following examples of employee relationships: a clothing manufacturer who hires a work-at-home seamstresses to make dresses from cloth and patterns supplied by the company, and a bakery that hires cake

NEW CALIFORNIA SUPREME COURT DECISION ON INDEPENDENT CONTRACTOR STATUS

decorators to work on a regular basis on its custom-designed cakes.

As mentioned above, currently the ABC Test is only applicable to determining independent contractor versus employee status under the wage orders. (There are 17 wage orders setting forth rules and regulations pertaining to wages, overtime, meal and rest periods, and working conditions for most employees in the state. More information can be obtained at <http://www.dir.ca.gov/iwc/wageorderindustries.htm>.) However, the ABC Test is not yet applicable in other contexts such as under the Labor Code, the Workers' Compensation Act, or for tax-related determinations by the EDD or IRS. For example, information regarding the factors considered by the EDD can be found at www.edd.ca.gov/pdf_pub_ctr/de38.pdf.

The ABC Test will require employers to reassess the continuing viability of classifying certain individuals as independent contractors. Employers should consider taking the time to carefully evaluate these relationships and determine whether a corrective strategy should be implemented.

Please contact Jeff Dinkin or John Wicker at Stradling if you would like our assistance.

Jeff Dinkin
805.730.6820
jdinkin@sycr.com

John Wicker
424.214.7023
jwicker@sycr.com