

# *Understanding Dynamex and its Implications in Legal & Historical Context*

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# Overview.

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1. Historicizing the “Gig Economy.”
2. Understanding worker independence and flexibility as it relates to employment status.
3. Situating the *Dynamex* decision in the innovation versus wage-theft conversation.

# Truman's Veto of "independent contractor carve-out" in 1948.

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VETO MESSAGE—MAINTAINING THE STATUS QUO IN  
RESPECT OF CERTAIN EMPLOYMENT TAXES AND  
SOCIAL SECURITY BENEFITS

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M E S S A G E

FROM

THE PRESIDENT OF THE UNITED STATES

RETURNING

Despite representations to the contrary, sections 1 and 2 of this resolution would exclude from the coverage of the old-age and survivors insurance and unemployment-insurance systems up to 750,000 employees, consisting of a substantial portion of the persons working as commission salesmen, life-insurance salesmen, pieceworkers, truck drivers, taxicab drivers, miners, journeymen tailors, and others. In June 1947 the Supreme Court held that these employees have been justly and legally entitled to social-security protection since the beginning of the program in 1935. I cannot approve legislation which would deprive many hundreds of thousands of employees, as well as their families, of social-security benefits when the need for expanding our social-insurance system is so great.

# CA Employee or Independent Contractor?

## BORELLO

*Totality of the Circumstances Test which Examines 11 Factors*

- Is person performing the work engaged in an occupation distinct from that of the company
- Is the work part of the company's regular business
- Who supplies the equipment
- How much financial investment does the worker make
- Is their skill required for the particular occupation
- Is the work done under supervision
- Does the worker have opportunity for profit/loss
- How long have the services been performed
- How permanent is the relationship
- What is the payment method (time or job?\_
- Do the parties believe they are forming an employee-employer relationship

## DYNAMEX

*(for wage orders ONLY)*

### PRESUMPTION OF EMPLOYEE STATUS

Hiring Entity must prove—

- A. Worker is free from the control and direction of the hiring entity in connection with the performance of the work
- B. The worker performs work that is outside the usual course of the hiring entity's business; AND
- C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

# WAGE PROTECTIONS do not apply to ALL workers.

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- **Exemptions from Wage & Hour Coverage—**
  - White-collar exemptions
    - Executive
    - Administrative
    - Professional Workers
  - 2 Part Test
    - Minimum Salary Test
    - Duties Test—worker exercises discretion & independent judgment

# Dynamex is limited to Wage Orders.

Image from William Weissman, Esq. *The Implications of Dynamex Operations West v. Superior Court*. **Little Mendelson**. June 2018. P6.

## IV. RECOMMENDED PRACTICES

In light of the substantial uncertainty surrounding worker status, there are a number steps that service recipients can take to address the uncertainty caused by the *Dynamex* decision.

- **Analyze whether the worker would be exempt.** Because the *Dynamex* decision applies only to the wage orders, as a practical matter that means it applies only to workers who are non-exempt employees. Independent contractors who would qualify as exempt if they were employees would fall outside the wage order's protections. Thus, even if the workers are "employees" under the ABC test, the wage order would not apply and the workers could still potentially qualify as independent contractors for all other purposes under the *Borello* test.
- **Analyze whether it matters if they are subject to the wage orders.** Because the wage orders impact only a limited number of issues, chiefly minimum wage, meal and rest periods, overtime, reporting time pay, payments for required uniforms, and rules relating to meals and lodging, it may be of little consequence if a worker is an employee for wage order purposes. For example,

14 2018 U.S. Dist. LEXIS 65009 (D. Mass. Apr. 12, 2018).

15 See also *Michael v. Pella Products, Inc.*, 14 N.E.3d 533 (Ill. 2014) (bona fide corporation not an individual for purposes of the Illinois' Employee Classification Act); *Resilient Floor Decorators Vacation Fund v. Contract Carpet, Inc. et al.*, 1993 U.S. Dist. LEXIS 18768 (E.D. Mich. 1993) (rejecting that court could pierce the corporate veil to hold corporations were actually individuals); *Sargent v. Commissioner*, 929 F.2d 1252 (8th Cir. 1991).

16 See, e.g., Cal. Lab. Code, §§ 201, 202, 203, 203.1, 203.5, 204a, 206, 206.5, 208, 209, 212, 218.6, 221, 226(a), 226.8, 227, 227.3, 227.5, 230.5, 230.7, 230.8, 231, 232, 233, 240, 243, 351, 353, 2082, 2800, and 2810.5 (all Labor Code provision that are not covered by the Wage Orders).

“No business which depends for its existence on paying less than living wages to its workers has any right to continue in this country.

By living wages I mean more than a bare subsistence level—I mean the wages of decent living.”

*--President Franklin D. Roosevelt,  
June 16, 1933*



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