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May 3, 2019

Ms. Dana Hadl
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Re: Application of the “ABC” Test to Claims Arising Under Wage Orders

Dear Ms. Hadl:

In your letter dated April 26, 2019, you ask for clarification on whether the “ABC” test set forth by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, would apply if a hiring business were to assert that a worker is an independent contractor and not an employee.¹ To the extent that the claims rest on the “failure to fulfill obligations imposed by” an applicable Industrial Welfare Commission (IWC) wage order, the ABC test applies. (*See Dynamex*, 4 Cal.5th at p. 942.)

The IWC Wage Order Definitions of “Employ,” Including to “Suffer or Permit”

The applicability of the ABC test turns on whether the IWC employer definitions govern a particular claim. (*See id.* at pp. 915-16, 942-43.) Under the IWC wage orders, the term “employ” has three alternative meanings: (1) to exercise control over wages, hours, or working conditions; (2) to suffer or permit to work; or (3) to engage, and create a common law employment relationship. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 64.)

Every wage order contains the same “suffer or permit” definitional standard. (*See Dynamex, supra*, 4 Cal.5th at p. 937.) In *Dynamex*, the Supreme Court adopted the ABC test to determine whether an individual is an employee within the meaning of “suffer or permit to work,” or an independent contractor. (*Id.* at p. 916.) The Court framed the issue presented as whether “the wage order definitions of ‘employ’ and ‘employer’ discussed in *Martinez* are applicable to the question whether a worker is properly considered an employee or an independent contractor for purposes of the obligations imposed by an applicable wage order.” (*Dynamex, supra*, 4 Cal.5th at p. 916.) Thus, *Dynamex* ties application of the ABC test to enforcement of obligations imposed by the wage orders.

Obligations of employers under the wage orders include those relating to overtime; minimum wages; reporting time pay; recordkeeping (including itemized pay stub obligations); business expense reimbursement for cash shortages, breakage, or loss of equipment; business expense reimbursement for required uniforms, tools, and equipment; meal periods; and rest periods. (*See, e.g.*, Wage Order No. 1-2001, sections 3, 4, 5, 7, 8, 9, 11, 12.)

¹ The ABC test places the burden on the hiring entity to establish that the worker is an independent contractor. To meet this burden, the hiring entity must establish *each* of the following factors: (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; *and* (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. (*Dynamex, supra*, 4 Cal.5th at p. 957.)

Application of the ABC Test to Labor Code Claims

Decisions following *Dynamex* have reiterated that the ABC test applies “for purposes of the wage orders,” and have utilized the test for “wage order” claims.² When a claim “derive[s] directly from,” or “rest[s] on” an obligation imposed by a wage order, the ABC test applies to determine questions of employee status. (See *Dynamex*, 4 Cal.5th at p. 942.)

Thus, *Dynamex* and decisions following it have applied the ABC test to Labor Code sections enforcing minimum wage, overtime, meal and rest breaks, and itemized pay stubs.³ Because wage order provisions are not independently actionable (see *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1132), the “obligations imposed by a wage order” do not appear only in the wage orders themselves. Wage order obligations are also imposed by certain Labor Code provisions, which serve to enforce the wage orders.⁴ In such cases, the IWC employer definitions are imported into the Labor Code provision.⁵ (See *Martinez, supra*, 49 Cal.4th at p. 64 [IWC employer definitions govern Labor Code section 1194, which creates private right of action to enforce the minimum wage]; see also *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027 [“[t]o the extent a wage order and a statute overlap, [courts] will seek to harmonize them”]; *Cole v. East Bay Municipal Utility Dist.* (N.D.

² See, e.g., *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 570-71 [*Dynamex* only applies to “wage-order claims”]; *Alvarez v. XPO Logistics Cartage LLC* (C.D. Cal. Nov. 15, 2018, No. CV 18-03736) 2018 WL 6271965, at *4 [*Dynamex* applies “for the purpose of wage orders”]; *Karl v. Zimmer Biomet Holdings* (N.D.Cal. Nov. 6, 2018, No. C 18-04176) 2018 WL 5809428, at *3 [“ABC test applies only to claims arising under Industrial Welfare Commission Wage Orders”]; *Johnson v. Serenity Transportation, Inc.* (N.D.Cal. Aug. 1, 2018, No. 15-CV-02004) 2018 WL 3646540, at *11 [Supreme Court recently adopted the ABC test “for purposes of the wage orders”].

³ See *Dynamex, supra*, 4 Cal.5th at pp. 942, 967 [applying ABC test to Labor Code section 226 (itemized wage statements), and sections 510 and 1194 (overtime provisions)]; *Garcia, supra*, 28 Cal.App.5th at pp. 563-64, 571 [applying ABC test to Labor Code sections 1182.12, 1194, 1194.2, and 1197 (various minimum wage provisions, including liquidated damages), sections 226.7 and 512 (meal and rest periods), and section 226 (itemized wage statements)]; *Alvarez, supra*, 2018 WL 6271965, at *2, 4 [applying ABC test to Labor Code claims for violations of minimum wage and meal and rest periods (but not to business expenses, itemized wage statements, waiting time penalties, and PAGA penalties)]; *Karl, supra*, 2018 WL 5809428, at *1, 3 [applying ABC test to Labor Code claims for unpaid wages, overtime, meal and rest periods, itemized wage statements, and civil and statutory penalties (but not business expenses)].

⁴ Some Labor Code provisions expressly reference the substantive standards of the wage orders. (See, e.g., Labor Code section 1197 [“The minimum wage for employees fixed by the [IWC] or by any applicable state or local law, is the minimum wage to be paid to employees...”]; section 1198 [“The maximum hours of work and the standard conditions of labor fixed by the [IWC] shall be the maximum hours of work and the standard conditions of labor for employees.”]; section 226.7 [“An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the [IWC]...”].)

⁵ Most Labor Code provisions do not contain a definition of employer. However, the Legislature explicitly incorporated the IWC employer definitions into Labor Code provisions enforcing the minimum wage when it increased the minimum wage, effective January 1, 2017. (See Labor Code section 1182.12(b)(3) (Stats. 2016, ch. 4 (SB 3), section 3); SB 3 Assembly Floor Analysis (Senate Third Reading), as amended March 28, 2016, at p. 1 [“this bill...[d]efines ‘employer’ ... (consistent with the definition contained in the Industrial Welfare Commission Wage Orders)”].) For workers whose regular rate of pay is higher than minimum wage (e.g., \$25 per hour), the minimum wage is incorporated into the higher rate of pay as the floor (e.g., the minimum wage of \$11 is part of the \$25 earned per hour). A worker who is not paid at all or is paid below minimum wage, regardless of the worker’s higher hourly rate, experiences a minimum wage violation. (See *Armenta v. Osmose* (2005) 135 Cal.App.4th 314, 324 [finding that minimum wage applies to each hour worked, where employer paid higher hourly rate and impermissibly averaged higher rate over all hours worked].)

Cal. June 1, 2016, No.16-cv-00694) 2016 WL 3078856, at *3 [“it would be nonsensical to conclude that the Legislature intended to exclude...employees [covered by the wage order] from the civil enforcement mechanisms [of the Labor Code] it adopted to ensure...wage orders were obeyed”].)

All IWC wage orders contain provisions enforceable through section 2802. (*See, e.g.*, Wage Order No. 1-2001, §§ 8, 9.) Thus, reimbursement claims under section 2802 that enforce specific requirements directly set forth in the wage orders are also governed by the ABC test. (*See Dynamex, supra*, 4 Cal.5th at pp. 915-16, 942.)

Considerations Under Labor Code Section 203

California appellate courts have differed on whether the IWC “suffer or permit” definition applies to section 203 claims for waiting time penalties. (*Compare Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 571, fn.11 [stating section 203 claim did not “arise under the wage order” and declining to apply the ABC test, but limiting its holding to the record in the case “[i]n the absence of an argument” by the parties], *with Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1425, 1428-31 [following *Martinez* and applying “suffer or permit” standard to section 203].)

Whether courts considering application of the ABC test to section 203 will follow *Garcia* or *Futrell* may hinge on the court’s examination of how waiting time penalties serve to enforce wage order provisions, as well as the statutory purpose behind the penalties. (*See Dynamex*, 4 Cal.5th at p. 935 [“statutory purpose [i]s the touchstone for deciding whether a particular category of workers should be considered employees...for purposes of social welfare legislation.”].) Section 203 concerns wages that are not paid at the time of termination from employment. An employee who brings a claim under section 203 when, for example, she has not been paid, was paid less than minimum wage, or was not paid overtime, uses section 203 to enforce payment of her wages due. The broad remedial purpose of section 203 penalties – to ensure the prompt payment of wages – has been noted by courts. (*See Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492 [quoting cases].) Thus, where section 203 serves to enforce the underlying minimum wage and overtime obligations of the wage orders, application of the ABC test to these claims would be appropriate. (*See generally, Martinez, supra*, 49 Cal.4th at pp. 57, 64 [explaining in context of minimum wage how enforcement of Labor Code serves to enforce the wage order].)

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the DLSE. Thank you for your inquiry.

Sincerely,



Christina Chung

Special Counsel to the California Labor Commissioner