

# MSPA Americas May 2018 Legislative Update:

## Implications of *Dynamex* Decision

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## ***Dynamex – The Lawsuit***

### Findings:

- Defendant company was a nationwide same-day courier and delivery service operating a number of business centers in California
- Prior to 2004 classified California drivers as employees; during 2004 converted them to independent contractors
- Lawsuit instituted by 2 individual delivery drivers, on their own behalf and on behalf of a class of allegedly similarly situated drivers

## ***Dynamex – The Lawsuit***

- Alleged violation of California wage orders
  - Imposes obligations relating to minimum wages, maximum hours, and working conditions
  - “Working conditions” can include mandatory rest time, break time and responsibility for purchasing any required tools or equipment
- Alleged violation of California Labor Code §2802
  - Requires an employer to indemnify its employee for all necessary expenditures or losses incurred in working for the employer

## ***Dynamex – The Lawsuit***

- **Importantly**, the lawsuit did not concern
  - California unemployment
  - California workers' compensation
    - a common-law type test applies for purposes of both statutes
- A court had certified the case as a class action
- Issue before the Supreme Court of California involved the defendant company seeking to decertify the class action

## ***Dynamex – The Decision***

- Decision filed: April 30, 2018
- Supreme Court of California made no substantive decision on whether the putative plaintiffs were independent contractors or employees
  - But it set forth the test to be applied in making that determination
- Explicitly left open – as an issue not addressed – the proper test for determining an individual's status for purposes of the California Labor Code
  - At this time a common-law test applies for that purpose – but this could change

## *Dynamex* – The Decision

- For purposes of California wage orders, the Supreme Court of California adopted an “ABC” test
- Adopted the version used in Massachusetts, which is the most difficult to satisfy for purposes of establishing an independent contractor relationship
- Court applied a “statutory purpose” analysis, focusing on the intended scope and purpose of the wage orders

## The “ABC” Test Adopted in *Dynamex*

- The “ABC” test **presumptively** considers all workers to be employees, and permits workers to be classified as independent contractors only if the **company** demonstrates that the worker in question satisfies each of 3 conditions:
  - A. that the worker is free from the control and direction of the hirer 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 that involved in the work performed for the hiring entity.

**A Factor: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?**

- Court explained that a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control
- Common-law test
- Similar to test used in New York for state unemployment and by the Internal Revenue Service

**A Factor: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?**

**Tactics for Mitigating this Risk**

- Winnable – based on New York decisions
- Avoid anything that could be construed as affecting the means or methods of a mystery shopper's performance
  - Training
  - Monitoring
  - Supervising
  - Evaluating
  - Dictating terms or conditions of an evaluation
- Do not provide any tools, equipment or supplies

**B Factor: Does the worker perform work that is outside the usual course of the hiring entity's business?**

- This factor is intended to bring within the “employee” category all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor
- Court applied a “level playing field” analysis

**B Factor: Does the worker perform work that is outside the usual course of the hiring entity's business?**

**Tactics for Mitigating this Risk**

- Company that contracts with independent-contractor mystery shoppers **cannot** describe its own business as “providing mystery shopping services”
  - Need to check:
    - Website
    - Marketing materials
    - Contracts
    - Articles of Incorporation/governing documents
  - Alternatives:
    - Broker/marketplace platform that connects independent mystery shoppers with clients seeking mystery shoppers to perform evaluations
    - Consultant to clients on how to improve the customer experience, how to develop programs to measure the customer experience, and contracting with independent third parties to execute the measurement programs, e.g., technology solution or independent mystery shoppers
      - Shoppers' independence essential to ensuring objectively reliable data

**C Factor: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?**

- The Court interpreted this factor as intending to identify an individual who independently has made the decision to go into business for himself or herself, 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
- The fact that a company does not prohibit a worker from engaging in such a business is not sufficient to satisfy this factor
  - A **hiring entity needs to prove** that the worker actually is customarily engaged in an independently established trade, occupation, or business

**C Factor: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?**

**Tactics for Mitigating this Risk**

- When registering a mystery shopper, ascertain whether...
  - Incorporated (not likely)
  - Licensed (not likely)
  - Federal employer identification number (EIN)
  - Advertise – LinkedIn, Facebook
  - Business cards
  - MSPA-Certified
  - Obtain opportunities through other sources, e.g., internet-based aggregators/third-party schedulers
- [www.certifiedse.com](http://www.certifiedse.com)

## Tactics for Mitigating the Risk – Generally

- Arbitration provision prohibiting class-based claims
- Your company should not employ any mystery shoppers
- During the registration process, collect information that demonstrates a mystery shopper's independent enterprise (e.g., business address, business cards, website, additional clients)
- Consider using third-party scheduling/aggregation firms

## Policy Implications of *Dynamex*

- Days following *Dynamex*, new lawsuits were filed in California against Lyft and Postmates
  - Other new lawsuits could follow
- The Court cited the broader definition of “employee” in the FLSA as supporting its adoption of a broader definition of the term for purposes of California wage orders
- The Court acknowledged the possibility of an individual qualifying as an independent contractor for one purpose (e.g., California unemployment) but not another (e.g., a California wage order)
- Reinforced the need for Harmonization...

## Need for Harmonization

- H.R. 3825, the Harmonization of Coverage Act of 2017
  - Introduced on September 25, 2017, by Representatives Diane Black (R-TN) and Elise Stefanik (R-NY)
  - Would harmonize the definition of “employee” for purposes of federal statutes by amending the Fair Labor Standards Act to adopt a common-law test in lieu of the broad “economic realities” test that most courts currently apply
  - The Court in *Dynamex* cited the broader definition of “employee” in the FLSA as precedent to adopt a broader definition of the term for purposes of the wage orders
  - Unless the FLSA is amended to adopt a common-law test, other courts could follow *Dynamex* and adopt an “ABC” test for other statutes
  - **Seeking Democrat cosponsors for the bill**

## Louisiana Development

- House Bill 748
- Provides that “individuals possessing a ‘certification’ from a voluntary program shall not utilize the term ‘certified’ as a title”
- **Implications for MSPA member companies....**
- MSPA sent May 8, 2018, letter to all Members of Senate Commerce, Consumer Protection, and International Affairs Committee – which was holding a hearing to consider the bill – opposing this prohibition
- **Success!** The bill was amended to remove the prohibition

