LOS ANGELES
Daily Journal
www.dailyjournal.com
131 NO. 203 THURSDAY, OCTOBER 18, 2018

GUEST COLUMN

Dynamex isn't just about Wage Orders

By Scott Nelson

After the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), the legal and business communities focused on its holding that for purposes of claims made pursuant to California's Wage Orders, the Wage Orders' definition of "employee" controls, and not the traditional common law multi-factor test. Of course, this holding was tremendously significant as the Wage Orders' definition of employee is much broader and simpler than the traditional common law test. After *Dynamex*, it will be much more difficult for businesses to legitimately classify any part of their workforce

See Page 6 — WORKER

Worker classification ruling extends beyond Wage Orders

Continued from page 1

as independent contractors under the Labor Code and complimentary Wage Orders.

However, *Dynamex* also provides guidance that is critical to the determination of employment status under all other statutes and regulations, such as the Workers' Compensation Act, Employment Development Department Regulations, the Fair Employment and Housing Act, and the Labor Code Sections that do not have a complimentary Wage Order. In particular, *Dynamex* held that the common law test of employment is not simply a list of factors that the courts are to apply however they see fit. Instead, *Dynamex* explained that courts are to examine these factors with regard to the purpose of the statute at issue. *Dynamex* calls this the "statutory purpose standard" and explained that courts must consider the common law factors in a manner that, "best effectuates the underlying legislative intent and objective of the statutory scheme at issue." Further, *Dynamex* held that for "social welfare legislation," the purpose of those statutes is served by broadly defining who is an employee. *Dynamex* specifically held that the Workers' Compensation Act and the Labor Code are social welfare legislation, and that the courts should broadly construe who is an employee under these statutes.

The ramifications of *Dynamex*'s "statutory purpose" standard will surely be flushed out in the lower courts. The four that I see are as follows.

First, *Dynamex* establishes that, "a worker may properly be considered an employee with reference to one statute but not another." Thus, businesses and attorneys are on notice from the California Supreme Court that, for example, just because the Employment Development Department has found a business' workers to be independent contractors, this does not mean that they cannot be found to be employees for purposes of the Workers' Compensation Act or the Labor Code.

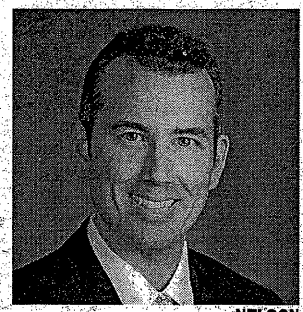
Second, adjudicating who is an employee or an independent contractor should prove to be less burdensome. For example, for purposes of social welfare legislation, *Dynamex* indicates that if the work being done is an integral part of the business and the worker does not have an independent business, "the modern tendency is to find employment status." Thus, courts will be much more likely to grant class certification of misclassification cases where there is common evidence of the factors considered of most import to the statutory scheme at issue. Further, misclassification cases are also more likely to be resolved via dispositive motions, such as summary adjudication, as courts will likely not focus on issues of fact with respect to all of the common law factors, but instead will focus on the common law factors of most import to the statute at issue.

Third, how will the courts continue to evolve the common law definition of employee? It appears that the tendency of the courts is to broaden the scope of who is an employee. Also, how will the courts define employee with respect to legislation that does not define employee? For example, many of the provisions of the Federal Employment Housing Act do not have a statutory definition of employment, and the courts will have to decide whether to treat these FEHA provisions as social welfare legislation, and thereby broadly define who is an employee for their purposes.

Finally, attorneys will need to carefully consider the cases they rely upon in arguing for or against employment status. Cases determining employment under traditional tort principles are likely not going to be found controlling with respect to cases involving employment status under social welfare legislation, such as the Labor Code or Workers' Compensation Act.

In sum, *Dynamex* is about much more than Wage Orders, as it provides significant guidance as to how employment status is to be determined under any statute or regulation. It is a further extension of the California Supreme Court's decisions in *S.G. Borello & Sons, Inc. v. DIR*, 48 Cal. 3d 345 (1989) and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014) and continues the evolution of California's common law definition of who is an employee and who is an independent contractor.

Scott D. Nelson *is a senior trial attorney at Callahan & Blaine.*



NELSON