

# TYLER & BURSCH, LLP

LAWYERS & ADVISORS

## Courtside *Newsletter*

### *Dynamex & the Independent Contractor Status*



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According to the California Supreme Court, “In recent years...both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.” With the recent decision in *Dynamex Operations West, Inc. v. Superior Court*, the question of what defines an independent contractor—and whether workers are being classified correctly—has come up once again.

#### **Background: *Dynamex Operations West, Inc. v. Superior Court***

In *Dynamex*, the primary issue was what standard applies in determining whether an individual worker should be classified as an employee or an independent contractor, for purposes of California wage orders. In this action, truck drivers brought a suit against the nationwide delivery company, Dynamex Operations West, Inc., alleging that Dynamex improperly classified them as independent contractors rather than employees. As a result, Defendants contended that Dynamex was in violation of the Industrial Welfare Commission wage order No. 9, sections of the Labor Code, and Business & Professions Code Section 17200. Focusing on the dispute surrounding the wage order, and the type of independent contractor to whom the wage order does not apply, the Court created a new “ABC” test as a standard. Pursuant to this test, “a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes:

- A) That the worker is free from the control and direction of the hirer in connection with the performance of the work...;
- 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.”

The drivers under contract with, and classified by, Dynamex as “independent contractors” performed essentially the same tasks as employees but were not compensated or treated as such. While there was certainly much more discussion behind the Court’s conclusion, and our main interest is the ABC test, the Court ultimately confirmed the decision of the Court of Appeal

#### **Interpretation**

The ABC test will likely make it more difficult for employers to classify employees as independent contractors as it is now the burden of the employer to prove that an employee is correctly classified. Per the Court, “It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard.” The Court opined that the ABC test had significant advantages, (presumably over past tests), by increasing clarity and consistency, and allowing courts to analyze the latter two parts of the standard when determining an employee’s status. If it can be established that a worker meets all three of the above criteria, the wage order does not apply to the individual and they, and the business, are allotted the advantages of being an independent contractor. Advantages for the business include the fact that independent contractors:

- Are not covered by state and federal wage and hour laws;
- Need not be covered by workers’ compensation;
- Do not have employment taxes deducted from their earnings by an employer;
- Have no rights to employee benefits;
- May not subject an employer to vicarious liability for their acts; and,

*Continued ...*

- Are not entitled to unemployment insurance benefits from the employer's account.

For independent contractors, they enjoy the autonomy of being their own boss, maintaining a work/life balance, certain tax benefits, and the potential for increased income.

#### What Does This Mean for Real Estate Professionals?

Upon first glance, it seems as though this new standard, the ABC test, is rigged against real estate agents and brokers. Real estate agents do not fulfill letter "A" since salespersons must operate under a supervising broker. Faced with this problem before, the California Legislature built a possible escape hatch for real estate professionals in the form of Business & Professions Code (B&P) Section 10032. B&P Section 10032 expressly authorizes the ability for a broker and a licensed real estate salesperson to classify themselves as either independent contractors or employer and employee. To have an independent contractor relationship, the broker and agents must follow the three-prong/factors test in the US Tax Code, which states:

- 1) The individual is duly licensed under the B&P Code;
- 2) Substantially all remuneration is directly related to sales or other output;
- 3) The services are performed pursuant to a written contract providing the individual will not be treated as an employee for state tax purposes.

Once these requirements are met, the independent contractor status is recognized but does not remove the supervision or other regulatory requirements.

#### Conclusion

Ultimately, while *Dynamex* is a landmark case in many ways—especially for other professions where there was still ambiguity about what constitutes an independent contractor—it may not have much of an effect on the real estate profession in the near future. That said, though, it will be interesting to see how this decision is treated by the Legislature. Brokers and real estate agents should be careful with those who do not fall under the protection of the B&P Code, such as transaction coordinators, administrative staff, and some team members. Additionally, they should be diligent in keeping written agreements current and confirming license status of their agents.

## Tyler & Bursch Acquires The Giardinelli Law Group!

We are pleased and excited to announce that Tyler & Bursch, LLP has acquired The Giardinelli Law Group, APC. John V. Giardinelli will now be "Of Counsel" to the firm, and TGLG's former staff is now working at Tyler & Bursch. The growing firm now has eight attorneys, and fourteen paralegals and support staff working on behalf of its clients.

John's 40+ years of experience in business and real estate transactions, litigation, business planning, and employment law will be well-utilized at Tyler & Bursch. Additionally, our practice areas have significantly expanded. We now have employment specialists, expanded litigation, estate planning, and family law under one roof. This cumulative experience will allow us to provide powerful representation and comprehensive legal advice to our clients.

John will continue to focus on real estate transactions and litigation, and all forms of business matters, as well as REALTOR® associations. With REALTOR® membership currently exceeding 35,000, he will continue to be a speaker at REALTOR® association and brokerage events. He will also continue to advise brokerage firms, business entities, brokers, agents, homeowners, developers, and business owners.

Along with his staff, John has served so many clients throughout Southern California, particularly within the Temecula Valley. Over the next few years John will continue to be active in Canyon Lake Community Church and spend time with his wife, children, and grandchildren. Fortunately for us, he will also be engaged with us as an attorney and mentor. We are fortunate to acquire the legal experience, as well as enthusiasm in politics, education, religion, and family The Giardinelli Law Group provides.

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