



California's ABC Test Applies Only to Wage Order Claims

Different independent contractor tests may be used under other laws

By Amanda Semaan © Faegre Daniels Baker
November 13, 2018

Companies can continue to rely on the broader more employer-friendly *Borello* standard for non-wage order claims, as the new ABC test applies only to claims brought under wage orders, a California appellate court ruled in *Garcia v. Border Transportation Group* (<http://www.courts.ca.gov/opinions/documents/D072521.PDF>), LLC, No. D072521 (Oct. 22, 2018).

The ABC test, an employment-classification test in California that presumes workers are employees rather than independent contractors, was first adopted in April by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/pages/new-california-contractor-test-will-impact-the-gig-economy.aspx?_ga=2.204672151.624750874.1542033379-1092065937.1535591491). Under this test, the burden is on the employer to demonstrate that every worker is not an employee by proving all three of the following:

- 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 such work and in fact.
- The worker performs work that is outside the usual course of the hiring entity's business.
- 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 appeals court in *Garcia* said it was logical to apply the ABC test to wage orders because they define employment broadly and "regulate very basic working conditions for covered California employees," suggesting courts should err on the side of extending employment protections.

For claims not brought under wage orders—such as claims based on labor statute violations—courts should continue to rely on the more flexible multi-standard test adopted by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/pages/what-independent-contractor-tests-apply-in-california.aspx), the appeals court said, explaining that there "is no reason to apply the ABC test categorically to every working relationship."

The *Borello* standard considers factors such as the worker's investment in tools used, the method of payment, the degree of permanence of the relationship, and the parties' intention regarding the relationship when determining whether a worker is properly classified as an employee or an independent contractor.

The panel mentioned in a footnote that it's an open question in California whether the ABC test applies retroactively. But because the parties' appeal briefs "implicitly assume retroactivity," the question did not need to be answered in the ruling, the appeals court said.

*Amanda Semaan is an attorney with Faegre Daniels Baker in Los Angeles © 2018 Faegre Daniels Baker. All rights reserved.
Reposted with permission.*

**CONTACT US (WWW.SHRM.ORG/ABOUT-SHRM/PAGES/CONTACT-US.ASPX) | 800.283.SHRM
(7476)**

© 2019 SHRM. All Rights Reserved

SHRM provides content as a service to its readers and members. It does not offer legal advice, and cannot guarantee the accuracy or suitability of its content for a particular purpose.

Disclaimer (www.shrm.org/about-shrm/Pages/Terms-of-Use.aspx#Disclaimer)

Feedback