crowell moring

CLIENT ALERT

Ninth Circuit Determines That Dynamex Independent Contractor Test Applies Retroactively

May.03.2019

On May 2 the Ninth Circuit determined that the California Supreme Court's 2018 *Dynamex* decision, which adopted a standard presuming that all workers are employees and announced a new "ABC test" making it harder for businesses to classify workers as independent contractors, applies retroactively.

In *Vasquez, et al. v. Jan-Pro Franchising International, Inc.,* the Ninth Circuit vacated janitorial franchisor Jan-Pro's victory in a proposed class action filed in 2008 and ordered the district court to apply the *Dynamex* ABC test. Even though the *Dynamex* opinion was silent on the issue of retroactivity, the appeals court held that the ABC test applies retroactively because of "the strong presumption" that judicial decisions in California operate retroactively and because the California Supreme Court denied a petition by an amicus (without comment) to clarify that the *Dynamex* test is prospective only. The Ninth Circuit also noted that at least two California appellate courts have applied the *Dynamex* test retroactively and that applying the test is consistent with due process because, quoting the California Supreme Court, "wage orders are the type of remedial legislation that must be liberally construed in a manner that services its remedial purpose."

The *Dynamex* decision has had far-reaching effects on businesses across California, especially in those "gig economy" industries which rely on part-time, off-site workers to support a business's core mission. The Ninth Circuit's *Vasquez* decision makes employers vulnerable to wage claims dating back up to four years. In addition to considering how current employment policies conform to the ABC test, employers may face new challenges to policies and practices concerning independent contractors that were in effect before the 2018 *Dynamex* decision.

Although the Ninth Circuit remanded to the district court for application of the ABC test, the appeals court also advised the district court on the merits. The appeals court focused on prong "B" in particular, which requires consideration of whether the janitors performed work outside the usual course of Jan-Pro's business. The Ninth Circuit said that the lack of a contract between Jan-Pro and workers does not preclude liability and that, contrary to Jan-Pro's claims that it is in the business of "franchising" rather than cleaning, that the district court should consider how Jan-Pro characterized itself in websites and advertising and whether Jan-Pro's business "depends on someone performing the cleaning." In light of *Vasquez*, employers may want to reconsider how they characterize their business and who they classify as a contractor.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Kris D. Meade
Partner – Washington, D.C.
Phone: +1 202.624.2854

Email: kmeade@crowell.com

Suzanne E. Rode
Counsel – San Francisco
Phone: +1 415.365.7276
Email: srode@crowell.com