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HUMAN RESOURCES

# Court Creates New Independent Contractor Test

THE CALIFORNIA Supreme Court has handed down a decision that rewrites the state's independent contractor law by adopting a more stringent test for determining whether or not someone is an employee for wage order cases.

The new law will affect any California business that uses independent contractors and it makes it more difficult to classify someone as an independent contractor.

In its decision in *Dynamex Operations West, Inc. vs. Superior Court*, the court rejected a test that's been used for more than a decade in favor of a more rigid three-factor approach, often called the "ABC" test.

## The big change

The prong that changes the most is the B prong under the ruling (see box on right). Prior to this decision, a hiring entity could show that a worker is an independent contractor by either demonstrating that they work outside the course of the company's usual business or outside all of the places of business of the hiring company.

The decision essentially deletes the second clause about outside all of the places of business of the hiring company.

In other words, the only way to be an independent contractor is if the work falls outside the scope of the usual course of business of the hiring entity. So, if you have employees doing the same work as an independent contractor, there could be a problem.

While this shouldn't interfere with your business if you hire a contractor to come in and work on building repairs, companies that have been using the independent contractor model to conduct their business may run into problems.

It should be noted that this case only concerns wage orders issued by the Industrial Welfare Commission, and does not apply to other wage and hour laws.

That means for other cases not concerning wage orders, an earlier decision known as the "Borello" decision still stands in terms of the independent contractor test.

In Borello, the Supreme Court held that the "right to control" the means and

*See 'Workers' on page 2*

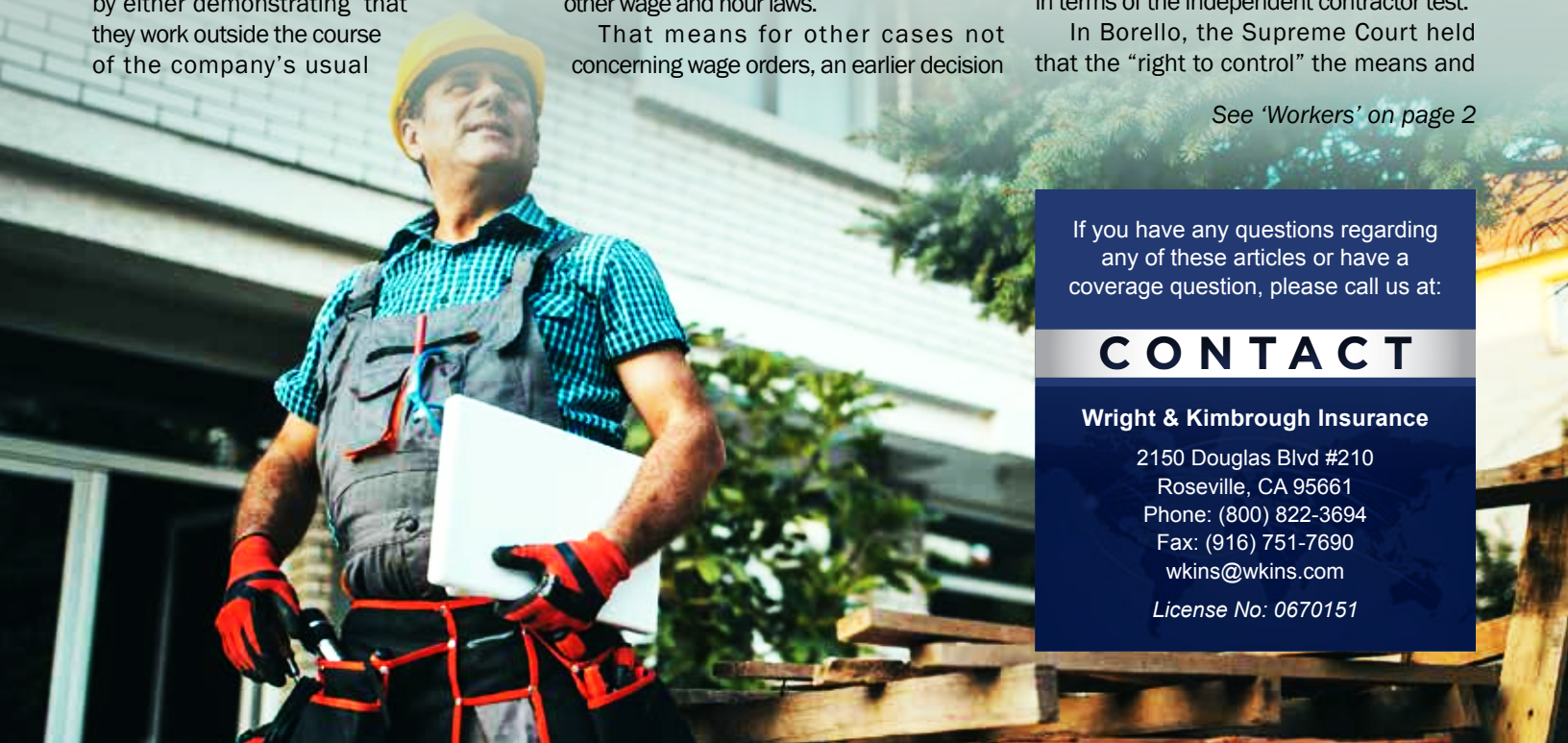
### THE NEW 'ABC' TEST

Under this new test, a person would be considered an independent contractor only if the hiring entity can prove:

**A.** That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

**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 (in other words, that the worker is in business for themselves).



If you have any questions regarding any of these articles or have a coverage question, please call us at:

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WORKERS' COMP

# Commissioner Approves 10.3% Benchmark Rate Cut

THANKS TO the reforms enacted in 2014, California Insurance Commissioner Dave Jones has ordered a 10.3% average mid-year decrease to the state's benchmark workers' comp rates.

The new benchmark rate, which insurers use as a guidepost to price their policies, will take effect on July 1.

The benchmark is essentially the base rates that cover expected costs of claims and claims-adjusting expenses across all worker class codes.

Insurers can price their policies as they wish, so there is no guarantee that any particular employers will see rate cuts. When pricing your policy, your insurer will take into account your claims history, your industry and your geographic location, among other factors.

## Why are rates falling?

The benchmark rate is falling due to the effects of SB 863, which took effect in 2014. The Workers' Compensation Insurance Rating Bureau said in its rate filing that besides increasing permanent and temporary disability payments to injured workers, the law has reduced claims costs by:

- Significantly reducing the number of spinal surgeries.
- Reducing bureaucratic tie-ups, leading to increases in claim settlement rates. At the 48-month mark, 77.1% of claims had been settled in 2017, up from 71.1% in 2011. The Rating Bureau says the law has accelerated the rate in which claims have settled as a result of quicker medical-treatment resolution through the use of independent medical review, reduction in the volume of liens and the drop in spinal surgeries. The higher claims settlement rates have also decreased the cost of adjusting claims.
- Setting requirements for lien filings and simplifying the lien system. Before new rules on liens took effect, in 2016 the Workers' Compensation Appeals Board was receiving 25,500 liens a month. After the rules took effect, lien filings had fallen 40% to a monthly average of 15,500 as of March 2017.

Also, a new Medical Treatment Utilization Schedule drug formulary, which took effect Jan. 1, 2018, is expected to reduce costs as well.

## The black marks

The one area of concern is cumulative injury claims, which continue to grow in numbers mostly in the Los Angeles area and San Diego. The ratio of cumulative injury claims in the LA area had grown to 15.5 claims per 100 indemnity claims in 2016, up from 8.7 in 2011.

In San Diego, they accounted for 11.2 claims per 100 indemnity claims in 2016, up from 6.6 claims in 2011.

In addition, the average cost of medical treatment is also on the way up, but at a relatively low rate of 3% a year. ❖

*Continued from page 1*

# *Workers are Employees if Job Is in 'Usual Course' of Operations*

manner in which work is performed is the most key factor when evaluating a classification analysis. Other factors include:

- Ownership of equipment
- Opportunity for profit and loss, and
- The belief of the parties.

This test is more flexible than the "ABC test" because it balances the different factors to arrive at a classification based on individual circumstances of each case.

Prior to Dynamex, many referred to the multi-factor Borello test as the traditional "common law" classification analysis.

## The takeaway

The court has abandoned the existing test for deciding a worker's employee status, which included factors like whether a person could be fired without cause and amount of supervision.

Now, workers are considered employees if their job is considered to be in the "usual course" of the business's operations. ❖

# Keep Injured Staff in the Loop to Reduce Claims Costs

THE KEY to getting injured employees back on the job and reducing litigation is keeping them engaged and educating them, so they have a better understanding of the claims process and what they can expect from it.

Employers that advocate for the injured worker, instead of just giving them the standard booklets on what to expect, can help them heal up enough to integrate back into work. Also, by keeping injured workers in the loop, you reduce the chances that they will seek out legal counsel for their claim, at which point it can spiral out of control for the employer.

The trend among forward-thinking employers is to use a few techniques for improving satisfaction among their injured workers, which in turn leads to lower claims costs.

## Early treatment

Getting an early and accurate diagnosis and putting the injured worker on a treatment plan greatly helps them recover faster – and it prevents the misuse of medicines.

This fast-track – or sports medicine – approach has the added effect of letting the employee know they are valued and that the employer cares about their swift recovery.

## Speak openly

Once an employee is off work for a workers' comp claim, they can easily start feeling disaffected and lost, particularly if they are left out of the loop about their claim.

If you at any point plan to discuss the claim, the injured worker should be included. This is important because some injured workers mistakenly believe their job is at risk after filing a claim.

Unfortunately, their treating physician and the claims adjusters will often not have the time to talk to the injured worker. Your H.R. manager can keep them engaged through education and explaining the processes.

## Advocacy

Some employers have also taken steps to advocate for their injured employees through the workers' comp process and representing their interests before the claims adjuster.

Employers who have had the best success sit down with the injured worker as early as possible to lay out the entire process for them, from the first doctor's visit to what to expect when dealing with the claims adjuster.

The main reason injured workers hire attorneys is that they don't understand what's going to happen and they don't understand the workers' compensation process. Acting as an advocate for the injured worker, and holding their hand through the process, will go a long way to easing their fears.

## Monitor and explain treatment

The proactive employer will stay in touch during treatment and help the worker monitor their process. If the employer is engaged, the injured worker is more likely to stay on track with the treatment regimens prescribed by the doctor.

This may involve coordination with the treating physician so that any physical rehabilitation is done with their job responsibilities in mind. A good therapist can also explain why certain exercises are necessary for the injured worker.

Also, urge the rehab center and the claims adjuster to ensure that the injured worker sees the same therapist every time.

## Stay engaged

Some employers communicate with the treating physician, claims adjuster and injured worker about the possibility of the individual coming back to limited or restricted duty.

Just remember, your engagement with the injured worker must be done in a way that best meets the person's needs.

Also, if there is friction between the worker and a superior, make sure it's not their superior that's engaging with them during this process. You don't want any undue stress on the injured employee during this sensitive and critical period.

Knowing the employer is concerned about their well-being, and is looking forward to their return, can aid recovery. ❖

# When a Customer Harasses One of Your Employees

SOCIETY HAS become increasingly aware of the problem of sexual harassment in the workplace. Several high-profile offenders have seen their careers harmed or ended.

Employers are beginning to realize the harm this behavior among employees can cause. However, the problem might not be the business's workers; in many cases, it is the customers.

Harassment by customers may occur in any business, but it is especially prevalent in the hospitality sector. That's especially true if customers have been drinking and behave inappropriately toward waitresses, bartenders, casino dealers or housekeeping staff.

Sales representatives may be subjected to unwanted attention and language, particularly during client dinners where most of the diners are men. And nurses are regularly subjected to patients exposing themselves or touching them improperly.

Employers who do learn of these problems have at least a legal responsibility to address them.

Some employers, such as restaurants, have a no-questions-asked procedure whereby a server can report to a supervisor that a customer is making them feel uncomfortable and the supervisor will immediately assign someone else to that table. This policy tells employees their complaints will be taken seriously.

## If an employee complains...

- Listen to them and take them seriously.
- Thank them for coming forward.
- Let them know that the issue will be addressed with the customer.
- Ask them to report any further incidents that may occur.
- Do nothing to imply that they will be retaliated against.

## What to do next

- Investigate the incident, including discussions with any witnesses.
- If the customer is from another business, refer the matter to an appropriate person at that company. This should be someone with the authority to take any necessary action.
- If the customer is an individual, separate the employee and the customer.
- If the customer persists, issue a warning.
- As a last resort, ask the customer to leave the premises.

### The legal implications

Employers cannot afford to ignore these problems. Equal Employment Opportunity Commission regulations hold an employer liable for harassment by non-employees over whom it has control, such as customers on the premises, if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

The EEOC levies penalties of up to six figures for sexual harassment.

In addition, victimized employees may sue their employers for tolerating hostile work environments. Settling these lawsuits can be costly.

If the employers do not carry employment practices liability insurance, settlement costs and attorney and court fees will be paid for out of pocket.

Lastly, the failure to protect employees from harassment can lower workplace morale. This will inevitably lead to increased staff turnover. The employer will lose valuable employees and be faced with the cost of hiring replacements.

Federal law gives employees the right to feel safe at work, free from mistreatment by co-workers, supervisors and non-employees. It is also good business practice to provide a place where people want to work.

Employers must be vigilant about possible mistreatment of staff by customers and vendors. Tolerating this behavior may save a customer in the short run, but it will cost the business dearly in the longer term.

A final thought: Sexual harassment is not the sole preserve of men harassing women. It is also an issue of women harassing men, men harassing men, or one female harassing another. ❖