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Memorandum

FROM: Jennifer Raphael Komsky, Esq.

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RE: Significant new California Supreme Court case making it extremely difficult to legally permit an independent contractor relationship

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While the judicial determination of the classification of "employee" versus "independent contractor" has been narrowing over the past few years, the California Supreme Court recently issued a decision which represents a substantial change making it extremely difficult for California employers to classify workers as independent contractors as opposed to employees. Many companies (and workers) prefer the flexibility of independent contractors because it negates the requirement to comply with wage and hour obligations, worker's compensation insurance, payroll withholdings, and compliance with the Fair Employment and Housing Act. However, this new ruling and the resultant new test cast a wide net over workers who must be classified as employees.

The prior test utilized a multi-pronged approach that relied most heavily on the control and direction exerted over the worker's performance. The recent California Supreme Court ruling resulted in a three-part test that begins with the presumption that all workers are employees. The worker can be classified as an independent contractor if three conditions are met. The Court refers to this as the "ABC test" and the worker in question may be classified as an independent contractor only if all the following apply:

(a) *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 the work and in fact*; and
(b) *the worker performs work that is outside the usual course of the hiring entity's business* (regardless of where the work occurs); and
(c) *the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed*.

The third prong (c) means the worker has independently made the decision to go into business, evidenced by things such as "incorporation, licensure, advertisements, [or] routine offerings to provide the services of the independent business to the public or to a number of potential customers."

This ruling applies only to California Wage Orders and not to other areas where a determination of employee versus independent contractor may be relevant, such as within worker's

compensation. California has 17 Wage Orders that regulate many different aspects of employment, most notably wages, hours, overtime calculations, and working conditions for each industry.

For most companies, this new test is essentially a death knell to the independent contractor relationship and in essence prevents the use of independent contractors except where the person's work has no tangible connection to the hiring entity's business. Since this case is so new, it is difficult to predict where deciding courts will land on relationships that may fall within any grey areas. In the meantime, any business that utilizes independent contractors needs to closely examine those relationships to determine the level of risk associated with maintaining independent contractor relationships. Our office can help with a risk assessment and determination of the best steps for your business. Contact me at jkomsky@laklawyers.com

For those interested in reading the California Supreme Court's decision, the case is *Dynamex Operations West, Inc. v. Superior Court* and is available at:

http://www.courts.ca.gov/opinions/documents/S222732.PDF