BRIEF

DYNAMEX OPERATIONS WEST, INC., v. THE SUPERIOR COURT OF LOS ANGELS COUNTY (04/30/18)

The following information is for educational purposes and is not legal advice, this information applies to salon establishments with independent contractors. Please contact the Professional Beauty Association for additional information.

On April 30, 2018, the California Supreme Court issued a landmark decision regarding the distinction between independent contractors and employees. The ruling promises to have a profound impact on how workers in hair salons are classified. In *Dynamex Operations West, Inc. v. Superior Court*, the Court addressed the issue of "whether an individual worker should properly be classified as an employee or, instead, as an independent contractor . . ." As the Court rightly pointed out, the question "has considerable significance for workers, businesses, and the public generally."

In its decision, the Court established a new test for California (referred to as the "ABC test") that **will make it nearly impossible for hair salons and other business in the beauty industry to classify workers in California as independent contractors.** The Court decided that, in order for a business to classify a worker as an independent contractor, it must prove each of the following:

(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

The Court concluded that the "hiring entity's failure to prove any one of these three prerequisites will be sufficient *in itself* to establish that the worker is" an employee rather than an independent contractor.
It will be impossible for most California hair salons to satisfy the foregoing requirements and properly classify workers and independent contractors. In particular, most salons will not be able to meet the "B" portion of the test, which requires that the worker perform work that is "outside the usual course of the hiring entity's business." If a salon that provides hair and beauty services hires a person to provide those services to its customers, that person will necessarily be performing work that is part of the entity's business (e.g., providing hair and beauty services to clients) and will almost certainly be considered an employee. Even if a salon can somehow overcome the hurdle provided by the "B" portion test, the salon must still ensure that it does not control a putative contractor's work and ensure that the contractor is actually engaged in his or her own business. 2

The stakes of misclassification are high. Employees are protected by minimum wage laws, employees earn overtime premiums, and employers must withhold taxes for employees. If a salon misclassifies an employee as a contractor, the salon could become liable for unpaid wages,
unpaid overtime, missed meal and rest periods, and taxes that should have been withheld. Misclassification of workers can also cause problems with workers compensation matters and with unemployment benefits.

If you own and / or operate a salon in California that currently uses independent contractors, you should immediately seek legal advice to determine whether you are in compliance with the rules established in *Dynamex*. If you are not in compliance, you should work with an attorney to convert independent contractors to employees so that you can be in compliance going forward.

The question remains whether independent contracts can ever be a viable option in the California salon industry. To be sure, salons remain able to hire independent contractors to perform work that is "outside the usual course" of the salon's business. For example, if the walls of a salon need to be painted, the salon owner can surely hire a contractor to do the job without worry that the contractor will later be considered a salon employee.

It is also possible that certain businesses will be able to continue to rent facilities to stylists and other independent businesses. Any such "booth rental or salon suite rental" business, however, will will need to take material and measurable steps to show that the usual course of its business is renting booths as opposed to providing hair and beauty services. The booth renting business will need to have no involvement in the stylist's business. That means the stylist should book her own clients, collect her own revenue, pay for her own supplies, and maintain her own station. She should also obtain her own business license and consider incorporating. The salon must do nothing other than collect the rent check. It should impose no rules or restrictions of any substance on the stylist's business and it should not handle the stylist's money. Post-*Dynamex*, any booth renting arrangement should be reviewed by legal counsel to make sure that it satisfies the "ABC test" and that it does not court a future claim that the stylist classified as a contractor is actually an employee.

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