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### ABC to AB 5: The Supreme Court of California Modernizes Common Law Doctrine in *Dynamex Operations West, Inc. v. Superior Court*

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# ABC TO AB 5: THE SUPREME COURT OF CALIFORNIA MODERNIZES COMMON LAW DOCTRINE IN *DYNAMEX OPERATIONS WEST, INC. v. SUPERIOR COURT*

**Abstract:** In 2018, the Supreme Court of California held in *Dynamex Operations West, Inc. v. Superior Court* that the ABC test for distinguishing between employees and independent contractors under state wage and hour laws should supplant its common law approach. As a result, California codified the decision as Assembly Bill 5 (AB 5). The adoption of the ABC test stands to benefit workers and have considerable effects on California’s economy. This Comment argues that courts should follow the Supreme Court of California’s example by shifting away from outdated common law doctrine to tackle emerging societal problems and propel legislative change.

## INTRODUCTION

Monumental changes in the way Americans work continue to drive the mischaracterization of employees<sup>1</sup> as independent contractors.<sup>2</sup> This trend fuels near-constant debate about the issue of worker misclassification.<sup>3</sup> Mis-

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<sup>1</sup> *Employee*, BLACK’S LAW DICTIONARY (11th ed. 2019). An employee completes assignments for a hiring enterprise or person, often through a formal or informal agreement. *Id.* The hiring entity exercises control over the way in which the employee accomplishes these tasks. *Id.*

<sup>2</sup> *Independent Contractor*, BLACK’S LAW DICTIONARY, *supra* note 1. An independent contractor agrees to perform a particular task for a hiring entity, but exercises control over how she will complete it. *Id.* She can accept payment or provide services free of charge. *Id.* The hiring entity will not be liable for her actions under most circumstances. *Id.*

<sup>3</sup> See William B. IV Gould, *Dynamex Is Dynamite, but Epic Systems Is Its Foil*—Chamber of Commerce: *The Sleeper in the Trilogy*, 83 MO. L. REV. 989, 992 (2018) (explaining that fears over worker misclassification have become more widespread as new labor arrangements have become more common). The percentage of workers who are classified as independent contractors has increased significantly since the beginning of the twenty-first century. John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 2–3 (2018). The development of the “fissured economy,” in which companies outsource tasks that they do not deem central to their operations, has propelled this phenomenon. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 10–13 (reprint ed. 2017) (defining the fissured economy and employers’ financial motivations to reorganize the workplace). The explosion of app-based companies increased the size of the contingent workforce. See Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 56 (2017) (explaining that the expansion of the contingent workforce predates the development of app-based businesses and has grown as a result of them). Today, employers increasingly classify individuals whose jobs do not require specialized skills, such as cleaning and serving food, as independent contractors. Pearce & Silva, *supra* note 3, at 13.

categorization strips workers of legal protections, curbs tax revenue, shifts liability away from employers, and provides an unfair advantage to businesses that exploit the system.<sup>4</sup> “Gig economy”<sup>5</sup> titans like Lyft, Uber, and DoorDash staunchly oppose changes to state labor laws that would require them to reclassify their workers as employees.<sup>6</sup> Companies fear that the costs of meeting obligations attached to employee status could endanger their businesses’ financial viability.<sup>7</sup> The fight over reform in California, home to the fifth-largest economy in the world,<sup>8</sup> has been particularly fierce.<sup>9</sup> Whereas lawmakers have con-

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<sup>4</sup> Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 54–55 (2015). Laws that shield employees from discriminatory practices and wage theft do not apply to independent contractors. *Id.* Independent contractors cannot sue on these bases, meaning that hiring businesses can escape liability if they discriminate against or underpay their independent contractors. *See id.* at 55. Moreover, businesses that use independent contractors do not need to furnish many of the taxes that employers do. *Id.* These include contributions to unemployment compensation funds and payroll taxes. *Id.* Independent contractors also tend to understate their earnings. David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL’Y 138, 140 (2015). Experts estimate that federal and state governments forgo billions of dollars due to worker misclassification. *Id.* Given that misclassification reduces labor costs and decreases a business’s tax burden, it gives companies that engage in the practice a leg up on their competitors. Deknatel & Hoff-Downing, *supra* note 4, at 55.

<sup>5</sup> Gould, *supra* note 3, at 989. The “gig economy” refers to “a labor market characterized by the flexibility and the prevalence of short-term work as opposed to permanent jobs.” *Id.*

<sup>6</sup> *See* Kate Conger, *Uber, Lyft and DoorDash Pledge \$90 Million to Fight Driver Legislation in California*, N.Y. TIMES (Aug. 29, 2019), <https://www.nytimes.com/2019/08/29/technology/uber-lyft-ballot-initiative.html> [<https://perma.cc/N2RL-LDJF>] (detailing large app companies’ promise to bankroll a ballot initiative campaign to prevent California law from changing how they classify drivers). Lyft and Uber are app-based transportation companies that match drivers with customers looking for a ride to the destination of their choice. *The Whole City. In the Palm of Your Hand.*, LYFT, <https://www.lyft.com/rider> [<https://perma.cc/NG8R-32S4>]; *Uber’s Technology Offerings*, UBER, <https://www.uber.com/us/en/about/uber-offerings/> [<https://perma.cc/2FR9-295Q>]. DoorDash is an app-based food delivery service. *About Us*, DOORDASH, <https://www.doordash.com/about/> [<https://perma.cc/5XL8-44XA>].

<sup>7</sup> *See* Joel Rosenblatt & Josh Eidelson, *Uber Urges California Court to End Law That Gives Gig Workers Benefits*, BLOOMBERG (Feb. 7, 2020), <https://www.bloomberg.com/news/articles/2020-02-07/uber-urges-court-to-smother-california-frankenstein-labor-law> [<https://perma.cc/J58S-Z96J>] (reporting that Uber believes reclassifying its drivers as employees will increase its labor expenditures by twenty to forty percent).

<sup>8</sup> Thomas Fuller, *The Pleasure and Pain of Being California, the World’s 5th-Largest Economy*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/us/california-economy-growth.html> [<https://perma.cc/TVC9-UJRE>]. The development of California’s technology and manufacturing sectors, among others, contributed to its exponential economic growth. *See id.* California is also dealing with the negative consequences of its increased prosperity, including a ballooning homeless population, skyrocketing real estate prices, and hellish traffic, that accompany the state’s high cost of living. *See id.*

<sup>9</sup> *See* Conger, *supra* note 6 (illustrating the lengths gig economy companies are willing to go, namely funding a ballot referendum to avoid reclassifying independent contractors as employees in California). Prior to the passage of Assembly Bill 5 (AB 5), the California law that codified *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018), professional organizations representing a diverse array of occupations, which included real estate agents, veterinarians, and cosmetologists, spent considerable sums of money to lobby the legislature for exemptions from AB 5. *See* Sofia Bollag, *Uber, Lyft Couldn’t Beat California Employment Rules, but These Industries Did*, SACRAMENTO BEE (Sept. 9 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article>

fronted the issue of worker misclassification through statutory means in most states, the judiciary has paved the way for legislative reform in California.<sup>10</sup>

California recently changed its approach to assessing worker misclassification for the purposes of certain state regulations.<sup>11</sup> In 2018, in *Dynamex Operations West, Inc. v. Superior Court*, the Supreme Court of California held that the ABC test<sup>12</sup> is the proper method for distinguishing between employees and independent contractors under state wage orders.<sup>13</sup> The decision prompted the passage of Assembly Bill 5 (AB 5) to codify the holding in *Dynamex*.<sup>14</sup> Questions remain about how these changes will impact workers in various sectors, if the bill will apply retroactively, and whether the new legislation will survive a well-funded ballot initiative campaign to undermine it.<sup>15</sup> Despite lingering

234846227.html (discussing the degree of funding that representatives from different occupations poured into lobbying for exemptions from AB 5).

<sup>10</sup> See Deknatel & Hoff-Downing, *supra* note 4, at 64 (describing different state legislatures' approaches to changing laws concerning worker misclassification). Sixteen states recently enacted legislation to combat mischaracterization of independent contractors. *Id.*

<sup>11</sup> See *Dynamex*, 416 P.3d at 7 (Cal. 2018) (adopting the ABC test for distinguishing between employees and independent contractors).

<sup>12</sup> *Id.* The ABC test is the three-factor inquiry that the Supreme Court of California adopted to distinguish between employees and independent contractors. *Id.* The elements of the test state:

(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; and (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. *Id.* at 35. *Dynamex* marked the first time that a California court applied the ABC test. Amici Curiae Letter in Support of Petition for Rehearing at 3–4, *Dynamex*, 416 P.3d 1 (No. S222732) (explaining that *Dynamex* introduced the ABC test to California).

<sup>13</sup> *Dynamex*, 416 P.3d at 40–42 (implementing the use of the ABC test to distinguish between employees and independent contractors under California wage order provisions); see Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, 12 HARV. L. & POL'Y REV. ONLINE 1, 7 (2017) <https://harvardlpr.com/wp-content/uploads/sites/20/2018/01/Andrias-Social.pdf> [<https://perma.cc/GDW4-BUY7>] (describing the origins of California's wage orders). The California legislature created the Industrial Welfare Commission (IWC), a tripartite body that includes union, employer, and general public representatives in 1913. *Id.* at 7 n.34. The IWC possesses the power to promulgate wage orders, which are California state regulations that provide wage and hour protections to workers. *Id.* at 7. There are seventeen IWC wage orders, twelve of which concern wages and conditions in particular industries. *Id.*

<sup>14</sup> Assem. Bill No. 5 (2018–2019 Reg. Sess.) (Cal. 2019); John Myers et al., *Newsom Signs Bill Rewriting California Employment Law, Limiting Use of Independent Contractors*, L.A. TIMES (Sept. 28, 2019), <https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees-independent-contractors-california> [<https://perma.cc/V7A8-AHTP>]. AB 5 amended portions of the California Labor and Unemployment Insurance Codes. CAL. LABOR CODE §§ 2750.3, 3351 (West 2020); CAL. UNEMP. INS. CODE §§ 606.5, 621 (West 2020).

<sup>15</sup> See *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1045, 1046 (9th Cir. 2019) (directing the Supreme Court of California to determine whether *Dynamex* should apply retroactively); Eli Rosenberg, *Can California Rein in Tech's Gig Platforms? A Primer on the Bold State Law That Will Try.*, WASH. POST (Jan. 14, 2020), <https://www.washingtonpost.com/business/2020/01/14/can-california->

uncertainty about the future implications of the decision, the Supreme Court of California correctly updated common law doctrine concerning worker misclassification to address abuses in the modern economy.<sup>16</sup>

Part I of this Comment presents relevant background information necessary for understanding *Dynamex*.<sup>17</sup> Part II discusses how the *Dynamex* decision represents a departure from common law precedent and examines possible effects of the change.<sup>18</sup> Lastly, Part III contends that other courts should follow the Supreme Court of California's lead by dispensing with common law doctrine that functions improperly in its modern context.<sup>19</sup>

## I. THE EVOLUTION OF CALIFORNIA'S APPROACH TO WORKER MISCLASSIFICATION

Misclassification of workers has become a hot button issue due to its considerable ramifications for individual laborers, employers, and the government.<sup>20</sup> Section A of this Part discusses the significance and evolution of federal and California law pertaining to worker classification.<sup>21</sup> Section B of this Part describes the facts and procedural history of *Dynamex*.<sup>22</sup>

### A. *The History and Modern Significance of Worker Misclassification Under Federal and State Law*

The legal issues associated with worker misclassification have evolved over time.<sup>23</sup> Prior to the close of the nineteenth century, litigation concerning worker classification primarily concerned whether employers could be held liable for damages resulting from workplace accidents.<sup>24</sup> This was critical in cases premised on *respondeat superior*, a doctrine that imposes liability on

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reign-techs-gig-platforms-primer-bold-state-law-that-will-try/ [https://perma.cc/7J2S-VUS7] (explaining that app-based companies pledged over \$100 dollars to fund a ballot initiative campaign).

<sup>16</sup> See 15A AM. JUR. 2D *Common Law* § 13 (2020) (stating that courts should adjust common law doctrine in accordance with shifting societal norms). “Common law” in this context refers to precedent that judges create through court decisions. *Common Law*, BLACK'S LAW DICTIONARY, *supra* note 1.

<sup>17</sup> See *infra* notes 20–93 and accompanying text.

<sup>18</sup> See *infra* notes 94–136 and accompanying text.

<sup>19</sup> See *infra* notes 137–158 and accompanying text.

<sup>20</sup> See Bauer, *supra* note 4, at 140 (describing how misclassification costs state and federal governments significant tax revenue); Anna Deknatel & Hoff-Downing, *supra* note 4, at 55 (elaborating on the consequences worker misclassification has for various stakeholders).

<sup>21</sup> See *infra* notes 23–72 and accompanying text.

<sup>22</sup> See *infra* notes 73–93 and accompanying text.

<sup>23</sup> See *Dynamex*, 416 P.3d at 4–5 (emphasizing the adverse effects of employee misclassification on individual workers, employers, and society as a whole today).

<sup>24</sup> See Pearce & Silva, *supra* note 3, at 5 (explaining that the legal significance of worker classification originally centered around determining employers' liability for their employees' activities).

employers for their employees' negligence.<sup>25</sup> The significance of worker mis-categorization shifted with the advent of the "New Deal."<sup>26</sup> During the 1930s, the federal government passed several laws that offered protection to workers.<sup>27</sup> New Deal legislation included the National Labor Relations Act (NLRA), which protects workers' rights to organize and bargain collectively,<sup>28</sup> and the Fair Labor Standards Act (FLSA), which mandates a minimum wage and requires increased payment for overtime hours.<sup>29</sup>

Most federal and state laws that offer workers protection only cover laborers classified as employees.<sup>30</sup> The power imbalance between employers and workers prompted legislators to enact laws that protect employees and their ability to bargain collectively.<sup>31</sup> As a result, employees enjoy legal safeguards, including those guaranteed under state and federal wage and hour regulations, which do not extend to independent contractors.<sup>32</sup> Independent contractors are traditionally highly-skilled workers who operate autonomous businesses, and lawmakers did not believe they required additional protection due to their specialized capabilities and capacity to garner satisfactory remuneration for their services.<sup>33</sup>

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<sup>25</sup> See *id.* (noting that the *respondeat superior* doctrine renders employers culpable for damages their employees incur while operating within the scope of their employment).

<sup>26</sup> *Id.* at 6.

<sup>27</sup> See MARION CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* 21 (3ded. 2015) (describing how legislation enacted as part of the New Deal offered additional protections to employees). Labor laws constituted an instrumental portion of the New Deal, a legislative strategy intended to help the United States emerge from the Great Depression. *Id.* The initiatives sought to increase workers' wages and job stability to encourage spending. *Id.* Architects of the program hoped this would produce additional employment opportunities. *Id.*

<sup>28</sup> National Labor Relations Act, 29 U.S.C. §§ 151–168 (1935); see CRAIN, *supra* note 27, at 22 (explaining that the NLRA safeguards employees' rights regarding collective bargaining and organization). The statute is also known as the Wagner Act. CRAIN, *supra* note 27, at 22.

<sup>29</sup> Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1938); see CRAIN, *supra* note 27, at 21, 779 (noting that the FLSA instituted a minimum wage and guaranteed employees one and a half times their normal rate of pay for every hour worked beyond forty hours in one week). FLSA's overtime provision was supposed to encourage employers to divide available work among a greater number of employees. CRAIN, *supra* note 27, at 21.

<sup>30</sup> See Bauer, *supra* note 4, at 144 (explaining that independent contractors are excluded from the lion's share of federal laws that protect employees); Christopher Buscaglia, *Crafting a Legislative Solution to the Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111, 111–12 (2008) (describing the benefits available to employees and not independent contractors, including overtime pay, employer-provided medical insurance, and employer-supported retirement funds); Deknatel & Hoff-Downing, *supra* note 4, at 54–55 (noting that independent contractors do not enjoy wage and hour protections, recourse for discrimination, access to workers' compensation, and other legal safeguards).

<sup>31</sup> See *Dynamex*, 416 P.3d at 32 (explaining that California enacted wage and hour laws because it recognized that workers lack equal bargaining power and will often accept poor working conditions and insufficient payment due to their need to support themselves and their families).

<sup>32</sup> See *supra* notes 29–30 and accompanying text.

<sup>33</sup> Pearce & Silva, *supra* note 3, at 12–13.

Additional consequences of worker misclassification include loss of tax revenue and unjust competition among businesses.<sup>34</sup> When companies misclassify workers as independent contractors, they do not contribute to unemployment compensation funds, furnish payroll taxes, or withhold any of their workers' Social Security and Medicare taxes.<sup>35</sup> This decreased tax burden offers a competitive edge to companies that misclassify their workers.<sup>36</sup> Additionally, designating workers as independent contractors has additional cost-saving benefits.<sup>37</sup> Independent contractors can neither attain workers' compensation for accidents sustained in the course of their work nor sue for employment discrimination.<sup>38</sup> Worker misclassification offers an unfair advantage to businesses that flout the law, and companies that comply with regulations suffer as a result.<sup>39</sup>

Therefore, classification can determine which workers enjoy protection under state labor laws.<sup>40</sup> The California wage order at issue in *Dynamex* was

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<sup>34</sup> Bauer, *supra* note 4, at 140 (noting that worker misclassification deprives governments of billions of tax dollars); Buscaglia, *supra* note 30, at 112 (highlighting the fact that misclassification gives companies a competitive edge over businesses that properly designate their workers as employees).

<sup>35</sup> See Bauer, *supra* note 4, at 139–40, 151 (elaborating on the taxes employers avoid through misclassifying their workers as independent contractors). The Federal Insurance Contributions Act mandates that employers and employees divide the cost of paying taxes that fund Medicare and Social Security. *Id.* at 147. The government taxes an employee's full earned income. *Id.* at 148. The law governing independent contractors' tax obligation imposes the same tax rate, but does not collect taxes based on independent contractors' entire income. See *id.* at 148 (specifying that the federal government taxes approximately ninety-two percent of independent contractors' earnings). Independent contractors are also more likely to downplay their earnings, which further decreases the tax base. *Id.* Individuals who work for themselves may underreport their earnings because they can easily do so through activities like overestimating their business expenditures. See Pirooska Soos, *Self-Employed Evasion and Tax Withholding: A Comparative Study and Analysis of the Issues*, 24 U.C. DAVIS L. REV. 107, 119–20 (1990) (arguing that self-employed people possess more opportunities to avoid taxation). It is difficult for the IRS to detect noncompliance among the self-employed, which might encourage independent contractors to understate their earning. See *id.* (noting that the Internal Revenue Service (IRS) focuses on larger companies that evade taxes for practical reasons).

<sup>36</sup> See Buscaglia, *supra* note 30, at 112, 128–29 (indicating that businesses have an incentive to misclassify workers to reduce costs, decrease liability, and avoid taxes).

<sup>37</sup> See *id.* (outlining how worker misclassification decreases labor costs and lowers a business's tax burden, which makes it financially advantageous for employers).

<sup>38</sup> See Bauer, *supra* note 4, at 139–40, 145 (describing legal protections that are not available to independent contractors). Although independent contractors cannot sue hiring enterprises for employment discrimination, employers can face liability for the discriminatory acts of third-party independent contractors against their employees. Dallan F. Flake, *Employer Liability for Non-Employer Discrimination*, 58 B.C. L. REV. 1169, 1173–74 (2017). Workers' compensation refers to a framework for providing funds to individuals harmed in the course of their work. *Workers' Compensation*, BLACK'S LAW DICTIONARY, *supra* note 1.

<sup>39</sup> See Deknatel & Hoff-Downing, *supra* note 4, at 55 (explaining how misclassification benefits businesses acting in bad faith because it lowers their labor costs and tax burden).

<sup>40</sup> Order Regulating Wages, Hours, and Working Conditions in the Transportation Industry, CAL. CODE REGS. tit. 8, § 11090 (2000); see *Dynamex*, 416 P.3d at 14 (explaining that the wage order does not cover independent contractors).

the Order Regulating Wages, Hours, and Working Conditions in the Transportation Industry.<sup>41</sup> It includes regulations concerning minimum wages, break periods, and restrictions on hours worked.<sup>42</sup> The order does not define independent contractor.<sup>43</sup> Nevertheless, it notes that “employ” means “engage, suffer, or permit to work” and “employee” signifies “any person employed by an employer.”<sup>44</sup> Additionally, the dispute in *Dynamex* concerned California Labor Code Section 2802, which dictates that employers must compensate their employees for certain expenses.<sup>45</sup>

Due to the high stakes of worker misclassification, courts frequently need to determine whether a hiring business appropriately characterized its workers.<sup>46</sup> Despite the significance of distinguishing between employees and independent contractors, federal and state courts often struggle to make crucial determinations concerning the line between them.<sup>47</sup> For example, the Internal Revenue Service (IRS) considers over ten factors in its analysis.<sup>48</sup> Prior to *Dynamex*, California courts utilized a common law test that entailed a “control of details” standard to decide how individual workers should be classified.<sup>49</sup> The

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<sup>41</sup> CAL. CODE REGS. tit. 8, § 11090; *Dynamex*, 416 P.3d at 13.

<sup>42</sup> CAL. CODE REGS. tit. 8, § 11090; *Dynamex*, 416 P.3d at 13–14.

<sup>43</sup> *Dynamex*, 416 P.3d at 13 (quoting CAL. CODE REGS. tit. 8, § 11090(2)).

<sup>44</sup> CAL. CODE REGS., tit. 8, § 11090(2).

<sup>45</sup> Indemnification for Employee’s Expenses and Losses in Discharging Duties, CAL. LAB. CODE § 2802 (West 2016); *Dynamex*, 416 P.3d at 6. Part (a) of the statute provides that, “[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.” *Id.*

<sup>46</sup> See *Dynamex*, 416 P.3d at 14 (detailing the long history of cases concerning worker misclassification in California).

<sup>47</sup> See *id.* (quoting Nat’l Labor Relations Bd. v. Hearst Publ’ns, Inc., 322 U.S. 111, 121 (1944)) (illustrating the difficulty of properly distinguishing between employees and independent contractors in federal cases); Lobel, *supra* note 3, at 59 (“Misclassification cases are difficult because the legal test used to determine employee status is notoriously messy.”).

<sup>48</sup> See *Understanding Employee v. Independent Contractor Designation*, IRS (July 20, 2017), <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation> [<https://perma.cc/JH92-KA2S>] (categorizing the criteria into three groups: control over work performance, management of finances, and the connection between the worker and the hirer). These factors include the specificity of the hiring entity’s instructions, the extent of the worker’s investment in materials, and the duration of the working relationship. *Id.* Although the inquiry depends on the particular facts involved, the IRS notes that independent contractors determine how they will execute tasks that a business or individuals hires them to accomplish. *Id.*

<sup>49</sup> See *Dynamex*, 416 P.3d at 14–15 (citing *Tieberg v. Unemployment Ins. App. Bd.*, 471 P.2d 975, 977 (Cal. 1970)) (describing the evolution of the common law test for distinguishing between employees and independent contractors). Under the common law “control of details” test, California courts assessed numerous secondary factors, including, (a) whether the individual completing work was involved in a discrete profession or enterprise, (b) whether the work was normally completed without supervision or by an expert in the field, (c) the degree of training the profession requires, (d) which party provided materials and space to complete the work, (e) duration of the work period, (f)



test concerned the degree to which the hiring entity could control a worker's activities and performance.<sup>50</sup> In addition, California courts assessed numerous secondary factors to help make their determinations.<sup>51</sup> These factors included the subject worker's occupation, the skills the profession required, the duration of the service period, and the means of payment.<sup>52</sup>

The California courts' modern approach to worker misclassification crystallized over the past thirty years.<sup>53</sup> In 1989, in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, the Supreme Court of California held that a farm misclassified its cucumber harvesters as independent contractors.<sup>54</sup> The court affirmed the use of the common law "control-of-work" test and considered secondary factors outlined in prior case law.<sup>55</sup> The dispute arose after the Department of Industrial Relations cited the farmer for failing to buy workers' compensation insurance.<sup>56</sup> California law required it if the pickers were employees.<sup>57</sup> The Supreme Court of California also emphasized the importance of statutory intent, noting that the law requires employers to purchase workers' compensation insurance to protect laborers like the cucumber harvesters.<sup>58</sup> After considering the extent of the farmer's control over the workers' performance, analyzing secondary factors, and taking the intent of the workers' compensation mandate into account, the Supreme Court of California held that the pickers were employees.<sup>59</sup> *Borello* emerged as the touchstone for assessing worker misclassification under the California wage orders.<sup>60</sup>

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means of remuneration, (g) whether the work related to the central activities of the business, and (h) how the worker and the hiring party viewed their relationship. *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* Many of the factors California courts examined originated from § 220 of the *Restatement Second of Agency*. *Id.* The *Restatement* lists criteria for classifying a servant. See *RESTATEMENT (SECOND) OF AGENCY* § 220 (AM. LAW INST. 1958).

<sup>52</sup> See *supra* note 49 and accompanying text.

<sup>53</sup> See *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 401 (Cal. 1989) (articulating the California courts' approach to assessing misclassification before *Dynamex*).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 404, 407. Factors which demonstrate that the hiring entity exercises considerable control over the worker tilt in favor of employee status. See *id.* at 407 (explaining that the defendant cucumber growers exerted control over the harvesters).

<sup>56</sup> *Id.* at 400–01.

<sup>57</sup> *Id.* at 401.

<sup>58</sup> *Id.* at 401, 406.

<sup>59</sup> *Id.* at 407. The Supreme Court of California held that the grower exercised considerable control over the cucumber pickers. *Id.* Although the grower did not directly supervise workers as they harvested vegetables, it directed the processing and sale of the produce they collected. *Id.* Moreover, the court noted that the workers did not make substantial investments in their equipment and performed low-skill work. *Id.* The harvesters' business acumen had no bearing on their earnings. *Id.* These factors tilted in favor of employee classification. *Id.*

<sup>60</sup> See *id.* (outlining the secondary factors and statutory intent that California courts would utilize in subsequent cases).

Later, the court considered the meaning of “employ” within the state wage orders, which impacted how the court distinguished between employees and independent contractors.<sup>61</sup> In 2010, in *Martinez v. Combs*, the Supreme Court of California held that the term “employ,” as defined in Wage Order No. 14, has three valid interpretations.<sup>62</sup> The three interpretations include a) having authority over payments, scheduling, or conditions of work, b) the suffer-or-permit-to-work standard, or c) employment relationships recognized under common law.<sup>63</sup> *Martinez* concerned whether plaintiff strawberry pickers could hold distributors that contracted with their bankrupt employer liable for back wages.<sup>64</sup> To collect money from the suppliers, the harvesters needed to show that the distributors acted like joint employers.<sup>65</sup> Although the strawberry harvesters did not prevail, the Supreme Court of California’s holding embraced a broad interpretation of “employ” under the wage orders.<sup>66</sup>

Following its decision in *Martinez*, the Supreme Court of California considered worker misclassification in the newspaper business.<sup>67</sup> In 2014, in *Ayala v. Antelope Valley Newspapers, Inc.*, the Supreme Court of California held that the trial court improperly denied class certification to newspaper carriers whose employer allegedly engaged in misclassification.<sup>68</sup> The trial court failed

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<sup>61</sup> See *Martinez v. Combs*, 231 P.3d 259, 278 (Cal. 2010) (adopting the three definitions of “employ” under the state wage orders).

<sup>62</sup> CAL. CODE REGS. tit. 8 § 11140(2)(C); *Martinez*, 231 P.3d at 278, 279 (stating that all three interpretations of “employ” under the wage order align with the protective goals of the IWC).

<sup>63</sup> *Martinez*, 231 P.3d at 278. The “Order Regulating Wages, Hours, and Working Conditions in Agricultural Occupations,” Wage Order No. 14, defines “employ” as “engage, suffer, or permit to work.” CAL. CODE REGS. tit. 8 § 11140(2)(C). The suffer-or-permit-to-work standard intentionally encompasses relationships involving labor that common law would not recognize. *Martinez*, 231 P.3d at 278. The court noted that this makes sense given the order’s historical context. *Id.* at 281. The IWC borrowed its definition from laws that banned children from working. *Id.* Under common law, courts recognized agreements in which the hirer exercised control over the specifics of the worker’s performance. *Borello*, 769 P.2d at 401.

<sup>64</sup> See *Martinez*, 231 P.3d at 263–67 (detailing the factual history of the case). The dispute in *Martinez* arose after *Munoz & Sons (Munoz)*, which employed strawberry harvesters, failed to pay its workers in the spring of 2000. *Id.* at 265. *Munoz* worked with several produce distributors. *Id.* The company rented land from one merchant, accepted advance payments for products, and allowed representatives from distributors to perform inspections in the fields. *Id.* at 264–65. A representative from one of the suppliers asked the strawberry pickers to keep working after they did not receive payment. *Id.* at 266. A group of harvesters sued *Munoz* and three distributors for unpaid wages and related violations. *Id.* After *Munoz* declared bankruptcy, the court needed to determine whether the strawberry harvesters could proceed with their claims. *Id.*

<sup>65</sup> *Id.* at 267, 286. A joint employer is an entity that functions like an employer even though it does not directly employ the workers in question. See *Dynamex*, 416 P.3d at 6 (describing joint employers). If an entity is a joint employer, it must act in accordance with labor laws like the California wage orders. *Id.*

<sup>66</sup> See *Martinez*, 231 P.3d at 278 (adopting three interpretations of “employ”). The court held in favor of the defendant employer and distributors. *Id.* at 287.

<sup>67</sup> *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 169 (Cal. 2014).

<sup>68</sup> *Id.* (affirming that the trial court used an improper analysis to deny class certification to the plaintiffs). The Supreme Court of California held that the trial court erred by refusing to grant class

to examine the full scope of the newspaper's control over its carriers' work performance.<sup>69</sup> Moreover, the trial court neglected to distinguish between secondary factors that required individual versus communal assessment.<sup>70</sup> As a result, the Supreme Court of California remanded the case.<sup>71</sup> *Ayala, Martinez, and Borello* illustrate how the Supreme Court of California assessed worker misclassification and interpreted the scope of the employee-employer relationship under the wage orders before *Dynamex*.<sup>72</sup>

### B. Facts and Procedural History of *Dynamex*

The Supreme Court of California's holding in *Dynamex* originated with one company's decision to reclassify its workers' employment status for financial purposes.<sup>73</sup> In 2004, *Dynamex Operations West, Inc.*,<sup>74</sup> a national courier and delivery enterprise, switched the employment status of its drivers from employees to independent contractors.<sup>75</sup> Fiscal considerations motivated the

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certification to newspaper carriers alleging misclassification. *Id.* Class certification allows a group of litigants to try their claims as a group, otherwise known as a class. *See id.* (stating that the plaintiffs wanted to bring the case as a group). The newspaper carriers argued that their misclassification as independent contractors deprived them of the wage and hour protections available under the California Labor Code and the Business and Professions Code. *Id.* The plaintiffs hoped to pursue claims against their employer as a class, alleging that they could resolve the issue of misclassification as a group. *Id.* Under California law, the side seeking to bring a class action must illustrate that the group is definable, appropriately large, and has members that share a common interest, and that it would be better to litigate their claims as a group rather than through another avenue. *Id.* at 170 (quoting *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012)).

<sup>69</sup> *Id.* at 172 ("Significantly, what matters under the common law is not how much control a hirer exercises, but how much control the hirer retains the right to exercise."). The trial court improperly focused on fluctuation in the amount of control the newspaper actually exerted over individual carriers instead of looking at how much control it could exert. *Id.* at 172–73.

<sup>70</sup> *Id.* at 175–76 (stating that the trial court only acknowledged differences between secondary factors that required individual or group analysis without assessing the materiality of the issues they would produce). The trial court found considerable differences in the level of oversight that the business exercised over the carriers. *Id.* at 177. At that point, the trial court should have balanced the pros and cons of allowing the carriers to proceed as a class. *Id.* at 176. The existence of factors that require individual consideration is not automatically dispositive of class certification. *Id.*

<sup>71</sup> *Id.* at 177. The Supreme Court of California did not decide whether class certification was proper for the newspaper carriers. *Id.* Instead, it remanded the case for further proceedings to ensure that the lower court would accurately determine whether to grant class certification. *Id.* In doing so, it affirmed the decision of the Court of Appeal. *Id.*

<sup>72</sup> *See Dynamex*, 416 P.3d at 14–25 (describing how these cases laid the groundwork for the Supreme Court of California's decision in *Dynamex*).

<sup>73</sup> *See Lee v. Dynamex, Inc.*, 83 Cal. Rptr. 3d 241, 245 (Ct. App. 2008) (noting that *Dynamex* changed its drivers' employment status from employee to independent contractor to save money); Bauer, *supra* note 4, at 139–40 (describing financial advantages misclassification can have for employers); Deknatel & Hoff-Downing, *supra* note 4, at 55 (arguing that mis-designating workers gives companies a competitive edge over businesses that properly classify their employees).

<sup>74</sup> *Dynamex Operations W., Inc. v. Superior Court*, 179 Cal. Rept. 3d 69, 71 (Cal. 2014) (explaining that *Dynamex Operations West, Inc.* was previously known as *Dynamex, Inc.*).

<sup>75</sup> *Dynamex*, 83 Cal. Rptr. 3d at 245.

change.<sup>76</sup> After the conversion, drivers needed to purchase their own insurance and utilize their own vehicles to complete deliveries.<sup>77</sup> Dynamex set fees for its services, determined the rate of pay for independent contractors, and allocated fixed routes to drivers who did not work on-demand.<sup>78</sup>

*Dynamex* concerned delivery drivers' alleged misclassification as independent contractors.<sup>79</sup> The original plaintiff, Charles Lee, started working for Dynamex as an independent contractor in January 2005, and he completed fifteen days of work on-demand.<sup>80</sup> Lee did not work for any other delivery service during this period.<sup>81</sup> He filed a lawsuit against Dynamex on April 15, 2005 to challenge the designation of drivers as independent contractors on behalf of himself and similarly situated workers.<sup>82</sup> The complaint alleged that Dynamex violated Wage Order No. 9, the Business and Professions Code, and the California Labor Code.<sup>83</sup> The trial court initially denied Lee's motion to

<sup>76</sup> *Dynamex*, 416 P.3d at 8 (stating that Dynamex reclassified its drivers after determining that the change would benefit the company financially); see Rosenblatt & Eidelson, *supra* note 7 (noting that Uber expects reclassification to increase its labor costs by at least twenty percent, which illustrates the impact reclassification can have on companies).

<sup>77</sup> *Dynamex*, 416 P.3d at 8. Dynamex dictated how drivers should present themselves while working, which often included wearing a branded shirt, badge, and using a truck decal. *Id.* Drivers bought these materials themselves. *Id.*

<sup>78</sup> *Id.* "On-demand" refers to deliveries completed outside a regularly scheduled route. *Id.* Drivers who accepted on-demand work needed to buy a particular type of cell phone to communicate with the company. *Id.* Additionally, drivers conducting on-demand deliveries received assignments through the company and needed to communicate with the dispatcher if they were unable or unwilling to complete a delivery. *Id.* Dynamex required drivers to perform all work provided within a day with limited exceptions. *Id.* Dynamex allowed drivers to hire people and permitted them to accept assignments from other businesses while they were not working for Dynamex. *Id.*

<sup>79</sup> *Id.* at 5.

<sup>80</sup> *Dynamex*, 83 Cal. Rptr. 3d at 245. Lee executed deliveries as needed and did not receive regularly scheduled delivery routes. See *id.* (noting that Lee only completed on-demand work for one of Dynamex's California facilities).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* Lee was the only plaintiff representing the class at the time that he filed the lawsuit. *Id.* He filed the initial motion for class certification in November 2006. *Dynamex Operations W.*, 179 Cal. Rept. 3d at 72.

<sup>83</sup> CAL. CODE REGS. tit. 8, § 11090; *Dynamex*, 83 Cal. Rptr. 3d at 245; see *supra* note 41 and accompanying text. The drivers asserted claims under the Business and Professions Code for improper business activities. CAL. BUS. & PROF. CODE § 17200 (West 2020); *Dynamex*, 83 Cal. Rptr. 3d at 245. The plaintiffs also alleged Labor Code violations for refusing to furnish overtime wages, failing to offer itemized pay stubs, and neglecting to reimburse work-related expenditures. CAL. LABOR CODE §§ 200, 201, 203, 218.6, 223, 226, 226.7, 500, 510, 512, 515, 558, 1194, 1198, 2802 (West 2020); *Dynamex*, 83 Cal. Rptr. 3d at 245; Complaint [Class Action] at 8, 11–13, *Dynamex*, 83 Cal. Rptr. 3d 241 (No. BC 332016). Lee argued that these violations arose from Dynamex's improper classification of its drivers as independent contractors. *Dynamex*, 83 Cal. Rptr. 3d at 245.

certify a class, and the Second District Court of Appeal subsequently reversed and remanded the decision.<sup>84</sup>

On remand, the trial court permitted Pedro Chevez to join the suit as a plaintiff and certified the class of drivers on the basis of the holding in *Martinez*.<sup>85</sup> The class consisted of drivers who did not employ other drivers, deliver for other companies, or transport packages to their own customers during the period at issue.<sup>86</sup> After the trial court denied Dynamex's renewed motion to decertify the class, the company filed a petition with the Court of Appeal to compel the trial court to reverse its decision.<sup>87</sup> Nevertheless, the Court of Appeal affirmed class certification for Lee and Chevez's claims related to wage order violations.<sup>88</sup> Dynamex then filed a petition for review with the Supreme Court of California.<sup>89</sup>

The Supreme Court of California upheld the Court of Appeal's order regarding class certification.<sup>90</sup> It affirmed the lower court's acceptance of the suffer-or-permit-to-work standard from *Martinez*, and held that the ABC test was the appropriate means to distinguish between independent contractors and employees under state wage orders.<sup>91</sup> The ABC test mandates a presumption that a worker is an employee unless the employer can prove that the worker is

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<sup>84</sup> *Dynamex*, 416 P.3d at 9 (stating that the Court of Appeal reversed the trial court's denial of class certification because the trial court permitted Dynamex to withhold information from Lee that would have enabled him to contact possible class participants).

<sup>85</sup> *Id.* at 9, 12. The trial court granted class certification, finding that the class was determinable, of sufficient size, and possessed adequate commonality of interest. *Id.* at 9–10. The commonality of interest requirement hinged on whether the trial court agreed that the holding in *Martinez* applied beyond the joint employer context. *Id.* at 10. The trial court affirmed use of the three interpretations of “employ” adopted in *Martinez* to determine whether Dynamex misclassified the drivers. *Id.*

<sup>86</sup> *Id.* at 9. The class was comprised of drivers “(1) who were classified as independent contractors and performed pickup or delivery service for Dynamex between April 15, 2001 and the date of the certification order [the period at issue], (2) who used their personally owned or leased vehicles weighing less than 26,000 pounds, and (3) who had returned questionnaires which the court deemed timely and complete.” *Id.*

<sup>87</sup> *Id.* at 12. Dynamex argued that the trial court erred because it relied on the holding in *Martinez* to certify the class. *Id.* at 10. The company contended that the suffer-or-permit-to-work standard accepted in *Martinez* should only apply to wage order claims concerning joint employer status. *Id.* If Dynamex had prevailed, it would have restricted the use of this expansive conceptualization of employment to a limited number of cases. *See id.* (articulating Dynamex's argument that the standard solely applied in the joint employer context).

<sup>88</sup> *Id.* at 13. The Court of Appeal, an intermediate appellate court, asked the trial court to reconsider whether the plaintiffs should proceed as a class for their California Business and Professions Code claims. *Id.* The Court of Appeal directed the trial court to apply the test from *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 401 (Cal. 1989), to the drivers' claims that did not implicate the wage order. *Dynamex*, 416 P.3d at 13. The *Borello* test assessed the degree of control the employer exerted over its workers, secondary factors, and statutory intent.” 769 P.2d at 401, 404, 406.

<sup>89</sup> *Dynamex*, 416 P.3d at 13.

<sup>90</sup> *Id.* at 42.

<sup>91</sup> *Id.* at 35, 42.

(a) free of its control regarding work performance; (b) completes work beyond the purview of its normal operations; and (c) has an independent trade, profession, or enterprise that aligns with the services rendered.<sup>92</sup> Therefore, *Dynamex* resulted in California's adoption of the ABC test to distinguish between employees and independent contractors.<sup>93</sup>

## II. *DYNAMEX* REPRESENTS A BREAK FROM COMMON LAW PRECEDENT THAT PROMISES TO HAVE EXPANSIVE RAMIFICATIONS

The Supreme Court of California's landmark decision in *Dynamex Operations West, Inc. v. Superior Court* departed from precedent by adopting the ABC test in the absence of pre-existing state legislation or case law.<sup>94</sup> *Dynamex* started to generate controversy in 2018, and disagreements concerning its adoption of the ABC test only intensified, before and after its codification.<sup>95</sup> Governor Gavin Newsom signed AB 5, which codified the holding in *Dynamex*, into law on September 18, 2019.<sup>96</sup> Questions remain, however, as to whether *Dynamex* will apply retroactively,<sup>97</sup> prompt subsequent legislation,<sup>98</sup> or spur a ballot referendum challenge.<sup>99</sup> Section A of this Part explores how *Dynamex* represented a shift away from existing common law precedent.<sup>100</sup> Section B of this Part details the anticipated consequences of AB 5's enactment.<sup>101</sup>

<sup>92</sup> *Id.* at 35.

<sup>93</sup> *Id.*

<sup>94</sup> 416 P.3d 1, 7 (Cal. 2018); see Amici Curiae Letter in Support of Petition for Rehearing, *supra* note 12, at 3–4 (emphasizing that other states, including New Jersey and Vermont, that use the ABC test had a prior history of doing so through legislative reform).

<sup>95</sup> CAL. LAB. CODE §§ 2750.3, 3351 (West 2020); Myers, *supra* note 14 (describing how professional organizations lobbied for exemptions from AB 5 and remarking on pending legal challenges that arose following the law's codification). A number of app-based companies, professional organizations, and freelance workers disagreed with the holding in *Dynamex*. Rosenberg, *supra* note 15. Now that the legislation has gone into effect, opponents of the bill are organizing to secure exemptions or repeal the law in its entirety. *Id.*

<sup>96</sup> CAL. LAB. CODE §§ 2750.3, 3351; Assem. Bill No. 5 (2018–2019 Reg. Sess.) (Cal. 2019).

<sup>97</sup> See *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1045, 1046 (9th Cir. 2019) (directing the Supreme Court of California to determine whether *Dynamex* should apply retroactively).

<sup>98</sup> See Johana Bhuiyan et al., *Uber, Lyft Warn They'll Take the Fight Over Drivers' Status to California Voters*, L.A. TIMES (Aug. 29, 2019), <https://www.latimes.com/business/technology/story/2019-08-29/ab5-uber-lyft-newsom-lorena-gonzalez-ballot-tony-west> [<https://perma.cc/WFE9-GGMD>] (discussing future legislation that could create a separate employment designation for gig-economy workers).

<sup>99</sup> See Myers, *supra* note 14 (describing tech companies' pledge to fund a voter referendum campaign to repeal AB 5); see also Bhuiyan et al., *supra* note 98 (reporting that app-based companies would prefer to avoid pursuing a ballot referendum if they can win concessions through other measures, like passing a second law to create a new designation for gig-economy workers).

<sup>100</sup> See *infra* notes 102–121 and accompanying text.

<sup>101</sup> See *infra* notes 122–136 and accompanying text.

### A. A Departure from Common Law Precedent

*Dynamex* marked a shift in the Supreme Court of California's jurisprudence concerning worker misclassification.<sup>102</sup> Lee, the original plaintiff in *Dynamex*, argued that the court should construe *Martinez* broadly in accordance with the purpose of the wage orders.<sup>103</sup> In contrast, *Dynamex* contended that the suffer-or-permit-to-work standard adopted in *Martinez* only applied to wage order disputes involving joint employer liability.<sup>104</sup> The company argued that this standard solely pertained to the definition of "employ," not "employee," and was therefore unsuitable for distinguishing between independent contractors and employees.<sup>105</sup> *Dynamex* further argued that the adoption of the suffer-or-permit-to-work standard for the purposes of the California wage orders would create inconsistencies and adversely affect the state's economy.<sup>106</sup>

The Supreme Court of California sided with Lee, holding that the extension of the suffer-or-permit-to-work standard aligned with the intent of the Industrial Welfare Commission (IWC), the body which enacted the wage orders.<sup>107</sup> The court stated that the IWC developed the wage orders to protect workers.<sup>108</sup> The opinion further explained that the IWC intentionally adopted a broad understanding of "employ" to cover workers who would not count as employees under a more restrictive standard.<sup>109</sup> Therefore, the Supreme Court

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<sup>102</sup> *Dynamex*, 416 P.3d at 7 (implementing the ABC test, which other states use, to determine whether workers are employees under California's wage orders). In *Dynamex*, the Supreme Court of California applied the suffer-or-permit-to-work standard beyond the joint employer context and adopted the ABC test to distinguish between independent contractors and employees for the first time. *Id.* at 7, 26, 40.

<sup>103</sup> See Answering Brief on the Merits at 39–40, *Dynamex*, 416 P.3d 1 (No. S222732) (emphasizing the importance of expansively interpreting the suffer-or-permit-to-work standard from *Martinez* to protect workers outside of traditional employee-employer arrangements).

<sup>104</sup> See Petition for Review at 3, *Dynamex*, 416 P.3d 1 (No. S222732) (contending that the holding in *Martinez* is inapplicable to a case concerning the correct means for distinguishing between independent contractors and employees).

<sup>105</sup> *Dynamex*, 416 P.3d at 6; Petitioner's Letter Brief on ABC Test at 6, *Dynamex*, 416 P.3d 1 (No. S222732) (detailing *Dynamex*'s contention that the *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399 (Cal. 1989), test was the only inquiry necessary to determine whether the drivers were properly classified). The *Borello* test requires the court to determine the extent of the hiring entity's control over the worker, assess secondary factors, and consider the intent behind the legislation at issue. 769 P.2d at 404, 407.

<sup>106</sup> See Petitioner's Letter Brief on ABC Test, *supra* note 105, at 6 (positing that adoption of the ABC test would be ruinous for California businesses). Given that companies chose how to classify their workers on the basis of prior precedent, *Dynamex* argued that it was unfair for the court to alter the common law approach they relied upon. *Id.* When businesses reclassify their workers as employees, they take on additional labor costs, more liability, and an increased tax burden. See Buscaglia, *supra* note 30, at 128–29 (arguing that companies which misclassify their workers benefit because of reduced expenses).

<sup>107</sup> *Dynamex*, 416 P.3d at 40.

<sup>108</sup> *Id.* at 32.

<sup>109</sup> *Id.* at 35. The court held that prior case law showed that California's wage and hour laws were supposed to be more protective than federal labor law. *Id.*

of California reasoned that liberally interpreting “employ” in the worker misclassification context adhered to the IWC’s protective motivation.<sup>110</sup>

In addition, *Dynamex* introduced a variation of the ABC test for distinguishing between independent contractors and employees.<sup>111</sup> The plaintiffs, Lee and Chevez, argued that the ABC test is a sensible tool that courts could use to determine whether employers properly classified their workers under the suffer-or-permit-to-work standard embodied in the wage orders.<sup>112</sup> The drivers also contended that the establishment of the ABC test did not invalidate any statutory language.<sup>113</sup> *Dynamex* countered that all other jurisdictions using variations of the ABC test did so at the behest of their state legislatures, and implied that allowing the judiciary to establish a new test would circumvent the role of lawmakers.<sup>114</sup> Additionally, *Dynamex* contended that the implementation of the ABC test would harm businesses and allow all workers to obtain employee designation.<sup>115</sup>

Despite *Dynamex*’s argument, the Supreme Court of California held that the ABC test aligned more closely with the suffer-or-permit-to-work-standard than the common law approach articulated in *Borello*.<sup>116</sup> The court justified the move away from *Borello* by emphasizing the confusing, difficult to apply nature of multifactor tests.<sup>117</sup> Thus, the court, agreeing with Lee and Chevez, held that the ABC test helped operationalize the suffer-or-permit-to-work stand-

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<sup>110</sup> *Id.* at 7.

<sup>111</sup> *Id.*

<sup>112</sup> See Letter Brief at 3–4, *Dynamex*, 416 P.3d 1 (No. S222732) (contending that courts can use the ABC test as a practical means to interpret the wage orders’ three definitions of “employ”).

<sup>113</sup> See *id.* (stating that the adoption of the ABC test would not supplant the meaning of the suffer-or-permit-to-work standard).

<sup>114</sup> See Petitioner’s Letter Brief on ABC Test, *supra* note 105, at 3 (underscoring that all other states, including New Jersey and Connecticut, instituted reforms through legislative action in the form of statutes). *Dynamex* argued that the ABC test lacked roots in California precedent. *Id.* Moreover, it contended that the test would not unify existing doctrine as it had in New Jersey. See *id.* at 1–2 (citing *Hargrove v. Sleepy’s LLC*, 106 A.3d 449, 462–65 (N.J. 2015)). In *Hargrove v. Sleepy’s LLC*, workers who delivered mattresses alleged that their employer misclassified them as independent contractors. 106 A.3d at 453. The court held that the ABC test was the proper means to determine the workers’ status under New Jersey’s wage and hour laws. *Id.* at 465.

<sup>115</sup> *Dynamex*, 416 P.3d at 29; Petitioner’s Letter Brief on ABC Test, *supra* note 105, at 6 (alleging that *Dynamex* would unfairly penalize companies that designed their workforce structure to comply with previous state court decisions). Businesses that attempted to comply with the *Borello* conceptualization of independent contractors might lack the fiscal capacity to reclassify their workers as employees. Petitioner’s Letter Brief on ABC Test, *supra* note 105, at 6.

<sup>116</sup> *Dynamex*, 416 P.3d at 32, 35; *Borello*, 769 P.2d at 404, 407.

<sup>117</sup> *Dynamex*, 416 P.3d at 33. The court stated that multifactor tests can confuse employers as well as workers due to their complexity. *Id.* Moreover, complicated multifactor analyses allow businesses to avoid fulfilling their duties under employment laws and incentivize labor arrangements that limit hirers’ liability because they can more easily feign ignorance and exploit loopholes. *Id.* at 34.



ard.<sup>118</sup> The Supreme Court of California stated that the standard should apply broadly, but not to workers that fit conventional independent contractor criteria.<sup>119</sup> Additionally, the court held that establishing the ABC test as a means to distinguish between employees and independent contractors under the wage orders corresponded with the protective purpose of the provisions.<sup>120</sup> Therefore, *Dynamex* represented a departure from common law precedent.<sup>121</sup>

### B. The Future Implications of *Dynamex* and AB 5

Given the transformative nature of *Dynamex*, the decision and its subsequent codification have generated strong reactions from employers, workers, and activists.<sup>122</sup> *Dynamex* and its codification continue to impact at least one million workers in California.<sup>123</sup> Furthermore, the law has the potential to alter workplace arrangements across the country.<sup>124</sup> The extent of the decision's retroactive application remains disputed and additional challenges are on the horizon.<sup>125</sup> The consequences and reach of the decision will continue to evolve in the wake of AB 5's enactment on January 1, 2020.<sup>126</sup>

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<sup>118</sup> *Id.* at 34, 40. The court did not characterize the ABC test as an approach that destroys prior precedent. *Id.* The Supreme Court of California reasoned that the test provided a means for judges to apply the suffer-or-permit-to-work standard in a straightforward way. *Id.* at 40.

<sup>119</sup> *Id.* at 37 (providing electricians as an example of the category of worker that would not garner employee designation under the ABC test). Traditional independent contractors are highly skilled workers that businesses or individuals hire to complete particular tasks, like carpenters and plumbers. Pearce & Silva, *supra* note 3, at 12–13.

<sup>120</sup> *Dynamex*, 416 P.3d at 7 (justifying the adoption of the ABC test because it accords with the IWC's interest in protecting vulnerable workers from abuse).

<sup>121</sup> *See id.* at 40 (diverging from prior case law by adopting the ABC test).

<sup>122</sup> *See generally* Alexia F. Campbell, *Gig Workers' Win in California Is a Win for Workers Everywhere*, VOX (Sept. 11, 2019), <https://www.vox.com/2019/9/11/20851034/california-ab-5-workers-labor-unions> [<https://perma.cc/B48P-W32F>] (celebrating the passage of AB 5 and quoting legal scholars who support the legislation); Harry Campbell, Opinion, *Uber Drivers Just Want to Be Free*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/opinion/uber-ab5-california.html> [<https://perma.cc/9M6G-KNXJ>] (arguing that most gig-economy workers do not want employee designation because they value flexible schedules and less oversight); George Skelton, *California's Labor Law Is Rewritten. Many Independent Contractors Aren't Thrilled*, L.A. TIMES (Sept. 23, 2019), <https://www.latimes.com/california/story/2019-09-22/skelton-ab5-employment-law-independent-contractors-gig-economy> [<https://perma.cc/977N-Y5S6>] (contending that workers and businesses both oppose the codification of *Dynamex* since it could limit flexibility for workers and increase costs for companies).

<sup>123</sup> Kate Conger & Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html> [<https://perma.cc/6XDN-3CF4>].

<sup>124</sup> *See id.* (referring to proposed federal legislation that would change tests used to distinguish between employees and independent contractors). David Weil, former Department of Labor official and scholar, commented that the decision could compel businesses to reclassify their workers in response to the legislation. *Id.*

<sup>125</sup> *See Vazquez*, 939 F.3d at 1046 (directing the Supreme Court of California to decide whether *Dynamex* should apply retroactively). Truck drivers recently secured an exemption from the legislation, and other sectors want to follow suit. Rosenberg, *supra* note 15. Gig economy companies are

At this time, the degree to which *Dynamex* will apply retroactively remains uncertain.<sup>127</sup> An amicus brief filed in support of *Dynamex*'s petition for rehearing argued that retroactive application would unfairly harm law-abiding businesses that acted in accordance with prior precedent.<sup>128</sup> After the Ninth Circuit initially permitted the decision to apply retroactively, it withdrew its opinion and remanded the matter to the Supreme Court of California for further proceedings.<sup>129</sup> AB 5 states that the law will only apply retroactively to existing claims.<sup>130</sup>

Like the disagreement over whether *Dynamex* will apply retroactively, legal and electoral challenges to AB 5 are just beginning.<sup>131</sup> Businesses across various industries lobbied to carve out exemptions for their workers, but Governor Newsom signed the bill without concessions for rideshare companies and other sectors.<sup>132</sup> Lyft and Uber have argued that they properly classify their drivers as independent contractors.<sup>133</sup> These companies, along with DoorDash and other app-

prepared to mount a \$110 million ballot referendum campaign to repeal AB 5, and the state legislature promised to spend \$20 million to enforce the legislation. *Id.*

<sup>126</sup> See Assem. Bill No. 5 (2018–2019 Reg. Sess.) (Cal. 2019) (stating that AB 5 would take effect on January 1, 2020).

<sup>127</sup> See *Vazquez*, 939 F.3d at 1046 (suggesting the Supreme Court of California should determine whether *Dynamex* applies retroactively).

<sup>128</sup> Amici Curiae Letter in Support of Petition for Rehearing, *supra* note 12, at 1–2. A petition for rehearing asks an appellate court to remedy a mistake in an opinion. *Petition for Rehearing*, CAL. CTS., <https://www.courts.ca.gov/12419.htm?rdeLocaleAttr=en> [<https://perma.cc/YFZ7-ZBRT>].

<sup>129</sup> *Vazquez*, 939 F.3d at 1046; see *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 923 F.3d 575, 579 (9th Cir. 2019) (withdrawn). The California Court of Appeal recently held that *Dynamex* applies retroactively in cases concerning violations of state wage orders. See *Gonzalez v. San Gabriel Transit, Inc.*, 253 Cal. Rptr. 3d 681, 688 (Ct. App. 2019) (affirming that *Dynamex* applies retroactively in cases concerning wage order claims that were pending at the time of the decision's release). The plaintiffs in *Vazquez* were California residents who purchased cleaning service franchises from a Georgia-based company's regional franchisors. 939 F.3d at 1046–47. The plaintiffs argued that the franchisor misclassified janitors to evade obligations under wage and hour laws. *Id.* at 1047. Due to the plaintiffs' state law claims, the court certified the question of whether *Dynamex* applied retroactively to the Supreme Court of California. *Id.* at 1046.

<sup>130</sup> See Assem. Bill No. 5 (2018–2019 Reg. Sess.) (Cal. 2019) (maintaining that the law will not apply retroactively unless litigation was already in motion when the Supreme Court of California handed down the decision).

<sup>131</sup> See *Vazquez*, 939 F.3d at 1046 (ordering the Supreme Court of California to consider whether the holding in *Dynamex* should apply in a case that began in 2008); see also Conger, *supra* note 6 (explaining that companies operating in the gig economy could spend \$90 million on a ballot referendum to repeal AB 5).

<sup>132</sup> See Conger & Scheiber, *supra* note 123 (explaining that companies failed to secure exemptions for gig workers and reach a compromise with labor organizations before AB 5 passed the legislature). Lawyers, veterinarians, and other professions won carve outs from the law, meaning that AB 5 will not apply to them. Conger, *supra* note 6.

<sup>133</sup> See Joel Rosenblatt, *Uber's Future May Depend on Convincing the World Drivers Aren't Part of Its 'Core Business'*, TIME (Sept. 12, 2019), <https://time.com/5675637/uber-business-future/> [<https://perma.cc/TTV4-ANDN>] (explaining Uber's contention that it is a technology company and that its drivers do not perform a central component of its business).

based businesses, are evaluating ways to pass subsequent legislation that will allow them to avoid restructuring their business models.<sup>134</sup> If secondary legislation fails, they plan to bankroll a ballot initiative campaign to topple the new legislation in 2020.<sup>135</sup> Therefore, the future of AB 5 remains uncertain.<sup>136</sup>

### III. THE SUPREME COURT OF CALIFORNIA RIGHTLY MODERNIZED COMMON LAW DOCTRINE

Courts must perceive shifts in society and recognize when it is necessary to change course.<sup>137</sup> In *Dynamex Operations West, Inc. v. Superior Court*, the court departed from existing common law precedent because it needed to rethink its approach to fulfill the purpose of state wage regulations.<sup>138</sup> The Supreme Court of California saw evidence that employers exploit worker misclassification for their own benefit, and the court sought to remedy the problem.<sup>139</sup> Instead of applying common law tests developed under different historical circumstances, the court questioned whether its analytical methods were still helpful in the *Dynamex* context.<sup>140</sup> Therefore, the Supreme Court of California's decision in *Dynamex* shows that a court can be responsive to societal changes and reformulate common law doctrines when necessary.<sup>141</sup>

If a common law approach prevents a regulation from achieving its objective, a court should explore how it can better achieve the legislature's aim.<sup>142</sup> Laws surrounding worker misclassification developed at a time when most independent contractors were entrepreneurial individuals with specialized ca-

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<sup>134</sup> See Conger & Scheiber, *supra* note 123 (illustrating that rideshare companies are lobbying to pass legislation that will enable them to avoid reclassifying their independent contractors as employees); Rosenberg, *supra* note 15 (noting that Postmates and Instacart, app-based delivery services companies, agreed to help fund the ballot initiative).

<sup>135</sup> Bhuiyan et al., *supra* note 98.

<sup>136</sup> See Rosenberg, *supra* note 15 (elaborating on the ballot initiative and various legal challenges to AB 5).

<sup>137</sup> See *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 33, 40 (Cal. 2018) (adopting the ABC test after analyzing the weaknesses inherent in using the common law multifactor test from *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989)).

<sup>138</sup> See *id.* at 7 (emphasizing that the IWC created the wage orders to protect workers and holding that the court's decision would correspond with that goal).

<sup>139</sup> See *id.* at 39–40 (stating that the implementation of the suffer-or-permit-to-work standard and ABC test will make it harder for employers to exploit workers and circumvent the wage orders).

<sup>140</sup> See *id.* at 33–35 (listing the disadvantages of the multifactor *Borello* test and introducing the ABC test to operationalize the suffer-or-permit-to-work standard).

<sup>141</sup> *Dynamex*, 416 P.3d at 40; see 15A AM. JUR. 2D *Common Law* § 13, *supra* note 16 (stating that courts should update common law doctrine as social conditions evolve).

<sup>142</sup> See *Dynamex*, 416 P.3d at 34 (introducing the ABC test due to the difficulties involved in applying the *Borello* test); 15A AM. JUR. 2D *Common Law* § 13, *supra* note 16 (stating that courts have a duty to change outdated common law precedent).

pabilities.<sup>143</sup> That has changed.<sup>144</sup> Legislators originally excluded independent contractors from laws that protect employees because their skills and status rendered them less vulnerable to exploitation.<sup>145</sup> In *Dynamex*, the Supreme Court of California recognized that contingent labor arrangements leave workers who lack conventional independent contractor characteristics without safeguards and benefits.<sup>146</sup> Given these changes, and in recognition of the purpose underlying the IWC's wage orders, the court modified its approach by adopting the ABC test.<sup>147</sup>

Moreover, the court's acceptance of the ABC test did not signal a dramatic shift away from earlier case law because the approach helps evaluate proper designation under existing doctrine.<sup>148</sup> Even if it did, a court that clung to tradition without accounting for societal changes might affirm exploitative labor structures that support worker misclassification.<sup>149</sup> Employers argued that the Supreme Court of California abandoned precedent and unleashed chaos on unsuspecting businesses.<sup>150</sup> AB 5, however, effectively limits employer liability because its provisions only apply retroactively to existing claims.<sup>151</sup> Additionally, the employers' perspective ignores the key point the court made repeatedly in its opinion: the California wage orders exist to aid workers, not businesses.<sup>152</sup> The Supreme Court of California rightly recognized that the suffer-or-permit-to-work standard articulated in *Martinez v. Combs* aligns with the IWC's core goals.<sup>153</sup>

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<sup>143</sup> See Pearce & Silva, *supra* note 3, at 12–13 (explaining why legislators excluded independent contractors from coverage under laws that protect employees). Lawmakers believed traditional independent contractors possessed the skills and bargaining power to earn living wages without additional legal protections. *Id.*

<sup>144</sup> See *id.* (detailing the proliferation of independent contractor designation beyond its historical purview into low-skill sectors like janitorial and rideshare services).

<sup>145</sup> *Id.*

<sup>146</sup> See *Dynamex*, 416 P.3d at 37 (articulating the importance of ensuring that legislation intended to safeguard workers from exploitation covers individuals who essentially perform their work as employees).

<sup>147</sup> *Id.* at 7.

<sup>148</sup> See *id.* at 6–7 (suggesting that the ABC test does not displace the common law *Borello* test in all situations, including for some of the plaintiffs' claims).

<sup>149</sup> See 15A AM. JUR. 2D *Common Law* § 13, *supra* note 16 (stating that courts need to recalibrate common law doctrine on the basis of societal shifts).

<sup>150</sup> See Petitioner's Letter Brief on ABC Test, *supra* note 106, at 6 (arguing that broadly applying the suffer-or-permit-to-work standard from *Martinez v. Combs*, 231 P.3d 259 (Cal. 2010), would harm businesses that did not intentionally misclassify workers).

<sup>151</sup> Assem. Bill No. 5 (2018–2019 Reg. Sess.) (Cal. 2019) (providing that the new law will only apply retroactively to pending matters).

<sup>152</sup> See *Dynamex*, 416 P.3d at 32 (stating that the principle at the heart of the wage orders is to safeguard workers).

<sup>153</sup> See *Martinez*, 231 P.3d at 278 (accepting the three definitions of “employ” that encompass the suffer-or-permit-to-work standard).

The Supreme Court of California exemplified how courts can, and should, reform outdated common law doctrine.<sup>154</sup> The court justly held that the ABC test offered a pragmatic guide to judges who need to assess whether an employer is misclassifying its workers.<sup>155</sup> The Supreme Court of California recognized that the common law test did not function correctly due to societal changes, and it acted to remedy the problem.<sup>156</sup> Furthermore, the codification of AB 5 reflects legislative acceptance of the court's responsibility to update common law doctrine to reflect the times.<sup>157</sup> Although it is still too early to tell how AB 5 will impact workers, businesses, and other stakeholders in California and beyond, the court discharged its duty in this case.<sup>158</sup>

### CONCLUSION

The Supreme Court of California's decision in *Dynamex* transformed the state's approach to worker misclassification. Its ensuing codification and enactment continue to affect a significant number of workers in one of the world's largest economies. At its core, the holding in *Dynamex* reflects what happens when a court looks beyond pretext to consider whether common law doctrine still functions properly in a modern setting. When the Supreme Court of California recognized that existing tests used for distinguishing between independent contractors and employees failed to fulfill the protective objectives of IWC wage orders, it moved decisively to remedy the issue. In the process, it paved the way for legislative reform and exemplified how a court can thoughtfully transform outdated common law precedent.

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<sup>154</sup> See *Dynamex*, 416 P.3d at 35, 40 (adopting the ABC test to protect workers and foreclose employers' ability to avoid their responsibilities through misclassification); 15A AM. JUR. 2D *Common Law* § 13, *supra* note 16 (imbuing courts with a duty to amend common law over time).

<sup>155</sup> See *Dynamex*, 416 P.3d at 32, 40 (emphasizing that the IWC passed regulations that would protect workers from exploitation, which the ABC test would help operationalize).

<sup>156</sup> See *id.* at 34, 40 (outlining the drawbacks of the common law approach to assessing worker misclassification and implementing the ABC test); 15A AM. JUR. 2D *Common Law* § 13, *supra* note 16 (highlighting that courts have a responsibility to respond to societal shifts with respect to common law doctrine).

<sup>157</sup> CAL. LAB. CODE §§ 2750.3, 3351; Assem. Bill No. 5 (2018–2019 Reg. Sess.) (Cal. 2019) (codifying the court's holding in *Dynamex*, thereby approving the court's decision to deviate from precedent and modernize the standard); see 15A AM. JUR. 2D *Common Law* § 13, *supra* note 16 (characterizing the court's capacity to amend common law doctrine as a duty that is squarely within its discretion).

<sup>158</sup> See 15A AM. JUR. 2D *Common Law* § 13, *supra* note 16 (claiming that courts have an obligation to update common law as needed); Rosenberg, *supra* note 15 (noting that app-based companies are gearing up for a ballot referendum to repeal AB 5 and that various sectors are still seeking exemptions from the law).