



## **e-Alert – California Supreme Court Adopts New Independent Contractor Test**

### **Background**

The California Supreme Court has adopted a new three-part test to determine whether a worker is an independent contractor or an employee under California's wage orders, which regulate wages, hours, and working conditions.

The Borello test, used for decades to determine if a worker is an independent contractor, was recently rejected by the California Supreme Court. In the case (*Dynamex Operations v. Superior Court*), the California Supreme Court announced a new "ABC test" that requires a company to establish three factors to show a worker is an independent contractor:

- A. The worker is free from the hiring employer's control and direction in connection with performing the work, both under contract and in fact.
- B. The worker performs work that is outside the usual course of the hiring employer's business.
- C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring employer.

Making the distinction between employee and independent contractor is a common challenge for employers, and misclassification of employees is one of the most frequent reasons for an audit or lawsuit. While the IRS offers assistance on its [website](#) for employers to determine whether or not a worker meets the independent contractor rules, many states have strict independent contractor rules that go beyond the IRS tax requirements. Massachusetts's test is similar to this new California ABC test, where the law creates a presumption of employee status and requires a business to meet its stringent [Three Prong Test](#) to overcome this presumption.

### **Next steps for employers**

If your organization uses independent contractors, we strongly recommend that you conduct a self-audit to ensure all your employees are classified correctly or hire a company such as HR Knowledge to conduct this assessment for you. Once you are certain that your independent contractors are classified properly, make sure you have a W-9 on file for each of them. It's a best practice to gather these at the start of the contract, rather than at the end of the year. If you do not have a W-9 on file for each worker, you should be withholding a standard 28% in backup withholdings.

To help protect your business, ensure that your contractors are invoicing for all agreed-upon work, and that you are paying them *only* based off invoices. If you are issued a contract from an independent contractor, be sure to have it reviewed by an employment attorney, then keep it on file for as long as the contractor is with your company.

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