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AB 5 Passed Out of Senate as Ninth Circuit Depublishes *Vasquez* Decision

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Assembly Bill 5 (Gonzalez) has passed out of the Senate Labor, Public Employment and Retirement Committee, bringing those in the employment industry and employees one step closer to clarity regarding independent contractor status. AB 5 is in response to *Dynamex Operations West, Inc. v. Superior Court*, wherein the Court created a new "ABC" test as a standard for determining independent contractor status. Pursuant to this test, "a worker is properly considered an independent contractor, to whom a wage order does not apply, only if the hiring entity establishes:

A. The worker is free from the control and direction of the hirer in connection with the performance of the work…;
B. The worker performs work that is outside the usual course of the hiring entity's business; and
C. The worker is customarily engaged in an independently established trade, occupation, or are not entitled to unemployment insurance benefits from the employer's account.

Shortly thereafter, the Ninth Circuit ruled in *Vazquez v. Jan Pro Franchising Int'l* that the ABC test applied retroactively, meaning that federal courts could apply the ABC test to all pending misclassification claims that originated prior to the *Dynamex* ruling. This understandably caused confusion and concern for many employers and companies.

In a surprising twist coming on the heels of AB 5, passing out of the Senate Committee, the Ninth Circuit depublished its *Vazquez* decision, which means that it is no longer binding on the federal courts. Now, the question of whether *Dynamex* applies retroactively will be a question for the California Supreme Court.

By virtually eliminating independent contractor status in the employment industry, AB 5 would force employers to offer guaranteed minimum wage, overtime pay, contributions to Social Security and Medicare, unemployment and disability insurance as well as workers' compensation, sick leave, family leave, and reimbursement for mileage and maintenance of their vehicles. It would also allow the State to recover billions of dollars a year in payroll tax revenue.

While the development of *Dynamex* and *Vazquez* is concerning, California real estate agents should remain content that their status as an independent contractor will remain unchanged. As discussed in previous Courtside Newsletters, the California Legislature enacted Business & Professions Code (B&P) Section 10032, which expressly authorizes the

ability for a broker and a licensed real estate salesperson to classify themselves as either independent contractors or employer and employee. To have an independent contractor relationship, the broker and agents must follow the three-prong/factors test in the US Tax Code, which states:

1. The individual is duly licensed under the B&P Code;
2. Substantially all remuneration is directly related to sales or other output;
3. The services are performed pursuant to a written contract, providing the individual will not be treated as an employee for state tax purposes.

Once these requirements are met, the independent contractor status is recognized but does not remove the supervision or other regulatory requirements. If signed into law, AB 5 will not only codify the ABC Test, but will reinforce the statutory exemptions already in place for real estate agents and other industries.