GIG REFLEX

WILL FASHION FIND NEW INDEPENDENT CONTRACTOR LAWS HARD TO SWALLOW?

OCTOBER 10, 2019



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CLE MATERIALS

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October 10, 2019

Reception: 6:00 p.m.
Panel: 6:30 p.m. - 7:45 p.m.

Fordham University School of Law
150 W. 62nd Street
2nd Floor, Bateman Room
New York, NY 10023

SPEAKERS:

- **Elisheva M. Hirshman**, Vice President, Associate General Counsel, Employment and Litigation, PVH Corp.
- **Joey Hunter**, Fashion and Talent Industry Consultant
- **Karyn D. Jefferson**, Deputy General Counsel - Labor & Employment, Benjamin Moore & Co.
- **Rebecca Nathanson**, Counsel to Labor Standards; Director, Anti-Retaliation Unit, New York State Department of Labor

MODERATOR:

- **Jeff Trexler**, Co-Founder, Moda Legal; Associate Director, Fashion Law Institute

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SPEAKERS' BIOGRAPHIES

ELISHEVA M. HIRSHMAN

Vice President, Associate General Counsel, Employment & Litigation, PVH Corp.

Elisheva M. Hirshman is Vice President, Associate General Counsel, Employment & Litigation at PVH Corp., one of the world's largest global apparel companies with over 38,000 employees worldwide. She leads a global team of employment lawyers who support PVH and its entire portfolio of brands which includes CALVIN KLEIN, TOMMY HILFIGER, Van Heusen, IZOD, Arrow, Speedo (licensed in perpetuity for North America and the Caribbean) and Warner's. Immediately prior to joining PVH, Elisheva practiced employment law at DLA Piper LLP. Elisheva started her legal career at Weil, Gotshal & Manges LLP and clerked for the Honorable Lawrence E. Kahn of the U.S. District Court for the Northern District of New York. She graduated cum laude from the Washington University in St. Louis School of Law where she was a member of the Law Review and co-chair of The Wiley Rutledge Moot Court Board and cum laude from Dartmouth College where she received her B.A. with high honors in History.

JOEY HUNTER

Fashion and Talent Industry Consultant

Currently, Mr. Hunter is the vice president of Modasphere, formerly known as Modelwire, a software company that provides imaging and booking solutions designed to cater to today's top model, talent, artist and photographer's representation and agency. Modasphere provides you with all of the tools you need to succeed in one all-inclusive, web-based system.

Its headquarters are based in Los Angeles, California, a subsidiary of Casting Networks, Inc. He is also expert consultant in the modeling industry, well sought-after by industry professionals for consultation and by legal professionals for litigation purposes.

Joey Hunter was formerly a co-president of Ford Model Management, one of the most prestigious modeling agencies in the world. With 40+ years of experience, he has held various executive positions at Ford and in the modeling industry.

Mr. Hunter has been a part of senior management at Ford since 1975 as executive vice president and later, as a partner. He was also the founder and president of the New York branch of Karin Models Paris from 1998 to 2000.

Ford Models, is an American international modeling agency based in New York City, established in 1946 by Eileen and Jerry Ford. The agency has represented a diverse list of world's internationally acclaimed models and celebrities.

While at Ford, Mr. Hunter and his partners coined the term “Super Model.” Mr. Hunter is well known in the industry for having negotiated lucrative television and print contracts for numerous Ford Super Models. He has represented and managed the careers of famous Super Models such as Cheryl Tiegs, Lauren Hutton, Christy Turlington, Brooke Shields, Jennifer Connelly, Vendela Kirsebom, Rachel Hunter, Elle MacPherson, Kelly LeBrock, Christie Brinkley, Naomi Campbell, and Willow Bay.

He also represented the top male models who became successful actors such as Jack Scalia, Matthew Fox, and Christopher Atkins.

Mr. Hunter was the first to establish the licensing and branding of products for Super Models such as Elle Macpherson and Christie Brinkley. He is extremely knowledgeable about the modeling industry standards, modeling contracts, especially with regard to fee structuring, residuals, and for usage of pictures and every aspect of the modeling industry.

Mr. Hunter was formerly the president of the International Model Management Association, a position he held for over ten (10) years.

KARYN D. JEFFERSON

Deputy General Counsel - Labor & Employment, Benjamin Moore & Co.

Karyn is an experienced labor and employment attorney who has worked with clients in a wide array of industries including healthcare, financial services, manufacturing, higher education, entertainment and fashion from both law firm and in-house environments. Presently, Karyn serves as Deputy General Counsel – Labor & Employment at Benjamin Moore & Co. in Montvale, NJ. Her practice consists primarily of advising and counseling her Human Resources business partners through day-to-day employment-related concerns, including wage-and-hour compliance, employee hiring, discipline and terminations, unemployment compensation and employees benefits, as well as drafting workplace policies, negotiating HR vendor agreements and conducting training on a variety of employment law topics. Karyn also manages Benjamin Moore & Co.’s employment discrimination litigation and administrative agency complaints, conducts workplace investigations, oversees all workers' compensation claims and serves on Benjamin Moore & Co.’s Benefits committee. Karyn holds a J.D. from Fordham University School of Law and a B.A. from the University of Virginia.

REBECCA NATHANSON

Counsel to Labor Standards; Director, Anti-Retaliation Unit,
New York State Department of Labor

Rebecca Nathanson is the Director of the Anti-Retaliation Unit and Counsel to Labor Standards at the New York State Department of Labor, Division of Labor Standards. Rebecca was named the Director of the Anti-Retaliation Unit when it was established in October 2015 by Governor Cuomo, in an effort to curb retaliation against workers who complain about wage theft, misclassification, and/or other rights protected by the New York Labor Law. As Counsel to Labor Standards, Rebecca assists the Deputy Commissioner for Worker Protection in conducting complex investigations into employers and in creating, launching and leading the inaugural efforts of the Governor's Joint Task Force on Worker Exploitation.

Prior to coming to the DOL, Rebecca was a litigator at a plaintiff's employment law firm, where she represented employees in the state and federal courts of New York and New Jersey in discrimination and retaliation matters. Earlier in her career, Rebecca worked in-house at two major financial institutions. Rebecca is a graduate of Brooklyn Law School.

JEFF TREXLER

Co-Founder, Moda Legal; Associate Director, Fashion Law Institute

Jeff Trexler teaches the Fashion Ethics, Sustainability, and Development course at Fordham University School of Law. He is an attorney and consultant whose clients include fashion brands, nonprofits, and social ventures. He has worked with organizations around the world on issues ranging from tax exemption and corporate compliance to intellectual property and communications strategy. His publications address a wide range of topics, including complexity theory and social enterprise, business ethics, copyright, and more.

Trexler previously served as a chaired professor and executive director of the Wilson Center for Social Entrepreneurship at Pace University and taught nonprofit organizations at Yale, SMU and Saint Louis University.

Trexler holds a J.D. from Yale Law School and a Ph.D. in American Religious History from Duke University.

SELECTED READINGS

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LEGISLATIVE MATERIALS

N.J. Stat. Ann. § 43:21-19 (West 2018).

Assem. Bill 5, 2019 Reg. Sess., (Cal. 2019).

Cal. Unemp. Ins. Code § 686 (West 2019).

Cal. Lab. Code § 3351.5(c) (West 2019).

N.Y. Lab. Law § 511 (McKinney 2018).

N.Y. Lab. Law § 651 (McKinney 2018).

New York State Senate Transcript, June 23, 1997, 5750-5756, (statement of Senator Nicholas A. Spano), https://www.nysenate.gov/transcripts/floor-transcript-062397v1.

17 U.S.C.A. § 101 (West 2018).

29 U.S.C.A. § 203 (West 2018).

Model Rules of Prof'l Conduct r. 5.5 (AM. BAR ASS'N 2019).

CASES

Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

Dynamex Operations W. v. Superior Court, 416 P.3d 1 (Cal. Sup. Ct. 2018).

N.E.I. Jewelmasters of N.J., Inc. v. Board of Review, 2016 WL 3449263 (N.J. Super. Ct. App. Div. (June 24, 2016).

Vogue v. Adm'r, Unemployment Comp. Act, 2019 WL 1938071 (Conn. Super. Ct. Apr. 4, 2019).

Agerbrink v. Model Serv. LLC, 2015 WL 6473005 (S.D.N.Y. Oct. 27, 2015).

N.J.S.A. 43:21-19

43:21-19. Definitions

Effective: August 7, 2017

Definitions. As used in this chapter (R.S.43:21-1 et seq.), unless the context clearly requires otherwise:

…

(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

STATE OF CALIFORNIA
LEGISLATIVE COUNSEL BUREAU
AUTHENTICATED
ELECTRONIC LEGAL MATERIAL

Assembly Bill No. 5

CHAPTER 296

An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor.

[Approved by Governor September 18, 2019. Filed with Secretary of State September 18, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 5, Gonzalez. Worker status: employees and independent contractors.

Existing law, as established in the case of Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903 (Dynamex), creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission. Existing law requires a 3-part test, commonly known as the "ABC" test, to establish that a worker is an independent contractor for those purposes.

Existing law, for purposes of unemployment insurance provisions, requires employers to make contributions with respect to unemployment insurance and disability insurance from the wages paid to their employees. Existing law defines "employee" for those purposes to include, among other individuals, any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

This bill would state the intent of the Legislature to codify the decision in the Dynamex case and clarify its application. The bill would provide that for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is customarily engaged in an independently established trade, occupation, or business. The bill, notwithstanding this provision, would provide that any statutory exception from employment status or any extension of employer status or liability remains in effect, and that if a court rules that the 3-part test cannot be applied, then the determination of employee or independent contractor status shall be governed by the test adopted in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello). The bill would exempt specified occupations from the application of Dynamex, and would instead provide that these

occupations are governed by Borello. These exempt occupations would include, among others, licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry.

The bill would also require the Employment Development Department, on or before March 1, 2021, and each March 1 thereafter, to issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry. The bill would make the exemption for commercial fishermen applicable only until January 1, 2023, and the exemption for licensed manicurists applicable only until January 1, 2022. The bill would authorize an action for injunctive relief to prevent employee misclassification to be brought by the Attorney General and specified local prosecuting agencies.

This bill would also redefine the definition of "employee" described above, for purposes of unemployment insurance provisions, to include an individual providing labor or services for remuneration who has the status of an employee rather than an independent contractor, unless the hiring entity demonstrates that the individual meets all of specified conditions, including that the individual performs work that is outside the usual course of the hiring entity's business. Because this bill would increase the categories of individuals eligible to receive benefits from, and thus would result in additional moneys being deposited into, the Unemployment Fund, a continuously appropriated fund, the bill would make an appropriation. The bill would state that addition of the provision to the Labor Code does not constitute a change in, but is declaratory of, existing law with regard to violations of the Labor Code relating to wage orders of the Industrial Welfare Commission. The bill would also state that specified Labor Code provisions of the bill apply retroactively to existing claims and actions to the maximum extent permitted by law while other provisions apply to work performed on or after January 1, 2020. The bill would additionally provide that the bill's provisions do not permit an employer to reclassify an individual who was an employee on January 1, 2019, to an independent contractor due to the bill's enactment.

Existing provisions of the Labor Code make it a crime for an employer to violate specified provisions of law with regard to an employee. The Unemployment Insurance Code also makes it a crime to violate specified provisions of law with regard to benefits and payments.

By expanding the definition of an employee for purposes of these provisions, the bill would expand the definition of a crime, thereby imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) On April 30, 2018, the California Supreme Court issued a unanimous decision in Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903 (Dynamex).

(b) In its decision, the Court cited the harm to misclassified workers who lose significant workplace protections, the unfairness to employers who must compete with companies that misclassify, and the loss to the state of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for workers' compensation, Social Security, unemployment, and disability insurance.

(c) The misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality.

(d) It is the intent of the Legislature in enacting this act to include provisions that would codify the decision of the California Supreme Court in Dynamex and would clarify the decision's application in state law.

(e) It is also the intent of the Legislature in enacting this act to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous Dynamex decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law.

(f) The Dynamex decision interpreted one of the three alternative definitions of "employ," the "suffer or permit" definition, from the wage orders of the Industrial Welfare Commission (IWC). Nothing in this act is intended to affect the application of alternative definitions from the IWC wage orders of the term "employ," which were not addressed by the holding of Dynamex.

(g) Nothing in this act is intended to diminish the flexibility of employees to work part-time or intermittent schedules or to work for multiple employers.

SEC. 2. Section 2750.3 is added to the Labor Code, to read:

2750.3. (a) (1) For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration

shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person 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) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(2) Notwithstanding paragraph (1), any exceptions to the terms "employee," "employer," "employ," or "independent contractor," and any extensions of employer status or liability, that are expressly made by a provision of this code, the Unemployment Insurance Code, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of "employee" in subdivision 2(E) of Wage Order No. 2, shall remain in effect for the purposes set forth therein.

(3) If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello).

(b) Subdivision (a) and the holding in Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903 (Dynamex), do not apply to the following occupations as defined in the paragraphs below, and instead, the determination of employee or independent contractor status for individuals in those occupations shall be governed by Borello.

(1) A person or organization who is licensed by the Department of Insurance pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Part 2 of Division 1 of the Insurance Code.

(2) A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian licensed by the State of California pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation as defined in Section 13401 of the Corporations Code. Nothing in this subdivision shall apply to the employment settings currently or potentially governed by collective bargaining agreements for the licensees identified in this paragraph.

(3) An individual who holds an active license from the State of California and is practicing one of the following recognized professions: lawyer, architect, engineer, private investigator, or accountant.

(4) A securities broker-dealer or investment adviser or their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed by the State of California under Chapter 2 (commencing with Section 25210) or Chapter 3 (commencing with Section 25230) of Division 1 of Part 3 of Title 4 of the Corporations Code.

(5) A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met.

(6) A commercial fisherman working on an American vessel as defined in subparagraph (A) below.

(A) For the purposes of this paragraph:

(i) "American vessel" has the same meaning as defined in Section 125.5 of the Unemployment Insurance Code.

(ii) "Commercial fisherman" means a person who has a valid, unrevoked commercial fishing license issued pursuant to Article 3 (commencing with Section 7850) of Chapter 1 of Part 3 of Division 6 of the Fish and Game Code.

(iii) "Working on an American vessel" means the taking or the attempt to take fish, shellfish, or other fishery resources of the state by any means, and includes each individual aboard an American vessel operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, including maintaining the vessel or equipment used aboard the vessel. However, "working on an American vessel" does not apply to anyone aboard a licensed commercial fishing vessel as a visitor or guest who does not directly or indirectly participate in the taking.

(B) For the purposes of this paragraph, a commercial fisherman working on an American vessel is eligible for unemployment insurance benefits if they meet the definition of "employment" in Section 609 of the Unemployment Insurance Code and are otherwise eligible for those benefits pursuant to the provisions of the Unemployment Insurance Code.

(C) On or before March 1, 2021, and each March 1 thereafter, the Employment Development Department shall issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry. This report shall include, but not be limited to, reporting the number of commercial fishermen who apply for unemployment insurance benefits, the number of commercial fishermen who have their claims disputed, the number of commercial fishermen who have their claims denied, and the number of commercial fishermen who receive unemployment insurance benefits. The report required by this subparagraph shall be submitted in compliance with Section 9795 of the Government Code.

(D) This paragraph shall become inoperative on January 1, 2023, unless extended by the Legislature.

(c) (1) Subdivision (a) and the holding in Dynamex do not apply to a contract for "professional services" as defined below, and instead the determination of whether the individual is an employee or independent

contractor shall be governed by Borello if the hiring entity demonstrates that all of the following factors are satisfied:

(A) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. Nothing in this subdivision prohibits an individual from choosing to perform services at the location of the hiring entity.

(B) If work is performed more than six months after the effective date of this section, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession.

(C) The individual has the ability to set or negotiate their own rates for the services performed.

(D) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.

(E) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.

(F) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

(2) For purposes of this subdivision:

(A) An "individual" includes an individual providing services through a sole proprietorship or other business entity.

(B) "Professional services" means services that meet any of the following:

(i) Marketing, provided that the contracted work is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the contracted work.

(ii) Administrator of human resources, provided that the contracted work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(iii) Travel agent services provided by either of the following: (I) a person regulated by the Attorney General under Article 2.6 (commencing with Section 17550) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, or (II) an individual who is a seller of travel within the meaning of subdivision (a) of Section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (g) of Section 17550.20 of the Business and Professions Code.

(iv) Graphic design.

(v) Grant writer.

(vi) Fine artist.

(vii) Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service pursuant to Part 10 of Subtitle A of Title 31 of the Code of Federal Regulations.

(viii) Payment processing agent through an independent sales organization.

(ix) Services provided by a still photographer or photojournalist who do not license content submissions to the putative employer more than 35 times per year. This clause is not applicable to an individual who works on motion pictures, which includes, but is not limited to, projects produced for theatrical, television, internet streaming for any device, commercial productions, broadcast news, music videos, and live shows, whether distributed live or recorded for later broadcast, regardless of the distribution platform. For purposes of this clause a "submission" is one or more items or forms of content produced by a still photographer or photojournalist that: (I) pertains to a specific event or specific subject; (II) is provided for in a contract that defines the scope of the work; and (III) is accepted by and licensed to the publication or stock photography company and published or posted. Nothing in this section shall prevent a photographer or artist from displaying their work product for sale.

(x) Services provided by a freelance writer, editor, or newspaper cartoonist who does not provide content submissions to the putative employer more than 35 times per year. Items of content produced on a recurring basis related to a general topic shall be considered separate submissions for purposes of calculating the 35 times per year. For purposes of this clause, a "submission" is one or more items or forms of content by a freelance journalist that: (I) pertains to a specific event or topic; (II) is provided for in a contract that defines the scope of the work; (III) is accepted by the publication or company and published or posted for sale.

(xi) Services provided by a licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist provided that the individual:

(I) Sets their own rates, processes their own payments, and is paid directly by clients.

(II) Sets their own hours of work and has sole discretion to decide the number of clients and which clients for whom they will provide services.

(III) Has their own book of business and schedules their own appointments.

(IV) Maintains their own business license for the services offered to clients.

(V) If the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space.

(VI) This subdivision shall become inoperative, with respect to licensed manicurists, on January 1, 2022.

(d) Subdivision (a) and the holding in Dynamex do not apply to the following, which are subject to the Business and Professions Code:

(1) A real estate licensee licensed by the State of California pursuant to Division 4 (commencing with Section 10000) of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by subdivision (b) of Section 10032 of the Business and Professions Code. If that section is not applicable, then this determination shall be governed as follows: (A) for purposes of

unemployment insurance by Section 650 of the Unemployment Insurance Code; (B) for purposes of workers compensation by Section 3200 et seq.; and (C) for all other purposes in the Labor Code by Borello. The statutorily imposed duties of a responsible broker under Section 10015.1 of the Business and Professions Code are not factors to be considered under the Borello test.

(2) A repossession agency licensed pursuant to Section 7500.2 of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by Section 7500.2 of the Business and Professions Code, if the repossession agency is free from the control and direction of the hiring person or entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(e) Subdivision (a) and the holding in Dynamex do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions:

(1) If a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation ("business service provider") contracts to provide services to another such business ("contracting business"), the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied:

(A) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.

(C) The contract with the business service provider is in writing.

(D) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.

(E) The business service provider maintains a business location that is separate from the business or work location of the contracting business.

(F) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(G) The business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.

(H) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

(I) The business service provider provides its own tools, vehicles, and equipment to perform the services.

(J) The business service provider can negotiate its own rates.

(K) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

(L) The business service provider is not performing the type of work for which a license from the Contractor's State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

(2) This subdivision does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.

(3) The determination of whether an individual working for a business service provider is an employee or independent contractor of the business service provider is governed by paragraph (1) of subdivision (a).

(4) This subdivision does not alter or supersede any existing rights under Section 2810.3.

(f) Subdivision (a) and the holding in Dynamex do not apply to the relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry, and instead the determination of whether the individual is an employee of the contractor shall be governed by Section 2750.5 and by Borello, if the contractor demonstrates that all the following criteria are satisfied:

(1) The subcontract is in writing.

(2) The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.

(3) If the subcontractor is domiciled in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor has the required business license or business tax registration.

(4) The subcontractor maintains a business location that is separate from the business or work location of the contractor.

(5) The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.

(6) The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, legally authorized indemnity obligations, performance bonds, or warranties relating to the labor or services being provided.

(7) The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(8) (A) Paragraph (2) shall not apply to a subcontractor providing construction trucking services for which a contractor's license is not required by Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, provided that all of the following criteria are satisfied:

(i) The subcontractor is a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.

(ii) For work performed after January 1, 2020, the subcontractor is registered with the Department of Industrial Relations as a public works

contractor pursuant to Section 1725.5, regardless of whether the subcontract involves public work.

(iii) The subcontractor utilizes its own employees to perform the construction trucking services, unless the subcontractor is a sole proprietor who operates their own truck to perform the entire subcontract and holds a valid motor carrier permit issued by the Department of Motor Vehicles.

(iv) The subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.

(B) For work performed after January 1, 2020, any business entity that provides construction trucking services to a licensed contractor utilizing more than one truck shall be deemed the employer for all drivers of those trucks.

(C) For purposes of this paragraph, "construction trucking services" mean hauling and trucking services provided in the construction industry pursuant to a contract with a licensed contractor utilizing vehicles that require a commercial driver's license to operate or have a gross vehicle weight rating of 26,001 or more pounds.

(D) This paragraph shall only apply to work performed before January 1, 2022.

(E) Nothing in this paragraph prohibits an individual who owns their truck from working as an employee of a trucking company and utilizing that truck in the scope of that employment. An individual employee providing their own truck for use by an employer trucking company shall be reimbursed by the trucking company for the reasonable expense incurred for the use of the employee owned truck.

(g) Subdivision (a) and the holding in Dynamex do not apply to the relationship between a referral agency and a service provider, as defined below, under the following conditions:

(1) If a business entity formed as a sole proprietor, partnership, limited liability company, limited liability partnership, or corporation ("service provider") provides services to clients through a referral agency, the determination whether the service provider is an employee of the referral agency shall be governed by Borello, if the referral agency demonstrates that all of the following criteria are satisfied:

(A) The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.

(B) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration, the service provider has the required business license or business tax registration.

(C) If the work for the client requires the service provider to hold a state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor's license.

(D) The service provider delivers services to the client under service provider's name, rather than under the name of the referral agency.

(E) The service provider provides its own tools and supplies to perform the services.

(F) The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client.

(G) The service provider maintains a clientele without any restrictions from the referral agency and the service provider is free to seek work elsewhere, including through a competing agency.

(H) The service provider sets its own hours and terms of work and is free to accept or reject clients and contracts.

(I) The service provider sets its own rates for services performed, without deduction by the referral agency.

(J) The service provider is not penalized in any form for rejecting clients or contracts. This subparagraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

(2) For purposes of this subdivision, the following definitions apply:

(A) "Animal services" means services related to daytime and nighttime pet care including pet boarding under Section 122380 of the Health and Safety Code.

(B) "Client" means a person or business that engages a service contractor through a referral agency.

(C) "Referral agency" is a business that connects clients with service providers that provide graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup.

(D) "Referral agency contract" is the agency's contract with clients and service contractors governing the use of its intermediary services described in subparagraph (C).

(E) "Service provider" means a person or business who agrees to the referral agency's contract and uses the referral agency to connect with clients.

(F) "Tutor" means a person who develops and teaches their own curriculum. A "tutor" does not include a person who teaches a curriculum created by a public school or who contracts with a public school through a referral company for purposes of teaching students of a public school.

(3) This subdivision does not apply to an individual worker, as opposed to a business entity, who performs services for a client through a referral agency. The determination whether such an individual is an employee of a referral agency is governed by subdivision (a).

(h) Subdivision (a) and the holding in Dynamex do not apply to the relationship between a motor club holding a certificate of authority issued pursuant to Chapter 2 (commencing with Section 12160) of Part 5 of Division 2 of the Insurance Code and an individual performing services pursuant to a contract between the motor club and a third party to provide motor club services utilizing the employees and vehicles of the third party and, instead, the determination whether such an individual is an employee

of the motor club shall be governed by Borello, if the motor club demonstrates that the third party is a separate and independent business from the motor club.

(i) (1) The addition of subdivision (a) to this section of the Labor Code by this act does not constitute a change in, but is declaratory of, existing law with regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders.

(2) Insofar as the application of subdivisions (b), (c), (d), (e), (f), (g), and (h) of this section would relieve an employer from liability, those subdivisions shall apply retroactively to existing claims and actions to the maximum extent permitted by law.

(3) Except as provided in paragraphs (1) and (2) of this subdivision, the provisions of this section of the Labor Code shall apply to work performed on or after January 1, 2020.

(j) In addition to any other remedies available, an action for injunctive relief to prevent the continued misclassification of employees as independent contractors may be prosecuted against the putative employer in a court of competent jurisdiction by the Attorney General or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association.

SEC. 3. Section 3351 of the Labor Code, as amended by Section 33 of Chapter 38 of the Statutes of 2019, is amended to read:

3351. "Employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

(a) Aliens and minors.

(b) All elected and appointed paid public officers.

(c) All officers and members of boards of directors of quasi-public or private corporations while rendering actual service for the corporations for pay. An officer or member of a board of directors may elect to be excluded from coverage in accordance with paragraph (16), (18), or (19) of subdivision (a) of Section 3352.

(d) Except as provided in paragraph (8) of subdivision (a) of Section 3352, any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

(e) All persons incarcerated in a state penal or correctional institution while engaged in assigned work or employment as defined in paragraph (1) of subdivision (a) of Section 10021 of Title 8 of the California Code of Regulations, or engaged in work performed under contract.

(f) All working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company. A general partner of a partnership or a managing member of a limited liability company may elect to be excluded from coverage in accordance with paragraph (17) of subdivision (a) of Section 3352.

(g) A person who holds the power to revoke a trust, with respect to shares of a private corporation held in trust or general partnership or limited liability company interests held in trust. To the extent that this person is deemed to be an employee described in subdivision (c) or (f), as applicable, the person may also elect to be excluded from coverage as described in subdivision (c) or (f), as applicable, if that person otherwise meets the criteria for exclusion, as described in Section 3352.

(h) A person committed to a state hospital facility under the State Department of State Hospitals, as defined in Section 4100 of the Welfare and Institutions Code, while engaged in and assigned work in a vocation rehabilitation program, including a sheltered workshop.

(i) Beginning on July 1, 2020, any individual who is an employee pursuant to Section 2750.3. This subdivision shall not apply retroactively.

SEC. 4. Section 606.5 of the Unemployment Insurance Code is amended to read:

606.5. (a) Whether an individual or entity is the employer of specific employees shall be determined pursuant to subdivision (b) of Section 621, except as provided in subdivisions (b) and (c).

(b) As used in this section, a "temporary services employer" and a "leasing employer" is an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and performs all of the following functions:

(1) Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services.

(2) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.

(3) Retains the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.

(4) Assigns or reassigns the worker to perform services for a client or customer.

(5) Sets the rate of pay of the worker, whether or not through negotiation.

(6) Pays the worker from its own account or accounts.

(7) Retains the right to hire and terminate workers.

(c) If an individual or entity contracts to supply an employee to perform services for a customer or client, and is a leasing employer or a temporary services employer, the individual or entity is the employer of the employee who performs the services. If an individual or entity contracts to supply an employee to perform services for a client or customer and is not a leasing employer or a temporary services employer, the client or customer is the employer of the employee who performs the services. An individual or entity that contracts to supply an employee to perform services for a customer

or client and pays wages to the employee for the services, but is not a leasing employer or a temporary services employer, pays the wages as the agent of the employer.

(d) In circumstances which are in essence the loan of an employee from one employer to another employer wherein direction and control of the manner and means of performing the services changes to the employer to whom the employee is loaned, the loaning employer shall continue to be the employer of the employee if the loaning employer continues to pay remuneration to the employee, whether or not reimbursed by the other employer. If the employer to whom the employee is loaned pays remuneration to the employee for the services performed, that employer shall be considered the employer for the purposes of any remuneration paid to the employee by the employer, regardless of whether the loaning employer also pays remuneration to the employee.

SEC. 5. Section 621 of the Unemployment Insurance Code is amended to read:

621. "Employee" means all of the following:

(a) Any officer of a corporation.

(b) Any individual providing labor or services for remuneration has the status of an employee rather than an independent contractor unless the hiring entity demonstrates all of the following conditions:

(1) The individual 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.

(2) The individual performs work that is outside the usual course of the hiring entity's business.

(3) The individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(c) (1) Any individual, other than an individual who is an employee under subdivision (a) or (b), who performs services for remuneration for any employing unit if the contract of service contemplates that substantially all of those services are to be performed personally by that individual either:

(A) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or drycleaning services, for their principal.

(B) As a traveling or city salesperson, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, their principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(C) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by that person that are required to be returned to that person or a designee thereof.

(2) An individual shall not be included in the term "employee" under the provisions of this subdivision if that individual has a substantial investment in facilities used in connection with the performance of those services, other than in facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

(d) Any individual who is an employee pursuant to Section 601.5 or 686.

(e) Any individual whose services are in subject employment pursuant to an election for coverage under any provision of Article 4 (commencing with Section 701) of this chapter.

(f) Any member of a limited liability company that is treated as a corporation for federal income tax purposes.

SEC. 6. No provision of this measure shall permit an employer to reclassify an individual who was an employee on January 1, 2019, to an independent contractor due to this measure's enactment.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

Cal. Unemp. Ins. Code § 686

Employer; contractor for specially ordered or commissioned work of authorship

"Employer" also means any person contracting for the creation of a specially ordered or commissioned work of authorship when the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire, as defined in Section 101 of Title 17 of the United States Code, and the ordering or commissioning party obtains ownership of all of the rights comprised in the copyright in the work. The ordering or commissioning party shall be the employer of the author of the work for the purposes of this part.

(Added by Stats.1982, c. 1332, p. 4937, § 3.)

Cal. Lab. Code § 3351.5(c)

§ 3351.5. Employee; additional inclusions

"Employee" includes:

…

(c) Any person while engaged by contract for the creation of a specially ordered or commissioned work of authorship in which the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire, as defined in Section 101 of Title 17 of the United States Code, and the ordering or commissioning party obtains ownership of all the rights comprised in the copyright in the work.

(Added by Stats.1969, c. 1133, p. 2201, § 1. Amended by Stats.1978, c. 463, p. 1571, § 2, eff. July 18, 1978; Stats.1982, c. 1332, p. 4933, § 1.)

McKinney's Labor Law § 511

§ 511. Employment

Effective: November 28, 2016

1. General definition. "Employment" means (a) any service under any contract of employment for hire, express or implied, written, or oral and

(b) any service by a person for an employer …

(1-c) as an employee in the commercial goods transportation industry unless the presumption of employment can be overcome, as provided under section eight hundred sixty-two-b of this chapter; or

(2) as a traveling or city salesman engaged on a full-time basis in soliciting orders for merchandise for resale or supplies for use in the purchaser's business operations if the contract of service contemplates that substantially all of such services are to be performed personally by such person; such person does not have a substantial investment in facilities used in connection with the performance of such services, excepting facilities for transportation; and the services are not in the nature of a single transaction which is not part of a continuing relationship with the employer.

(3) as a professional model, where:

(i) the professional model performs modeling services for; or

(ii) consents in writing to the transfer of his or her exclusive legal right to the use of his or her name, portrait, picture or image, for advertising purposes or for the purposes of trade, directly to

a retail store, a manufacturer, an advertising agency, a photographer, a publishing company or any other such person or entity, which dictates such professional model's assignments, hours of work or performance locations and which compensates such professional model in return for a waiver of his or her privacy rights enumerated above, unless such services are performed pursuant to a written contract wherein it is stated that the professional model is the employee of another employer covered by this chapter. For purposes of this subparagraph, the term "professional model" means a person who, in the course of his or her trade, occupation or profession, performs modeling services. For purposes of this subparagraph, the term "modeling services" means the appearance by a professional model in photographic sessions or the engagement of such model in live, filmed or taped modeling performances for remuneration.

…

4. Other included work.

The term "employment" shall include

(a) Service, wherever performed within the United States, the Virgin Islands, or Canada, if

(1) contributions are not required with respect to such service under an unemployment compensation law of any other state, the Virgin Islands, or Canada, and

(2) the place from which such service is directed or controlled is in this state;

(b) Service performed within this state not otherwise within the purview of the foregoing provisions of this section if contributions are not required with respect to such service under corresponding provisions of an unemployment compensation law of any other state.

…

9. Day student. The term "employment" does not include service during all or any part of the school year or regular vacation periods as a part-time worker of any person actually in regular attendance during the daytime as a student in an elementary or secondary school.

…

14. The term "employment" does not include service by a child under the age of fourteen years.

15. Students and students' spouses at educational institutions. The term "employment" does not include services rendered for an educational institution by a person who is enrolled and is in regular attendance as a student in such an institution, or the spouse of such student employed by that institution if such spouse is advised at the beginning of such services that the employment is provided under a program of financial assistance to such student and will not be covered under this article. For the purposes of this article, the term "employment" shall include services rendered for a health care facility, including academic medical centers, by fellow, resident and intern physicians.

…

17. Certain college students. The term "employment" does not include service performed by an individual, regardless of age, who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers.

…

22. Recreational bowling. The term "employment" shall not include recreational bowling, such as bowling in a league where an individual may occasionally win prize money.

New York Statutes Annotated - 2019

McKinney's Labor Law § 651

§ 651. Definitions

Effective: November 28, 2016

As used in this article:

…

4. "Occupation" means an industry, trade, business or class of work in which employees are gainfully employed.

5. "Employee" includes any individual employed or permitted to work by an employer in any occupation, but shall not include any individual who is employed or permitted to work: (a) on a casual basis in service as a part time baby sitter in the home of the employer; (b) in labor on a farm; (c) in a bona fide executive, administrative, or professional capacity; (d) as an outside salesman; (e) as a driver engaged in operating a taxicab; (f) as a volunteer, learner or apprentice by a corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual; (g) as a member of a religious order, or as a duly ordained, commissioned or licensed minister, priest or rabbi, or as a sexton, or as a christian science reader; (h) in or for such a religious or charitable institution, which work is incidental to or in return for charitable aid conferred upon such individual and not under any express contract of hire; (i) in or for such a religious, educational or charitable institution if such individual is a student; (j) in or for such a religious, educational or charitable institution if the earning capacity of such individual is impaired by age or by physical or mental deficiency or injury; (k) in or for a summer camp or conference of such a religious, educational or charitable institution for not more than three months annually; (l) as a staff counselor in a children's camp; (m) in or for a college or university fraternity, sorority, student association or faculty association, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and which is recognized by such college or university, if such individual is a student; (n) by a federal, state or municipal government or political subdivision thereof; (o) as a volunteer at a recreational or amusement event run by a business that operates such events, provided that no single such event lasts longer than eight consecutive days and no more than one such event concerning substantially the same subject matter occurs in any calendar year, where (1) any such volunteer shall be at least eighteen years of age, (2) a business seeking coverage under this paragraph shall notify every volunteer in writing, in language acceptable to the commissioner, that by volunteering his or her services, such volunteer is waiving his or her right to receive the minimum wage pursuant to this article, and (3) such notice shall be signed and dated by a representative of the business and the volunteer and kept on file by the business for thirty-six months; or (p) in the delivery of newspapers or shopping news to the consumer by a person who is not performing commercial goods transportation services for a commercial goods transportation contractor within the meaning of article twenty-five-C of this chapter. The exclusions from the term "employee" contained in this subdivision shall be as defined by regulations of the commissioner.

…

6. "Employer" includes any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer.

7. "Wage" includes allowances, in the amount determined in accordance with the provisions of this article, for gratuities and, when furnished by the employer to employees, for meals, lodging, apparel, and other such items, services and facilities.

8. "Non-profitmaking institution" means any corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.

…

ALBANY, NEW YORK

June 23, 1997

3:10 p.m.

REGULAR SESSION

SENATOR JOHN R. KUHL, JR., Acting President

STEPHEN F. SLOAN, Secretary

The Secretary will read Calendar Number 195.

THE SECRETARY: Calendar Number 195, by Senator Spano, Senate Print 2486, an act to amend the Labor Law and the Workers' Compensation Law, in relation to the definition of employment.

SENATOR PATERSON: Explanation.

ACTING PRESIDENT KUHL: Senator Spano, an explanation of Calendar Number 195 has been requested by Senator Paterson.

SENATOR SPANO: Mr. President, this bill provides that professional models who -- would be deemed independent contractors for unemployment and for Workers' Compensation if they meet certain criteria that we've set forth in the proposed statute.

If we go back to 1992, Chapter 668 of the Laws of 1992, it was enacted in an effort just to clarify who would be an independent contractor in terms of professional

models.

Prior to that, there was no clear definition in the law and Chapter 668 was enacted to put UI and Workers' Compensation coverage in statute. What happened was some confusion that was -- that resulted where we were defining employment with specific references that left some models out of the loop.

What -- this bill would implement specific criteria which a professional model must meet to determine they're an independent contractor.

ACTING PRESIDENT KUHL: Senator Paterson, do you wish to speak more on the bill, ask further questions?

SENATOR PATERSON: Mr. President, if Senator Spano would yield for a question.

ACTING PRESIDENT KUHL: Senator Spano, do you yield to a question? The Senator yields.

SENATOR PATERSON: Senator, is there a reason why we're only providing this protection to models as opposed to various other groups that are in the same sort of -

beauticians or other independent contractors that are in this similar circumstance?

SENATOR SPANO: Yes. There is a reason for that, Senator. While we don't pretend that we're handling all the problems of independent contractors with the passage of this, but when we did pass Chapter 668 of the Laws of '92, it did put in place a mechanism with respect to models specifically and this legislation will put -- implement some specific criteria to deal with problems that have resulted as a result of that -- of the law that we passed in 1992.

There are other pieces of legislation that we have and that the Labor Committee had been looking into dealing with independent contractors but this is not a subject for today and also, Senator, we did have -- it was last year, we had conducted a series of hearings across the state where we did hear from a number of models that overwhelmingly supported the passage of this legislation.

SENATOR PATERSON: Thank you very much, Senator Spano.

Mr. President, on the bill.

ACTING PRESIDENT KUHL: Senator Paterson, on the bill.

SENATOR PATERSON: Mr. President, not all of the individuals who are working are as glorified and as high profiled as some of the more famous and celebrated models that we're aware of in society and because of the inconsistency of the work that they are able to find, it becomes very difficult for them not being represented by unions to actually compete in the actual market and so, therefore, to remove them from -- or have them seen as independent contractors and not eligible for some of the benefits that Workers' Compensation and unemployment are providing; therefore, the AFL-CIO and many others are quite concerned about this and in spite of Senator Spano's efforts through the hearing that he did hold to alleviate that concern, there's still the feeling that the worker whose work comes inconsistently is placed in a situation where the barriers are increased probably through - without the protections that would be afforded to just the regular employee.

ACTING PRESIDENT KUHL: Senator

Stachowski.

SENATOR STACHOWSKI: Mr. President, it's not often I get up and disagree with an AFL-CIO memo, much less disagree with my wonderful colleague, David Paterson, but on this particular bill, I'm agreeing with Senator Spano.

Having gone through a situation years ago in Buffalo where one of the larger modeling agencies in a small market like Buffalo was almost put out of business by an audit and subsequent attempt to collect money for owed unemployment coverages and it -- and they had gone to court and they won all the way through the court system and won in the Supreme Court here in New York, showing that these models were independent agents, that they were not always handled by this particular agency when they got work, that the reason for this bill and the reason even the models backed this bill is because, in most cases, these models are represented by different people according to different jobs, so that somebody else would call them if they need their particular type for a certain job.

So the fact is that I think Senator Spano's bill goes a long way to addressing this particular problem, more in the smaller agencies than the larger ones. This would be a major problem if they were suddenly audited by the Labor Department and told they owe large sums of money because they didn't cover unemployment insurance for models that were just -- that they assigned to certain jobs that weren't full-time employees.

So that this is a legitimate concern of not only the models but also the agencies. I think that this bill is necessary and will go a long way to alleviate that pressure and that pressure still exists because that same agency that won all the way through to the Supreme Court was notified earlier this year that they were going to have another audit of the same nature and then all of a sudden they didn't, but they were under that scare for about a month that they were going to have to go through the same thing that they had gone through and had led them to go to that court decision years ago.

So I would recommend the people

support Senator Spano's bill and, by the way, there is one union modeling agency that we know of and they would not be ill-affected by this particular bill.

ACTING PRESIDENT KUHL: Is there any other Senator wishing to speak on the bill?

(There was no response.)

Hearing none, the Secretary will read the last section.

THE SECRETARY: Section 7. This act shall take effect immediately.

ACTING PRESIDENT KUHL: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes 54.

ACTING PRESIDENT KUHL: The bill is passed.

Senator Abate, why do you rise?

SENATOR ABATE: Yes. I'd ask for unanimous consent to be recorded in the negative on Calendar Number 767 and 1193.

ACTING PRESIDENT KUHL: Without objection, hearing no objection, Senator Abate will be recorded in the negative on Calendar Number 767 and 1193.

17 U.S.C.A. § 101

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

…

A "work made for hire" is--

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

29 U.S.C.A. § 203
§ 203.

Definitions

As used in this chapter--

...

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means--

(A) any individual employed by the Government of the United States--

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the[1] Government Publishing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who--

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer

engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

…

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

…

(g) "Employ" includes to suffer or permit to work.

…

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

American Bar Association

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Law Firms And Associations

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice

shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

Cmty. for Creative Non-Violence v. Reid

Supreme Court of the United States

March 29, 1989, Argued ; June 5, 1989, Decided

No. 88-293

Reporter
490 U.S. 730 *; 109 S. Ct. 2166 **; 104 L. Ed. 2d 811 ***; 1989 U.S. LEXIS 2727 ****; 10 U.S.P.Q.2D (BNA) 1985; 57 U.S.L.W. 4607; Copy. L. Rep. (CCH) P26,425; 16 Media L. Rep. 1769

COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL. v. REID

Prior History: [****1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Disposition: 270 U. S. App. D. C. 26, 846 F. 2d 1485, affirmed.

Judges: Marshall, J., delivered the opinion for a unanimous Court.

Opinion by: MARSHALL

Opinion

[*732] [***819] [**2168] JUSTICE **MARSHALL** delivered the opinion of the Court.

[1A] [2A] [3A] [1987] In this case, an artist and the organization that hired him to produce a sculpture contest the ownership of the copyright in that work. To resolve this dispute, we must construe the "work made for hire" provisions of the Copyright Act of 1976 (Act or 1976 Act), 17 U. S. C. §§ 101 [***820] and 201(b), and in particular, the provision in § 101, which defines as a "work made for hire" a "work prepared by an employee [**2169] within the scope of his or her employment" (hereinafter § 101(1)). …

We granted certiorari to resolve a conflict among the Courts of Appeals over the proper construction of the "work made for hire" provisions of the Act. [2] 488 U.S. 940 (1988). We now affirm.

[****15] [*737] II

[1989] A

[4]The Copyright Act of 1976 provides that copyright ownership "vests initially in the author or authors of the work." 17 U. S. C. § 201(a). As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection. § 102. The Act carves out an important exception, however, for "works made for hire." [3] If the work is for hire, "the employer or other person for whom the work was prepared is considered the author" and owns the copyright, unless there is a written agreement to the contrary. § 201(b). Classifying a work as "made for hire" determines not only the initial ownership of its copyright, but also the copyright's duration, § 302(c), [***823] and the owners' renewal rights, § 304(a), termination rights, § 203(a), and right to

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[2] Compare *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc.* v. *Playboy Enterprises*, 815 F. 2d 323 (CA5 1987), (agency law determines who is an employee under § 101), cert. denied, 485 U.S. 981 (1988), with *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F. 2d 410 (CA4 1987) (supervision and control standard determines who is an employee under § 101); *Evans Newton, Inc.* v. *Chicago Systems Software*, 793 F. 2d 889 (CA7) (same), cert. denied, 479 U.S. 949 (1986); and *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F. 2d 548 (CA2) (same), cert. denied, 469 U.S. 982 (1984). See also *Dumas* v. *Gommerman*, 865 F. 2d 1093 (CA9 1989) (a multifactor formal, salaried employee test determines who is an employee under § 101).

[3] We use the phrase "work for hire" interchangeably with the more cumbersome statutory phrase "work made for hire."

import certain goods bearing the copyright, § 601(b)(1). See 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 5.03 [A], [****16] pp. 5-10 (1988). The contours of the work for hire doctrine therefore carry profound significance for freelance creators -- including artists, writers, photographers, designers, composers, and computer programmers -- and for the publishing, advertising, music, and other industries which commission their works. [4]

[*738] [1B] [****17] [3B]Section 101 of the 1976 Act provides that a work is "for hire" under two sets of circumstances:

> "(1) a work prepared by an employee within the scope of his or her employment; or
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." [5]

Petitioners do not claim that the statue satisfies the terms of § 101(2). Quite clearly, it does not. Sculpture does not fit within any of the nine categories of "specially ordered or commissioned" works enumerated in that subsection, and no written agreement between the parties establishes "Third World America" as a work for hire.

[****18] [1C] [2B] [5A] [6A]The dispositive inquiry in this case therefore is whether "Third World America" is "a work prepared by an employee within the scope of his or her employment" under § 101(1). The Act does not define these [**2172] terms. In the absence of such guidance, four interpretations have emerged. The first holds that a work is prepared by an employee whenever the hiring party [6] retains the right to control the product. See *Peregrine* v. *Lauren Corp.*, 601 F. Supp. 828, 829 (Colo. 1985); *Clarkstown* v. *Reeder*, 566 F. Supp. 137, 142 (SDNY [*739] 1983). Petitioners take this view. Brief for Petitioners 15; Tr. of Oral Arg. 12. A second, and closely related, view is that a work is prepared by an employee under § 101(1) when the hiring party has actually wielded control with respect to the creation of a particular work. This approach [****19] was formulated by the Court of Appeals for the Second Circuit, *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F. 2d 548, cert. denied, 469 U.S. 982 (1984), and adopted by the Fourth Circuit, *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing* [***824] *Co.*, 810 F. 2d 410 (1987), the Seventh Circuit, *Evans Newton, Inc.* v. *Chicago Systems Software*, 793 F. 2d 889, [1990] cert. denied, 479 U.S. 949 (1986), and, at times, by petitioners, Brief for Petitioners 17. A third view is that the term "employee" within § 101(1) carries its common-law agency law meaning. This view was endorsed by the Fifth Circuit in *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc.* v. *Playboy Enterprises*, 815 F. 2d 323 (1987), and by the Court of Appeals below. Finally, respondent and numerous *amici curiae* contend that the term "employee" only refers to "formal, salaried" employees. See, *e. g.*, Brief for Respondent 23-24; Brief for Register of Copyrights as *Amicus Curiae* 7. The Court of Appeals for the Ninth Circuit recently adopted this view. See *Dumas* v. *Gommerman*, 865 F. 2d 1093 (1989). [****20]

[1D] [7] [8]The starting point for our interpretation of a statute is always its language. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Act nowhere defines the terms "employee" or "scope of employment." It is,

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[4] As of 1955, approximately 40 percent of all copyright registrations were for works for hire, according to a Copyright Office study. See Varmer, Works Made for Hire and On Commission, in Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Study No. 13, 86th Cong., 2d Sess., 139, n. 49 (Comm. Print 1960) (hereinafter Varmer, Works Made for Hire). The Copyright Office does not keep more recent statistics on the number of work for hire registrations.

[5] Section 101 of the Act defines each of the nine categories of "specially ordered or commissioned" works.

[6] [6B]

By "hiring party," we mean to refer to the party who claims ownership of the copyright by virtue of the work for hire doctrine.

however, well established that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the [****21] established meaning of these terms." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981); see also *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). In the past, when Congress has used the term "employee" without defining it, [*740] we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See, *e. g., Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974); *Baker* v. *Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) *(per curiam); Robinson* v. *Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915). Nothing in the text of the work for hire provisions indicates that Congress used the words "employee" and "employment" to describe anything other than "'the conventional relation of employer and employe.'" *Kelley, supra*, at 323, quoting *Robinson, supra*, at 94; cf. *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124-132 (1944) (rejecting agency law conception [****22] of employee for purposes of the National Labor Relations Act where structure and context of statute indicated broader definition). On the contrary, Congress' intent to incorporate the agency law definition is suggested by § 101(1)'s use of the term, "scope of employment," a widely used term of art in agency law. See Restatement [**2173] (Second) of Agency § 228 (1958) (hereinafter Restatement).

[1E] [9]In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer," and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms. See, *e. g., Kelley*, 419 U.S., at 323-324, and n. 5; *id.*, [***825] at 332 (Stewart, J., concurring in judgment); *Ward* v. *Atlantic Coast Line R. Co.*, 362 U.S. 396, 400 (1960); [****23] *Baker, supra*, at 228. This practice reflects the fact that "federal statutes are generally intended to have uniform nationwide application." *Mississippi Band of Choctaw Indians* v. *Holyfield, ante*, at 43. Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation. See 17 U. S. C. § 301(a). We thus [*741] agree with the Court of Appeals that the term "employee" should be understood in light of the general common law of agency. …

[5B] [6E] [****27] We therefore conclude that the language and structure of § 101 of the Act do not support either the right to control the product or the actual control approaches. [8] The structure of [*743] § 101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ordinary canons of statutory interpretation indicate that the classification of a particular hired party should be made with reference to agency law.

…

[****40] [6J]Finally, petitioners' construction of the work for hire provisions would impede Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright

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[8] [5C]

We also reject the suggestion of respondent and *amici* that the § 101(1) term "employee" refers only to formal, salaried employees. While there is some support for such a definition in the legislative history, see Varmer, Works Made for Hire 130; n. 11, *infra*, the language of § 101(1) cannot support it. The Act does not say "formal" or "salaried" employee, but simply "employee." Moreover, respondent and those *amici* who endorse a formal, salaried employee test do not agree upon the content of this test. Compare, *e. g.*, Brief for Respondent 37 (hired party who is on payroll is an employee within § 101(1)) with Tr. of Oral Arg. 31 (hired party who receives a salary or commissions regularly is an employee within § 101(1)); and Brief for Volunteer Lawyers for the Arts, Inc., et al. as *Amici Curiae* 4 (hired party who receives a salary *and* is treated as an employee for Social Security and tax purposes is an employee within § 101(1)). Even the one Court of Appeals to adopt what it termed a formal, salaried employee test in fact embraced an approach incorporating numerous factors drawn from the agency law definition of employee which we endorse. See *Dumas*, 865 F. 2d, at 1104.

ownership. See H. R. Rep. No. 94-1476, *supra*, at 129. In a "copyright marketplace," the parties negotiate [**2178] with an expectation that one of them will own the copyright in the completed work. *Dumas*, 865 F. 2d, at 1104-1105, [*750] n. 18. With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.

…

[****42] [1F] [6K]In sum, we must reject petitioners' argument. Transforming a commissioned work into a work by an employee on the basis of the hiring party's right to control, or actual control of, the work is inconsistent with the language, structure, and legislative history of the work for hire provisions. To [*751] determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor. After making this determination, the court can apply the appropriate subsection of § 101.

[1995] B

[2C] [11]We turn, finally, to an application of § 101 to Reid's production of "Third World America." In determining whether a hired party is an employee under the general common law of [****43] agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. [18] [****44] Among the other factors relevant to this inquiry are the skill required; [19] the source of the instrumentalities and tools; [20] the location of the work; [21] the duration of the relationship between the [**2179] parties; [22] whether the hiring party has the right to assign additional [***832] projects to the hired party; [23] the extent of the hired party's discretion over when and how long to work; [24] the method of payment; [25] [****45] the hired party's role in hiring and [*752] paying assistants; [26] whether the work is part of the regular business of the hiring party; [27] whether the hiring party is in business; [28] the provision of employee benefits; [29] and the tax treatment of the hired party. [30] See Restatement § 220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee). [31] No one of these factors is determinative. See *Ward*, 362 U.S., at 400; *Hilton Int'l Co.* v. *NLRB*, 690 F. 2d 318, 321 (CA2 1982).

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[18] See, *e. g., Hilton Int'l Co.* v. *NLRB*, 690 F. 2d 318, 320 (CA2 1982); *NLRB* v. *Maine Caterers, Inc.*, 654 F. 2d 131, 133 (CA1 1981), cert denied, 455 U.S. 940 (1982); Restatement § 220(1).

[19] See, *e. g., Bartels* v. *Birmingham*, 332 U.S. 126, 132 (1947); *Hilton Int'l Co., supra*, at 320; *NLRB* v. *A. Duie Pyle, Inc.*, 606 F. 2d 379, 382 (CA3 1979); Restatement § 220(2)(d).

[20] See, *e. g., NLRB* v. *United Ins. Co. of America*, 390 U.S. 254, 258 (1968); *United States* v. *Silk*, 331 U.S. 704, 717, 718 (1947); *Dumas*, 865 F. 2d, at 1105; Restatement § 220(2)(e).

[21] See, *e. g., United Ins. Co., supra*, at 258; *Dumas, supra*, at 1105; *Darden* v. *Nationwide Mutual Ins. Co.*, 796 F. 2d 701, 705 (CA4 1986); Restatement § 220(2)(e).

[22] See, *e. g., United Ins. Co., supra*, at 259; *Bartels, supra*, at 132; Restatement § 220(2)(f).

[23] See, *e. g., Dumas, supra*, at 1105.

[24] See, *e. g., United Ins. Co., supra*, at 258; *Short* v. *Central States, Southeast & Southwest Areas Pension Fund*, 729 F. 2d 567, 574 (CA8 1984).

[25] See, *e. g., Dumas, supra*, at 1105; *Darden, supra*, at 705; *Holt* v. *Winpisinger*, 258 U.S. App. D. C. 343, 351, 811 F. 2d 1532, 1540 (1987); Restatement § 220(2)(g).

[26] See, *e. g., Bartels, supra*, at 132; *Silk, supra*, at 719; *Darden, supra*, at 705; *Short, supra*, at 574.

[27] See, *e. g., United Ins. Co., supra*, at 259; *Silk, supra*, at 718; *Dumas, supra*, at 1105; *Hilton Int'l Co., supra*, at 321; Restatement § 220(2)(h).

[28] See, *e. g.*, Restatement § 220(2)(j).

[29] See, *e. g., United Ins. Co., supra*, at 259; *Dumas, supra*, at 1105; *Short, supra*, at 574.

[30] See, *e. g., Dumas, supra*, at 1105.

[31] In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency. See, *e. g., Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 323-324, and n. 5 (1974); *id.*, at 332 (Stewart, J., concurring in judgment); *Ward* v. *Atlantic Coast Line R. Co.*, 362 U.S. 396, 400 (1960); *Baker* v. *Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959).

[****46] [2D]Examining the circumstances of this case in light of these factors, we agree with the Court of Appeals that Reid was not an employee of CCNV but an independent contractor. 270 U.S. App. D. C., at 35, n. 11, 846 F. 2d, at 1494, n. 11. True, CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications. 652 F. Supp., at 1456. But the extent of control the hiring party exercises over the details of the product is not dispositive. Indeed, all the other circumstances weigh heavily against finding an employment relationship. Reid is a sculptor, a skilled occupation. Reid supplied his own tools. He worked in his own studio in Baltimore, making daily supervision of his activities from Washington practicably impossible. Reid was retained for less than two months, a relatively [*753] short period of time. During and after this time, CCNV had no right to assign additional projects to Reid. Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work. CCNV paid Reid $ [****47] 15,000, a sum dependent on "completion of a specific job, a method by which independent contractors are often compensated." *Holt* v. *Winpisinger*, 258 U.S. App. D. C. 343, 351, 811 F. 2d 1532, 1540 (1987). Reid had total discretion in hiring and paying assistants. "Creating sculptures was hardly 'regular business' for CCNV." 270 U.S. App. D. C., at 35, n. 11, 846 F. 2d, at 1494, n. 11. Indeed, CCNV is not a business at all. Finally, CCNV did [***833] not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds.

[2E] [3C] [12A]Because Reid was an independent contractor, whether "Third World America" is a [1996] work for hire depends on whether [**2180] it satisfies the terms of § 101(2). This petitioners concede it cannot do. Thus, CCNV is not the author of "Third World America" by virtue of the work for hire provisions of the Act. However, [****48] as the Court of Appeals made clear, CCNV nevertheless may be a joint author of the sculpture if, on remand, the District Court determines that CCNV and Reid prepared the work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U. S. C. § 101. [32] In that case, CCNV and Reid would be co-owners of the copyright in the work. See § 201(a).

For the aforestated reasons, we affirm the judgment of the Court of Appeals for the District of Columbia Circuit.

It is so ordered.

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[32] [12B]

Neither CCNV nor Reid sought review of the Court of Appeals' remand order. We therefore have no occasion to pass judgment on the applicability of the Act's joint authorship provisions to this case.

Dynamex Operations W. v. Superior Court

Supreme Court of California

April 30, 2018, Filed

Civil No. S222732

Reporter

4 Cal. 5th 903 *; 416 P.3d 1 **; 232 Cal. Rptr. 3d 1 ***; 83 Cal. Comp. Cases 817 ****; 2018 Cal. LEXIS 3152; 168 Lab. Cas. (CCH) P61,859; 2018 WL 1999120

DYNAMEX OPERATIONS WEST, INC., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CHARLES LEE et al., Real Parties in Interest.

Subsequent History: Petitions For Modification Denied and Petition for Rehearing Denied by Supreme Court June 20, 2018

Reported at Dynamex Operations West, Inc. v. Superior Court, 2018 Cal. LEXIS 3208 (Cal., Apr. 30, 2018)

Modified and rehearing denied by, 06/20/2018

Prior History: [1] Civil No. B249546—Court of Appeal, Second Appellate District, Division Seven; Los Angeles County Superior Court No. BC332016—Hon. Michael L. Stern, Judge, see Dynamex Operations West, Inc. v. Superior Court, 79 Cal. Comp. Cases 1366 (2014)

Dynamex Operations West, Inc. v. Superior Court, 230 Cal. App. 4th 718, 179 Cal. Rptr. 3d 69, 2014 Cal. App. LEXIS 921 (Cal. App. 2d Dist., Oct. 15, 2014)

Disposition: Appeal from judgment of the Court of Appeal, Second Appellate District, Division Seven. Judgment *affirmed*.

Judges: Opinion by Cantil-Sakauye, C. J., with Chin, Corrigan, Liu, Cuéllar, Kruger, and Siggins, JJ. [*], concurring.

Opinion by: Cantil-Sakauye

Opinion

[***5] [**4] **CANTIL-SAKAUYE, C. J.**—Under both California and federal law, the question whether an individual worker should properly [3] be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally. [1] On the one [**5] hand, if [*913] a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing workers' compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours, and working [****820] conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and

[*] Associate Justice of the Court of Appeal, First Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] See United States Department of Labor, Dunlop Commission on the Future of Worker-Management Relations, Final Report (1994) page 64 ("The single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors") <https://digitalcommons.ilr.cornell.edu/key_workplace/2/> (as of Apr. 30, 2018).

the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families.

Although in some circumstances classification as an independent contractor may be advantageous to workers [4] as well as to businesses, the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair [***6] competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled. [2]

The issue in this case relates to the resolution of the employee or independent contractor question in one specific context. Here we must decide what standard applies, under [5] California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*, which impose obligations relating to the minimum [*914] wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees. [3]

In the underlying lawsuit in this matter, two individual delivery drivers, suing on their own behalf and on behalf of a class of allegedly similarly situated drivers, filed a complaint against Dynamex Operations West, Inc. (Dynamex), a nationwide package and document delivery company, alleging that Dynamex had misclassified its delivery drivers as independent contractors rather than employees. The drivers claimed that Dynamex's alleged misclassification of its drivers as independent contractors led to Dynamex's violation of the provisions of Industrial [****821] Welfare Commission wage order No. 9, the applicable state wage order governing the transportation industry, as well as various sections of the Labor Code, and, as a result, that Dynamex had engaged in unfair and unlawful business practices under Business and Professions Code section 17200….

Dynamex filed a petition for review in this court, challenging only the Court of Appeal's conclusion that the wage order definitions of "employ" and "employer" discussed in *Martinez* are applicable to the question whether a worker is properly considered an employee or an independent contractor for purposes of the obligations imposed by an applicable wage order. We granted review to consider that issue. [5]

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[2] See United States Department of Labor, Wage and Hour Division, Misclassification of Employees as Independent Contractors <https://www.dol.gov/whd/workers/misclassification/> (as of Apr. 30, 2018); Department of Industrial Relations, Worker Misclassification <http://www.dir.ca.gov/dlse/worker_misclassification.html> (as of Apr. 30, 2018); see also National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (July 2015) pp. 2–6 <http://nelp.org/content/uploads/Independent-Contractor-Costs.pdf> (as of Apr. 30, 2018).

[3] In California, wage orders are constitutionally authorized, quasi-legislative regulations that have the force of law. (See Cal. Const., art. XIV, § 1; Lab. Code, §§ 1173, 1178, 1178.5, 1182, 1185; *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700–703 [166 Cal. Rptr. 331, 613 P.2d 579] (*Industrial Welfare Com.*).)

[5] In their answer brief filed in this court, the drivers challenge the Court of Appeal's conclusion that the *Borello* standard is applicable to their cause of action under section 2802 insofar as that claim seeks reimbursement for business expenses other than business expenses encompassed by the wage order. The drivers contend that the wage order definitions should apply to all the relief sought under section 2802, maintaining that the obligation to reimburse business expenses is necessary to preclude circumvention of the minimum and overtime wage obligations imposed by the wage order. The drivers, however, did not seek review of that aspect of the Court of Appeal decision or file an answer to the petition for review requesting review of that issue. Accordingly, that issue is not before us and we express no view on that question. (Cal. Rules of Court, rules 8.500(a), 8.516(b).)

For the reasons discussed below, we agree with the Court of Appeal that the trial court did not err in concluding that the "suffer or permit to work" definition of "employ" [10] contained in the wage order may be relied upon in evaluating whether a worker is an employee or, instead, an independent contractor for purposes of the obligations imposed by the wage order. As explained, in light of its history and purpose, we conclude that the wage order's suffer or permit to work [****823] definition must be interpreted broadly to treat as "employees," and thereby provide the wage order's protection to, *all* workers who would ordinarily be viewed as *working in the hiring business*. At the same time, we conclude that the suffer or permit to work definition is a term of art that cannot be interpreted literally in a manner that would encompass within the employee category the type of individual workers, like independent plumbers or electricians, who have traditionally been viewed as *genuine* independent contractors who are working only in their own independent business.

For the reasons explained hereafter, we conclude that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the "ABC" test, that [11] is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors. Under 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) that the worker is free from the control and direction of the hirer in connection with the performance of [*917] the work, both under the contract for the performance of such 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 of the same nature as the work performed for the hiring entity.

Although, as we shall see, it appears from the class certification order that the trial court may have interpreted the wage order's suffer or permit to work standard too literally, we conclude that on the facts [***9] disclosed by the record, the trial court's certification order is nonetheless correct as a matter of law under a proper understanding of the suffer or permit to work standard and should be upheld.

Accordingly, we conclude that the judgment of the Court of Appeal [12] should be affirmed.

IV. With Respect to the Claims Resting on Dynamex's Alleged Failure To Fulfill Obligations Imposed by the Applicable Wage Order, Did the Trial Court Properly Determine Class Certification Based on the Definitions of "Employ" and "Employer" in the Wage Order?

As noted, the drivers' general contention [63] in this case is that Dynamex misclassified its drivers as independent contractors when they should have been classified as employees and as a result violated its obligations under the applicable wage order and a variety of statutes. …

A multifactor standard—like the economic reality standard or the *Borello* standard—that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality'-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context.

First, these jurisdictions and commentators have pointed out that a multifactor, "all the circumstances" standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination [86] to a subsequent and often

considerably delayed judicial decision. In practice, the lack of an easily and consistently applied standard often leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly, on a day-to-day basis. (See, e.g., *Hargrove v. Sleepy's, LLC* (2015) 220 N.J. 289 [106 A.3d 449, 465] (*Hargrove*) ["permitting [**34] an employee to know when, how, and how much he will be paid requires a test designed to yield a more predictable result than a [****857] totality-of-the-circumstances analysis that is by its nature case specific"]; accord, *Lauritzen*, *supra*, 835 F.2d at p. 1539 (conc. opn. of Easterbrook, J.) ["People are entitled to know the legal [*955] rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. … My colleagues' balancing approach is the prevailing method, which they apply carefully. But it is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of 'economic reality' matter, and why"].)

Second, commentators have also pointed out that the use of a multifactor, all the circumstances standard affords [87] a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard. (See, e.g., Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?* (1997) 22 N.Y.U. Rev. L. & Soc. Change 557, 568–569 ["[t]he legal test for determining employee/independent contractor status is a complex and manipulable multifactor test which invites employers to structure their relationships with employees in whatever manner best evades liability"]; Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment* (2002) 43 B.C. L.Rev. 351, 419; Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying* (2001) 22 Berkeley J. Emp. & Lab. L. 295, 335–338.) [22]

(11) [***41] As already noted (*ante*, pp. 950–951, fn. 20), a number of jurisdictions have adopted a simpler, more structured test for distinguishing between employees and independent contractors—the so-called "ABC" test—that minimizes these disadvantages. The ABC test presumptively considers all workers to be employees, and permits workers [88] to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions: (a) that 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) 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 [*956] independently established trade, occupation, or business of the same nature as that involved in the work performed. [23]

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[22] Some jurists and commentators have advanced broader criticisms of the "economic reality" standard as applied by federal decisions, suggesting that the various factors are not readily susceptible to consistent application and that the standard—originally formulated in decisions dealing with other New Deal labor statutes (see *Martinez*, *supra*, 49 Cal.4th at pp. 66–67)—is not as expansive as the suffer or permit to work standard was intended to be. (See, e.g., *Lauritzen*, *supra*, 835 F.2d at pp. 1539–1545 (conc. opn. of Easterbrook, J.); *Enforcing Fair Labor Standards*, *supra*, 46 UCLA L.Rev. at pp. 1115–1123.)

[23] The wording of the ABC test varies in some respects from jurisdiction to jurisdiction. (See *ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change at pp. 67–71.) The version we have set forth in text (and which we adopt hereafter (*post*, pp. 956–7964)) tracks the Massachusetts version of the ABC test. (See Mass. Gen. Laws, ch. 149, § 148B; see also Del. Code Ann. tit. 19, §§ 3501(a)(7), 3503(c).) Unlike some other versions, which provide that a hiring entity may satisfy part B by establishing *either* (1) that the work provided is outside the usual course of the business for which the work is performed, *or* (2) that the work performed is outside all the places of business of the hiring entity (see, e.g., N.J. Stat. Ann. § 43:21-19(i)(6)(A)–(C)), the Massachusetts version permits the hiring entity to satisfy part B only if it establishes that the work is outside the usual course of the business of the hiring entity. In light of contemporary work practices, in which many employees telecommute or work from their homes, we conclude the Massachusetts version of part B

We briefly discuss each part of the ABC test and its relationship to the suffer or permit to work definition.

1. *Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?*

(14) First, as our decision in *Martinez* makes clear (*Martinez*, *supra*, 49 Cal.3d at p. 58), the suffer or permit to work definition was intended to be broader and more inclusive than the common law test, under which a worker's freedom from the control of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact, was the principal factor in establishing that a worker was an independent contractor rather than an employee. Accordingly, because a worker who [91] is subject, either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over employees would be considered an employee under the common law test, such a worker would, a fortiori, also properly be treated as an employee for purposes of the suffer or permit to work standard. Further, as under *Borello*, *supra*, 48 Cal.3d at pages 353–354, 356–357, depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor. The hiring entity must establish that the worker is free of such control to satisfy part A of the test. [27]
[*959] [****861]

[***44] [**37] 2. *Part B: Does the worker perform work that is outside the usual course of the hiring entity's business?*

(15) Second, independent of the question of control, the child labor antecedents of the suffer or permit to work language demonstrate that one principal objective of the suffer or permit to work standard is to bring within the "employee" category *all* individuals who can reasonably be viewed [92] as working "*in* [*the hiring entity's*] *business*" (see *Martinez*, *supra*, 49 Cal.4th at p. 69, italics added),

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provides the alternative that is more consistent with the intended broad reach of the suffer or permit to work definition in California wage orders.

Many jurisdictions that have adopted the ABC test use the standard only in the unemployment insurance context, but other jurisdictions use the ABC test more generally in determining the employee or independent contractor question with respect to a variety of employee-protective labor statutes. (See, e.g., Mass. Gen. Laws ch. 149, § 148B; Del. Code Ann. tit. 19, §§ 3501(a)(7), 3503(c); *Hargrove*, *supra*, 106 A.3d at pp. 462–465; see generally *ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change, at pp. 65–72 [discussing numerous state statutes and judicial decisions].)

[27] In *Fleece on Earth v. Department of Employment & Training* (2007) 181 Vt. 458 [923 A.2d 594], the Vermont Supreme Court held that the plaintiff children's wear company that designed all the clothing sold by the company and provided all the patterns and yarn for work-at-home knitters and sewers who made the clothing had failed to establish that the workers were sufficiently free of the company's control to satisfy part A of the ABC test, even though the knitters and sewers worked at home on their own machines at their own pace and on the days and at the times of their own choosing. Noting that the labor statute at issue "seeks to protect workers and envisions employment broadly," the court reasoned that "[t]he degree of control and direction over the production of a retailer's product is no different when the sweater is knitted at home at midnight than if it were produced between nine and five in a factory. That the product is knit, not crocheted, and how it is to be knit, is dictated by the pattern provided by [the company]. To reduce part A of the ABC test to a matter of what time of day and in whose chair the knitter sits when the product is produced ignores the protective purpose of the [applicable] law." (923 A.2d at pp. 599–600.) (See, e.g., *Western Ports v. Employment Security Dept.* (2002) 110 Wn.App. 440 [41 P.3d 510, 517–520] [hiring entity failed to establish that truck driver was free from its control within the meaning of part A of the ABC test, where hiring entity required driver to keep truck clean, to obtain the company's permission before transporting passengers, to go to the company's dispatch center to obtain assignments not scheduled in advance, and could terminate driver's services for tardiness, failure to contact the dispatch unit, or any violation of the company's written policy]; cf., e.g., *Great Northern Construction, Inc. v. Department of Labor* (2016) 161 A.3d 1207, 1215 [construction company established that worker who specialized in historic reconstruction was sufficiently free of the company's control to satisfy part A of the ABC test, where worker set his own schedule, worked without supervision, purchased all materials he used on his own business credit card, and had declined an offer of employment proffered by the company because he wanted control over his own activities].)

that is, all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor. (Accord, *Rutherford Food*, *supra*, 331 U.S. at p. 729 [under FLSA, label put on relationship by hiring business is not controlling and inquiry instead focuses on whether "the work done, in its essence, follows the usual path of an employee"].) Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.

Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted [93] the plumber or electrician to provide services to it as an employee. (See, e.g., *Enforcing Fair Labor Standards*, *supra*, 46 UCLA L.Rev. at p. 1159.) On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter [*960] be sold by the company (cf., e.g., *Silent Woman, Ltd.*, *supra*, 585 F. Supp. at pp. 450–452; accord, *Whitaker House Coop*, *supra*, 366 U.S. 28), or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes (cf., e.g,, *Dole v. Snell* (10th Cir. 1989) 875 F.2d 802, 811), the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.

Treating all workers whose services are provided within the usual course of the hiring entity's business as employees is important to ensure that those workers who need and want the fundamental protections afforded by the wage order do not lose those protections. If the wage order's obligations could be avoided for workers who provide services in a role comparable to employees but who are willing to forgo the wage order's [94] protections, other workers [***45] who provide similar [****862] services and are intended to be protected under the suffer or permit to work standard would frequently find themselves displaced by those willing to decline such coverage. As the United States Supreme Court explained in a somewhat analogous context in *Alamo Foundation*, *supra*, 471 U.S. at page 302, with respect to the federal wage and hour law: "[T]he purposes of the [FLSA] require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. [Citations.] Such [**38] exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." (*Ibid.*)

(16) As the quoted passage from the *Alamo Foundation* case suggests, a focus on the nature of the workers' role within a hiring entity's usual business operation also aligns with the additional purpose of wage orders to protect companies that in good faith comply with a wage [95] order's obligations against those competitors in the same industry or line of business that resort to cost saving worker classifications that fail to provide the required minimum protections to similarly situated workers. A wage order's *industry-wide* minimum requirements are intended to create a level playing field among competing businesses in the same industry in order to prevent the type of "race to the bottom" that occurs when businesses implement new structures or policies that result in substandard wages and unhealthy conditions for workers.

(Accord, *Gemsco, Inc. v. Walling* (1945) 324 U.S. 244, 252 [89 L.Ed. 921, 65 S. Ct. 605] ["[I]f the [proposed restrictions on homeworkers] cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the [*961] much larger number of factory workers to receive the minimum wage"]; see generally *Enforcing Fair Labor Standards*, *supra*, 46 UCLA L.Rev. at pp. 1078–1103.) Competing businesses that hire workers who perform the same or comparable duties within the entities' usual business operations should be treated similarly for purposes of the wage order. [28]

Accordingly, a hiring entity must establish that the worker performs work that is outside the usual course of its business in order to satisfy part B of [96] the ABC test. [29]
[****863]

[***46] 3. *Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?*

(17) Third, as the situations that gave rise to the suffer or permit to work language disclose, the suffer or permit to work standard, by expansively defining who is an employer, is intended to preclude a business from evading [*962] the prohibitions or responsibilities [**39] embodied in the relevant wage orders directly or indirectly—through indifference, negligence, intentional subterfuge, or misclassification. It is well established, under all of the varied standards that have been utilized for distinguishing employees and independent contractors, that a business cannot unilaterally determine a worker's status simply by assigning the worker the label "independent contractor" or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor. (See, e.g., *Borello*, *supra*, 48 Cal.3d at pp. 349, 358–359; *Rutherford Food*, *supra*, 331 U.S. at p. 729.) This restriction on a hiring business's unilateral authority has particular force and effect under the wage orders' broad suffer or permit to work standard.

(18) As a matter of common usage, the term "independent [97] contractor," when applied to an individual worker, ordinarily has been understood to refer to an individual who *independently* has made the decision to go into business for himself or herself. (See, e.g., *Borello*, *supra*, 48 Cal.3d at p. 354 [describing independent contractor as a worker who "has independently chosen the burdens and benefits

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[28] If a business concludes that there are economic or noneconomic advantages other than avoiding the obligations imposed by the wage order to be obtained by according greater freedom of action to its workers, the business is, of course, free to adopt those conditions while still treating the workers as employees for purposes of the applicable wage order. Thus, for example, if a business concludes that it improves the morale and/or productivity of a category of workers to afford them the freedom to set their own hours or to accept or decline a particular assignment, the business may do so while still treating the workers as employees for purposes of the wage order.

[29] In *McPherson Timberlands v. Unemployment Ins. Com.* (1998) 1998 ME 177 [714 A.2d 818], the Maine Supreme Court held that the cutting and harvesting of timber by an individual worker was work performed in the usual course of business of the plaintiff timber management company whose business operation involved contracting for the purchase and harvesting of trees and the sale and delivery of the cut timber to customers. Rejecting the company's contention that the timber harvesting work was outside its usual course of business because the company did not currently own any timber harvesting equipment itself, the court upheld an administrative ruling that the harvesting work was "not 'merely incidental to' [the company's] business, but, rather, was an 'integral part of' that business." (714 A.2d at p. 821.) By contrast, in *Great Northern Construction, Inc. v. Department of Labor*, *supra*, 161 A.3d at page 1215, the Vermont Supreme Court held the hiring entity, a general construction company, had established that the specialized historic restoration work performed by the worker in question was outside the usual course of the company's business within the meaning of part B, where the work involved the use of specialized equipment and special expertise that the company did not possess and did not need for its usual general commercial and residential work. (See also, e.g., *Appeal of Niadni, Inc.* (2014) 166 N.H. 256 [performance of live entertainers within usual course of business of plaintiff resort which advertised and regularly provided entertainment]; *Mattatuck Museum-Mattatuck Historical Society v. Administrator, Unemployment Comp. Act* (1996) 238 Conn. 273 [679 A.2d 347, 351–352] [art instructor who taught art classes at museum performed work within the usual course of the museum's business, where museum offered art classes on a regular and continuous basis, produced brochures announcing the art courses, class hours, registration fees and instructor's names, and discounted the cost of the classes for museum members].)

of self-employment"].) Such an individual generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like. When a worker has not independently decided to engage in an independently [****864] established business but instead is simply designated an independent contractor by the unilateral action of a hiring entity, there is a substantial risk that the hiring business is attempting to evade the demands of an applicable wage order through misclassification. **(19)** A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding [***47] the [98] financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself. [30]
[*963]

Accordingly, in order to satisfy part C of the ABC test, the hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation, or business. [31]
[****865]

(20) It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring [**40] entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, a court is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for a court to determine whether or not part B or part C of the ABC standard has been satisfied [99] than for the court to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the [***48] significant advantages of the ABC standard—in terms of increased clarity and

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[30] Courts in other states that apply the ABC test have held that the fact that the hiring business *permits* a worker to engage in similar activities for other businesses is not sufficient to demonstrate that the worker is "'customarily engaged in an independently established … business'" for purposes of part C of that standard. (*JSF Promotions, Inc. v. Administrator* (2003) 265 Conn. 413 [828 A.2d 609, 613]; see *Midwest Property Recovery, Inc. v. Job Service of North Dakota* (N.D. 1991) 475 N.W.2d 918, 924; *McGuire v. Dept. of Employment Security* (Utah Ct.App. 1989) 768 P.2d 985, 988 ["the appropriate inquiry under part (C) is whether the person engaged in covered employment actually has such an independent business, occupation, or profession, not whether he or she could have one"]; see also *In re Bargain Busters, Inc.* (1972) 130 Vt. 112 [287 A.2d 554, 559] [explaining that under part C of the ABC test, "'[t]he adverb "independently" clearly modifies the word "established", and must carry the meaning that the trade, occupation, profession or business was established, independently of the employer or the rendering of the personal service forming the basis of the claim'"].)

[31] In *Brothers Construction Co. v. Virginia Employment Com.* (1998) 26 Va.App. 286 [494 S.E.2d 478, 484], the Virginia Court of Appeal concluded that the hiring entity had failed to prove that its siding installers were engaged in an independently established business where, although the installers provided their own tools, no evidence was presented that "the installers had business cards, business licenses, business phones, or business locations" or had "received income from any party other than" the hiring entity. (See also, e.g., *Boston Bicycle Couriers v. Deputy Director of the Division of Employment & Training* (2002) 56 Mass.App.Ct. 473 [778 N.E.2d 964, 971] [hiring entity, a same-day pickup and delivery service, failed to establish that bicycle courier was engaged in an independently established business under part C of the ABC test, where entity did not present evidence that courier "held himself out as an independent businessman performing courier services for any community of potential customers" or that he "had his own clientele, utilized his own business cards or invoices, advertised his services or maintained a separate place of business and telephone listing"]; cf., e.g., *Southwest Appraisal Group, LLC v. Administrator, Unemployment Comp. Act* (2017) 324 Conn. 822 [155 A.3d 738, 741–752] [administrative agency erred in determining that hiring entity failed to establish that auto repair appraisers were customarily engaged in an independently established business based solely on the lack of evidence that appraisers had actually worked for other businesses, where appraisers had obtained their own independent licenses, possessed their own home offices, provided their own equipment, printed their own business cards, and sought work from other companies].)

consistency—will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question. (See, e.g., *Awuah v. Coverall North America, Inc.* (D.Mass. 2010) 707 F.Supp.2d 80, 82 [considering only part B of the ABC standard]; *Coverall North America, Inc. v. Division of Unemployment Assistance* (2006) 447 Mass. 852 [857 N.E.2d 1083, 1087] [considering only part C of the ABC standard]; *Boston Bicycle Couriers v. Deputy Director of the Division of Employment & Training*, *supra*, 778 N.E.2d at p. 968 [same].)
[*964]

4. *Conclusion regarding suffer or permit to work definition*

(21) In sum, we conclude that unless the hiring entity establishes (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 worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage [100] orders. 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 included employee, rather than an excluded independent contractor, for purposes of the wage order.

In our view, this interpretation of the suffer or permit to work standard is faithful to its history and to the fundamental purpose of the wage orders and will provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis. (Accord, *Hargrove, supra*, 106 A.3d at pp. 463–464 [interpreting suffer or permit to work definition of state wage law to permit application of the ABC test]; *Tianti ex rel. Gluck v. William Raveis Real Estate* (1995) 231 Conn. 690 [651 A.2d 1286, 1290–1291] [same].) [32]
[*965] [****866]

V. CONCLUSION

For the reasons discussed above, the judgment of the Court of Appeal is affirmed.

Chin, J., [***51] Corrigan, J., Liu, J., Cuéllar, J., Kruger, J., and Siggins, J.,* concurred.

Opinion Summaries, headnotes, tables, other editorial features, classification headings for headnotes, and related references and statements prepared by LexisNexis™,

[32] In its briefing in this court, Dynamex contends that the suffer or permit to work standard, *if interpreted as the trial court and Court of Appeal determined*, would exceed the IWC's constitutional authority under article XIV, section 1 of the California Constitution to "provide for minimum wages and for the general welfare of *employees*" (italics added) by effectively treating as employees *all* independent contractors and thus expanding the reach of the wage order beyond constitutionally permissible limits. The interpretation of the suffer or permit to work standard adopted in this opinion, however, recognizes that the wage orders are not intended to apply to the type of traditional independent contractor who has never been viewed as an employee of a hiring business and should not be interpreted to do so.

Our decision in *Martinez* makes clear that the IWC, in defining the employment relationship for purposes of wage orders, was not limited to utilizing the common law test of employment (*Martinez*, *supra*, 49 Cal.4th at pp. 57–66), and Dynamex does not take issue with *Martinez*'s conclusion in this regard. Further, the ABC test for distinguishing employees from independent contractors provides a common and well-established test for distinguishing employees from independent contractors. Accordingly, although the constitutional argument set forth in Dynamex's briefing is not directed to the standard adopted in this opinion, to avoid any misunderstanding we conclude that application of the suffer or permit to work standard, as interpreted in this opinion, to determine whether a worker is an employee or independent contractor for purposes of a wage order does not exceed the IWC's authority under article XIV, section 1 of the California Constitution.

N.E.I. Jewelmasters of N.J., Inc. v. Board of Review

Superior Court of New Jersey, Appellate Division

June 7, 2016, Submitted; June 24, 2016, Decided

DOCKET NO. A-2333-14T3

Reporter

2016 N.J. Super. Unpub. LEXIS 1456 *; 2016 WL 3449263

N.E.I. JEWELMASTERS OF NEW JERSEY, INC., Appellant, v. BOARD OF REVIEW, DEPARTMENT OF LABOR and THERESA C. KAZMIERCZAK, Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Board of Review, Department of Labor, Docket No. 014,029.

Counsel: Charles I. Epstein, attorney for appellant.

Robert Lougy, Acting Attorney General, attorney for respondent Board of Review (Melissa H. Raksa, Assistant Attorney General, of counsel; Anthony DiLello, Deputy Attorney General, on the brief).

Respondent Theresa C. Kazmierczak has not filed a brief.

Judges: Before Judges Hoffman and Leone.

Opinion

PER CURIAM

N.E.I. Jewelmasters of New Jersey, Inc. (NEI) appeals from the October 30, 2014 final agency decision of the Department of Labor Board of Review (Board), affirming an Appeal Tribunal (Tribunal) finding that claimant Theresa C. Kazmierczak was eligible for unemployment benefits. Because NEI failed to prove that Kazmierczak was an independent contractor under the three-prong standard of *N.J.S.A.* 43:21-19(i)(6) (the ABC Test), and failed to prove that Kazmierczak left voluntarily without good cause, we affirm.

Kazmierczak worked for NEI in sales and marketing, beginning in March 2010. In this capacity, she earned 15 dollars per hour plus a 2.5% commission on sales over $250,000. She worked a minimum of twenty hours per week, and her hours increased when there was extra work available. NEI controlled Kazmierczak's [*2] schedule and workload. Kazmierczak was precluded from working for other jewelers and was required to perform her work on NEI's premises. She filed her taxes utilizing 1099 forms issued to her by NEI.

In November 2013, Kazmierczak requested a pay raise from her superiors, Katie Diamond and John Nansi, as her work responsibilities had increased. According to Kazmierczak, Diamond appeared visibly angry and annoyed when discussing her request. Kazmierczak did not state that she would leave if the raise was denied. Nansi and Diamond promised Kazmierczak they would consider her request. Two weeks later, Diamond rejected her request. Furthermore, Diamond terminated Kazmierczak's employment, and replaced her with an intern.

Kazmierczak filed her claim for unemployment benefits on December 13, 2013. On February 21, 2014, the Deputy for the Director of the Division of

Unemployment Insurance (Deputy) mailed a determination to Kazmierczak, informing her that she was disqualified for benefits on the ground that she had left NEI voluntarily without good cause attributable to her job. Kazmierczak appealed to the Tribunal.

On May 12, 2014, the Tribunal conducted a telephonic hearing in which Kazmierczak [*3] testified; NEI neither appeared before the Tribunal, nor requested a postponement. After hearing Kazmierczak's testimony, the Tribunal reversed the decision of the Deputy, determining that Kazmierczak did not leave the job voluntarily without good cause, and therefore was not disqualified for benefits. The Tribunal concluded that Kazmierczak was "not an independent contractor," noting that she held no professional licenses or permits, and worked only for NEI, under its "direction and control"; moreover, Kazmierczak "did not have her own business cards or telephone number" and "was not allowed to hire anyone to assist her." Furthermore, the Tribunal noted that "the employer advised [Kazmierczak] that it would be best if she no longer worked there," and indicated that she "would be replaced with an intern."

NEI appealed to the Board and moved to supplement the record on May 21, 2014. The motion was denied. On October 30, 2014, the Board affirmed the Tribunal's decision, concluding: "Since [NEI] was given the opportunity to appear at the Appeal Tribunal hearing and as good cause for failing to appear or request an adjournment has not been presented, there is no ground for further hearing." [*4]

On appeal, NEI argues that the Board erred in finding that Kazmierczak was an employee rather than an independent contractor under the ABC Test, as well as in finding that Kazmierczak did not leave the job voluntarily without good cause. We disagree with these contentions.

Our scope of review of an agency decision is limited. *In re Stallworth*, 208 N.J. 182, 194, 26 A.3d 1059 (2011) (citing *Henry v. Rahway State Prison*, 81 N.J. 571, 579, 410 A.2d 686 (1980)). In challenging an agency conclusion, the claimant carries a substantial burden of persuasion, and the determination of the administrative agency carries a presumption of correctness. *Gloucester Cnty. Welfare Bd. v. N.J. Civil Serv. Comm'n*, 93 N.J. 384, 390-91, 461 A.2d 575 (1983).

Further, "[w]e are obliged to defer to the Board when its factual findings are based on 'sufficient credible evidence' in the record." *Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Review*, 197 N.J. 339, 367, 963 A.2d 289 (2009) (quoting *Brady v. Bd. of Review*, 152 N.J. 197, 210, 704 A.2d 547 (1997)). We also accord substantial deference to the agency's interpretation of a statute it is charged with enforcing. *Bd. of Educ. of Neptune v. Neptune Twp. Educ. Ass'n*, 144 N.J. 16, 31, 675 A.2d 611 (1996). We overturn an agency determination only if it is arbitrary, capricious, unreasonable, unsupported by substantial credible evidence as a whole, or inconsistent with the enabling statute or legislative policy. *Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 71-72, 494 A.2d 804 (1985) (citing *Gloucester Cnty. Welfare Bd., supra*, 93 N.J. at 391).

"The New Jersey Unemployment Compensation Law (UCL), *N.J.S.A.* 43:21-1 to -71[,] is a remedial act, the primary objective of [which] . . . is to provide a cushion for the workers of New Jersey against the shocks and rigors of unemployment." [*5] *Phila. Newspapers, Inc. v. Bd. of Review*, 397 N.J. Super. 309, 318, 937 A.2d 318 (App. Div. 2007) (citation and internal quotation marks omitted), *certif. denied*, 195 N.J. 420, 949 A.2d 849 (2008). Because of the statute's remedial nature, "its provisions [are to be] construed liberally, permitting a statutory employer-employee relationship to be found even though that relationship may not satisfy common-law principles." *Id.* at 319 (quoting *Carpet Remnant Warehouse v. N.J. Dep't of Labor*, 125 N.J. 567, 581, 593 A.2d 1177 (1991)).

The UCL carries a "presumption . . . by statute that all services performed by an individual for remuneration constitutes employment for purposes

of the UCL," unless the services satisfy an exception. *Ibid.* The relevant exception here involves the three-prong ABC Test used for determining whether a worker is an independent contractor:

> Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the division that:
>
> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for [*6] which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> [*N.J.S.A.* 43:21-19(i)(6).]

Generally, Prong A is referred to as the "control test," Prong B as the "course-of-business or location-of-work test," and Prong C as the "independent-business test." *Phila. Newspapers, supra*, 397 N.J. Super. at 320. The party challenging the classification of a worker as an employee "must prove each of the three prongs of the ABC Test." *Ibid.* Failure to satisfy any one of the prongs "results in an 'employment' classification." *Ibid.* (quoting *Carpet Remnant, supra*, 125 N.J. Super. at 581). The ABC Test requires a fact-sensitive analysis of the substance, not the form, of the working relationship. *Ibid.*

In *Philadelphia Newspapers*, we reviewed an unemployment claim by a "home delivery newspaper person." *Id.* at 312. In that case, the claimant periodically signed an "Independent Home Delivery Service Contract or Agreement," memorializing a contract for him to deliver various publications. *Id.* at 312-13. The contract contained multiple clauses establishing the claimant as an independent contractor. *Ibid.* The claimant agreed to lawfully maintain his own automobile, and use it to deliver newspapers by a set deadline. *Id.* at 313. He did not receive a salary, and [*7] instead received a fixed fee per newspaper delivered. *Id.* at 314. On appeal, we held that the newspaper company failed to prove the final prong:

> [T]he record is devoid of evidence demonstrating that [the] claimant was customarily engaged in an independently established trade or activity from the mere delivery of [the company's] newspapers "at the time of rendering the service involved." [The c]laimant never engaged in delivery services prior to commencing his delivery of newspapers for [the company], nor has he engaged in similar services since his termination from employment. Moreover, on termination from employment, [the] claimant joined the ranks of the unemployed. Accordingly, Prong (C) was not satisfied.
>
> [*Id.* at 323 (internal citation omitted).]

In this case, we find no occasion to interfere with the Board's decision. The record amply supports that Kazmierczak was an employee and not an independent contractor because she did not have an independently-established business. Indeed, the record leaves no doubt that NEI did not and cannot satisfy prong C of the ABC test. *See State v. Harris*, 181 N.J. 391, 476, 859 A.2d 364, (2004) (noting, where both prongs of a two-prong test were required, there was no need to address the second prong when the first prong was not [*8] satisfied), *cert. denied*, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005).

In the instant case, the relevant facts mirror those in *Philadelphia Newspapers*. It is undisputed that Kazmierczak did not work in the jewelry business beforehand, she worked solely for NEI, her termination rendered her unemployed, and she did not work in the jewelry business after her

termination. If, as here, "the claimant is 'dependent on the employer, and on termination of that relationship would join the ranks of the unemployed, the [Prong (C)] standard is not satisfied.'" *Phila. Newspapers, supra*, 397 N.J. Super. at 323 (quoting *Carpet Remnant, supra*, 125 N.J. at 585-86). Satisfaction of Prong C requires a clear showing that a viable independent business exists apart from the particular contractual relationship at issue. *Carpet Remnant, supra*, 125 N.J. at 592. The record here contains insufficient evidence to satisfy this burden.

NEI argues that the Board erred in finding that claimant did not leave the job voluntarily without good cause attributable to the work. We disagree. We have stated that "[w]hile the statute does not define 'good cause,' our courts have construed the statute to mean 'cause sufficient to justify an employee's voluntarily leaving the ranks of the employed and joining the ranks of the unemployed.'" *Domenico v. Bd. of Review*, 192 N.J. Super. 284, 287, 469 A.2d 961 (App. Div. 1983) (quoting *Condo v. Bd. of Review*, 158 N.J. Super. 172, 174, 385 A.2d 920 (App. Div. 1978)). "In scrutinizing an employee's reason for leaving, [*9] the test is one of ordinary common sense and prudence. . . . [I]t is the employee's responsibility to do what is necessary and reasonable in order to remain employed." *Id.* at 288 (citations omitted). If the employee voluntarily quits for personal reasons, benefits are not available. *See Self v. Bd. of Review*, 91 N.J. 453, 458, 453 A.2d 170 (1982) (holding that difficulty in obtaining transportation to work was not good cause attributable to the work).

On the other hand, where the unemployment is the direct result of the employer's conduct rather than the claimant's own choice or personal decision, then, "as a matter of law, the unemployment must be seen to be attributable to the work." *Gerber v. Bd. of Review*, 313 N.J. Super. 37, 39, 712 A.2d 688 (App. Div. 1998). Here, like in *Gerber*, it was the employer's conduct that resulted in Kazmierczak's unemployment. The record shows that Kazmierczak requested a raise. Approximately two weeks later, Diamond not only denied her request, but also informed her that the next day would be her last day. Diamond further instructed Kazmierczak to promptly clean out her desk and informed her that an intern would replace her. Kazmierczak offered to remain until the intern was appropriately trained, but Diamond rejected the offer. In assessing her reason for leaving, the record clearly shows that Kazmierczak [*10] was terminated by Diamond.

While NEI argued in its appeal to the Board that Kazmierczak quit, NEI did not participate in the Tribunal hearing, and failed to offer the Board any excuse for not appearing. Thus, the Board was not required to credit their appellate assertions. Moreover, the record provides ample support for the Board's finding that Kazmierczak did not leave her job voluntarily without good cause attributable to her work.

Affirmed.

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Vogue v. Adm'r, Unemployment Comp. Act

Superior Court of Connecticut, Judicial District of New London At New London

April 4, 2019, Decided; April 4, 2019, Filed

KNLCV175015384

Reporter

2019 Conn. Super. LEXIS 637 *; 2019 WL 1938071

Vogue v. Administrator, Unemployment Compensation Act

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Judges: [*1] Shari A. Murphy, J.

Opinion by: Shari A. Murphy

Opinion

MEMORANDUM OF DECISION RE MOTION TO CORRECT BOARD'S MODIFIED FINDINGS AND MOTION TO DISMISS

In this unemployment appeal, the plaintiff challenges four of the board's underlying determinations: (1) the board's denial in part of the plaintiff's motion to correct findings; (2) the board's determination that the plaintiff's tattoo artist was an employee, pursuant to part A of the ABC test; (3) the board's determination that the plaintiff's tattoo artist was an employee, pursuant to part B of the ABC test; and (4) the board's determination that the plaintiff's tattoo artist was an employee, pursuant to part C of the ABC test. Plaintiff argues that the board based its decision on erroneous findings of facts and further, that the board misapplied the law to the facts resulting in an abuse of discretion and contrary to Connecticut law. In accordance with the reasons to follow herein, the court affirms the board's denial of the plaintiff's motion to correct, and affirms the board's determination that the plaintiff failed to satisfy the ABC test, specifically, as to part B.

FACTS

The plaintiff, Vogue, Immortal Studios, pursuant to General Statutes §31-249b,[1] appeals from the decision of [*2] the Employment Security Appeals Division Board of Review (board) affirming the appeal referee's (referee) conclusion that Mark Sapia, a tattoo artist, was an employee of the plaintiff under the test set forth in General Statutes §31-222(a)(1)(B)(ii), commonly referred to as the ABC test. On appeal, the plaintiff challenges (1) the board's decision denying the plaintiff's motion to correct findings, and (2) the board's dismissal of its appeal on the ground that the board misinterpreted and misapplied the ABC test when it concluded that Sapia was an employee of the plaintiff.

The record contains the following relevant facts and procedural history. The plaintiff is a retailer of body jewelry with a leased store location in a large indoor mall in Waterford, Connecticut, known as the Crystal Mall. The plaintiff entered into an arrangement with Sapia in 2013 to provide tattoo services to interested customers at the plaintiff's store. On March 11, 2016, the defendant, the

[1] Section 31-249b provides in relevant part: "At any time before the board's decision has become final, any party, including the administrator, may appeal such decision, including any claim that the decision violates statutory or constitutional provisions, to the superior court for the judicial district of Hartford or for the judicial district wherein the appellant resides."

administrator of the Unemployment Compensation Act (administrator), ruled that the plaintiff was engaged in an employer-employee relationship with Sapia and was liable to pay contributions under the Unemployment Compensation Act. On March 29, 2016, the plaintiff [*3] filed a timely appeal of the administrator's decision contending that it should not be required to pay unemployment insurance contributions to Sapia, arguing his status as an independent tattoo artist and not an employee. A hearing was held before the referee on August 15, 2016. On September 2, 2016, the referee made fourteen findings of fact before affirming the administrator's decision and dismissing the plaintiff's appeal. On September 22, 2016, the plaintiff filed a timely appeal to the board contesting the referee's determination that Sapia was an employee and not an independent tattoo artist.

On January 19, 2017, after reviewing the record of the appeal and the hearing before the referee, the board affirmed the referee's decision and dismissed the plaintiff's appeal. In its decision, the board determined that Sapia was an employee of the plaintiff and not an independent contractor because the plaintiff failed to establish any part of the ABC test. In particular, the board determined that the plaintiff (1) failed to meet part A, pursuant to §31-222(a)(1)(B)(ii)(I), because it failed to establishe that Sapia was free from the plaintiff's control in connection with the performance of his services; (2) [*4] failed to meet part B, pursuant to §31-222(a)(1)(B)(ii)(II), because it failed to establish that Sapia performed services outside the plaintiff's usual course of business or outside all of the plaintiff's places of business; and (3) failed to meet part C, pursuant to §31-222(a)(1)(B)(ii)(III), because it failed to establish that Sapia was customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed for the plaintiff.

On February 16, 2017, pursuant to §31-249b, the plaintiff appealed the board's decision to the Superior Court. On January 26, 2018, pursuant to Practice Book 22-4,[2] the plaintiff filed a motion to correct the findings of the board on the ground that the board adopted and relied on findings of fact made by the referee that were erroneous and not supported by the evidence. The board issued a decision on the motion to correct on April 17, 2018, granting the motion in part and denying it in part. In so ruling, the board adopted, modified, and added to the referee's findings of fact, but found that the modifications to the referee's findings did not alter the board's ultimate conclusion that the plaintiff did not satisfy any part of the ABC test.

On May 15, [*5] 2018, the plaintiff filed a motion to amend its appeal to include claims of error regarding the board's decision to correct the modified findings.

On May 22, 2018, the defendant filed a motion for judgment dismissing the plaintiff's appeal and an accompanying memorandum of law. On August 7, 2018, the plaintiff filed an objection to the motion for judgment. This matter was heard at short calendar on January 7, 2019.

DISCUSSION

…

The Unemployment Compensation Act defines employment in Section 31-222(a)(1)(B)(ii) as "any service performed by any individual who, under either common-law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in

[2] Practice Book §22-4 provides in relevant part: "If the appellant desires to have the finding of the board corrected, he or she must, within two weeks after the record has been filed in the Superior Court . . . file with the board a motion for the correction of the finding . . ."

connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or [*7] business of the same nature as that involved in the service performed . . ." (Internal quotation marks omitted.) *Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act*, 320 Conn. 611, 615-16, 134 A.3d 581 (2016). "This statutory provision is commonly referred to as the 'ABC test,' with parts A, B and C corresponding to clauses I, II and III, respectively." *JSF Promotions, Inc. v. Administrator, Unemployment Compensation Act*, 265 Conn. 413, 418, 828 A.2d 609 (2003). "Because the [parts] of the ABC test . . . are conjunctive, the inability of the recipient of services to satisfy any single one of those [parts] necessarily results in a conclusion that an employer-employee relationship exists for the purposes of the Unemployment Compensation Act." *Latimer v. Administrator, Unemployment Compensation Act*, 216 Conn. 237, 252, 579 A.2d 497 (1990).

"In making [its] determination, [the court] take[s] as [its] starting point the fact that the act is remedial and, consequently, should be liberally construed in favor of its beneficiaries . . . Indeed, the legislature underscored its intent by expressly mandating that the act 'shall be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases.'" (Citation omitted.) *Mattatuck Museum-Mattatuck Historical Society v. Administrator, Unemployment Compensation* Act, 238 Conn. 273, 278, 679 A.2d 347 (1996). …

II

PART B

The plaintiff also challenges the board's determination that the plaintiff failed to meet part B pursuant to the ABC test because it failed to establish that Sapia performed his services outside the usual course of business. The plaintiff argues that tattoo services are not a continuous business with respect to the plaintiff because tattoos only occur when Sapia is physically present. The defendant [*19] argues that the plaintiff's focus on Sapia's availability ignores the definition of usual course of business as defined by our Supreme Court in *Mattatuck Museum-Mattatuck Historical Society v. Administrator, Unemployment Compensation Act, supra*, 238 Conn. 279.

Part B of the ABC test is stated in the disjunctive. Thus, the plaintiff bears the burden of establishing either that the services were outside the usual course of its business or that the services were performed outside of its place of business. The plaintiff need only prove one of the two in order to satisfy part B of the test. A review of the pleadings reveals that the plaintiff does not challenge the board's finding that the tattoo services provided by Sapia were outside of its place of business. Therefore, the court will only address the plaintiff's argument that Sapia performed his services outside the usual course of business.[3]

In *Mattatuck Museum-Mattatuck Historical Society v. Administrator, Unemployment Compensation Act, supra*, 238 Conn. 279, our Supreme Court analyzed and defined what it means for a service to be within an enterprise's usual course of business: "[part] B does not refer to the type of business, but rather, to the specific business activities engaged in by the enterprise. Accordingly . . . we examine the particular activities engaged in by the plaintiff." "[U]sual, in accordance with its common usage, simply means that an activity [*20] is performed by the enterprise on a regular or continuous basis. In the terms of [part B], if the activity is not performed on a regular or continuous basis, then the employer has

[3] Even if the plaintiff were to argue that Sapia performed his services outside of the plaintiff's place of business, the record reflects that Sapia provided his tattoo services at the plaintiff's store, and thus not outside the plaintiff's place of business.

satisfied [part] B because the activity is outside the usual course of the business of the enterprise." (Internal quotation marks omitted.) *Id.*, 280. The court also concluded that an activity need not comprise the majority of an enterprise's business in order to be within the enterprise's usual course of business "usual course of business, as used in [part B], means that the enterprise performs the activity on a regular or continuous basis, without regard to the substantiality of the activity in relation to the enterprise's other business activities." (Internal quotation marks omitted.) *Id.*, 281.

The foregoing definition of usual course of business led the court in *Mattatuck-Museum* to conclude that instructors hired to teach art courses at a museum were employees of the museum because the provision of the art courses was within the museum's usual course of business, even though the museum "operate[d] largely as an exhibition hall for regional historic artifacts and art." *Id.*, 274. The court emphasized that the museum had utilized [*21] instructors to teach art courses for several years. *Id.*, 282. In addition, the court highlighted that the museum had held itself out to the public as offering such courses through "produc[ing] and distributing] brochures announcing the courses, class hours, location, registration fees, and the instructor's names," thereby leading the general public to infer that art courses were a regular part of the museum's business. *Id.*

In the present case, the findings of fact made by the referee and adopted by the board make it clear that the board did not act unreasonably or arbitrarily in concluding that the provision of tattoo services was within the plaintiff's usual course of business. Substantial evidence exists in the record for the board to have determined that the provision of tattoo services was within the plaintiff's usual course of business. The plaintiff's business has offered tattoo services on a regular and continuous basis. The record reflects that the plaintiff had hired a tattoo artist prior to hiring Sapia and that he interviewed several candidates when he advertised the position of tattoo artist before Sapia began providing tattoo services at the plaintiff's store in 2013. The plaintiff's [*22] website also advertises tattoo services during all open store hours. Moreover, the plaintiff held itself out to the public as providing tattoo services. The board found that the plaintiff's website and Facebook page advertise the company as "Vogue Tattoo and Piercings" and describe the plaintiff's store as "your one stop destination for body jewelry, stainless steel jewelry, as well as piercing and tattoo services."

Because the three parts of the ABC test are conjunctive, the inability of the plaintiff to satisfy any single one of those parts necessarily results in a conclusion that an employer-employee relationship exists for the purposes of the act. Therefore, in the present case, because the plaintiff has failed to satisfy part B of the ABC test, the court deems it unnecessary to consider parts A or C.[4] See *Latimer v. Administrator, Unemployment Compensation Act, supra*, 216 Conn. 252. The board properly concluded that plaintiff failed to prove that Sabia was employed as an independent contractor under the provisions of the Unemployment Compensation Act.

CONCLUSION

For the foregoing reasons, the court denies the plaintiff's motion to correct the board's modified findings and grants the motion to dismiss the plaintiff's appeal.

S. Murphy, J.

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[4] In addition, the plaintiff argues that Sapia is not an "employee" as defined by General Statutes §31-71a. The court finds this argument unavailing as our Supreme Court in *Tianti v. William Raveis Real Estate, Inc.*, 231 Conn. 690, 697, 651 A.2d 1286 (1995), stated that the ABC test was applicable in determining the definition of "employee" as that term is defined in §31-71a.

Agerbrink v. Model Serv. LLC

United States Court of Appeals for the Second Circuit

September 24, 2019, Decided

No. 18-1471

Reporter
2019 U.S. App. LEXIS 28792 *

EVA AGERBRINK, Plaintiff-Counter-Defendant-Appellant, v. MODEL SERVICE LLC d/b/a MSA MODELS, SUSAN LEVINE, WILLIAM IVERS, Defendants-Counter-Claimants-Appellees.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from a judgment of the United States District Court for the Southern District of New York (Oetken, J.).

Agerbrink v. Model Serv. LLC, 293 F. Supp. 3d 470, 2018 U.S. Dist. LEXIS 42111 (S.D.N.Y., Mar. 14, 2018)

Counsel: For Appellant: CYRUS E. DUGGER, The Dugger Law Firm, PLLC, New York, NY.

For Appellees: EVAN J. SPELFOGEL, Phillips Nizer LLP, New York, NY; Matthew S. Aibel, Jeffrey H. Ruzal (on the brief), Epstein Becker & Green, P.C., New York, NY.

Judges: PRESENT: ROBERT A. KATZMANN, Chief Judge, RICHARD C. WESLEY, JOSEPH F. BIANCO, Circuit Judges.

Opinion

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **VACATED** and the case **REMANDED** for further proceedings.

Eva Agerbrink appeals the judgment of the United States District Court for the Southern District of New York (Oetken, *J.*) granting defendants' motion for summary judgment on the question of whether Agerbrink was misclassified as an independent contractor, rather than an employee, for purposes of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). For the following reasons, we conclude that there are genuine, material disputes of fact and so vacate that judgment and remand the case for trial on Agerbrink's misclassification claims. We assume the parties' familiarity [*2] with the underlying facts, the procedural history of the case, and the issues on appeal.

Eva Agerbrink is a fit model. Fit models do not pose for advertising campaigns or walk in runway shows—the work one might associate with a fashion model. Instead, fit models are hired based on their body proportions: clothing designers and apparel companies rely on fit models to test the fit of their designs. Model Service LLC (a/k/a MSA Models) is a model "management" company. J. App. 586. Susan Levine is MSA Models' President and Chief Executive; William Ivers is MSA Models' Chief Operating Officer. "MSA" refers to all Appellees.

On March 5, 2013, Agerbrink signed a three-year

"management agreement" with MSA.[1] MSA helped Agerbrink "book" work by acting as a match-maker between Agerbrink and apparel companies seeking models with her dimensions. Generally, an apparel company would contact MSA when it needed a model, and, if Agerbrink fit the description, MSA would schedule her for an initial meeting with that company. If a company decided to engage Agerbrink for more appointments, it would contact MSA directly. Similarly, if a company decided it no longer wanted to work with Agerbrink, it would communicate [*3] that decision to MSA, rather than to Agerbrink. The reverse was also true: if Agerbrink no longer wanted to work with an apparel company, she would inform MSA who, in turn, would relay that information to the company.

As part of its exclusive management of Agerbrink's career, MSA collected payments for Agerbrink's modeling work directly from apparel companies. After taking its commission—usually twenty percent—MSA would then pay Agerbrink. Agerbrink's contract with MSA noted that she was to consult with MSA regarding compensation or compensation rates. MSA also managed Agerbrink's schedule. This management included: setting her appointment schedule for the work week ahead, emailing Agerbrink her daily schedule a day in advance, and communicating directly with an apparel company if Agerbrink was running late to an appointment.

Agerbrink asserts that MSA had near full control over her schedule. She testified that she would be told the following day's schedule less than 24 hours before she was scheduled to be at an appointment—often having to confirm the following day's schedule with an apparel company after MSA's offices were closed. J. App. 1647. MSA, meanwhile, asserts that "Agerbrink [*4] dictated her own schedule of when she would work with [a]pparel [c]ompanies." J. App. 1580. However, Agerbrink further testified that on the occasions where she communicated with apparel companies directly she was required to relay any information regarding scheduling to MSA. *See* J. App. 1647. MSA, meanwhile, maintains that it was a neutral third-party, simply coordinating between Agerbrink and apparel companies.

Agerbrink asserts that MSA controlled all aspects of her pay and that she was not free to directly negotiate her own hourly rate. For example, she testified that she "never talked about [her] rate or [her] pay" with QVC, an apparel company with whom she had a standing appointment. J. App. 1676. She further testified that on one occasion, when she asked QVC if it had submitted payment to MSA because she had not received her compensation, QVC followed up with MSA. Conversely, MSA contends that "Agerbrink in her sole discretion decided whether to accept or reject the rate proposed by an [a]pparel [c]ompanies [sic], or to direct MSA to attempt to negotiate a better rate with the Apparel Company, or negotiate with the Apparel Company herself." J. App. 1588.

Agerbrink and MSA ended [*5] their relationship after Agerbrink was hired by an apparel company for an "in-house" position in June 2014. Agerbrink applied for that job directly, without going through MSA. The position involved fit modeling and office administrative work. When MSA found out that Agerbrink had been offered the position, it informed her that accepting the position would be a breach of her agreement with MSA. MSA threatened legal action but noted it would be willing to not pursue such action if Agerbrink, among other things, agreed to allow MSA to retain the nearly $18,000 of her wages it was holding, and instructed her new employer to remit twenty percent of her salary to MSA.

Agerbrink commenced this lawsuit, originally filed

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[1] That agreement designates Agerbrink as an independent contractor. But "an employer's self-serving label of workers as independent contractors is not controlling." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988). That designation, however, is "pertinent to the parties' beliefs about the nature of the relationship." *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 141 (2d Cir. 2017). Unless otherwise indicated, case quotations omit all internal quotation marks, alterations, footnotes, and citations.

as a putative class action, against MSA on September 26, 2014, asserting claims under the FLSA and the NYLL, as well as a claim for unjust enrichment. On March 14, 2018, the district court granted MSA's motion for summary judgment on the question of whether Agerbrink was MSA's employee for purposes of the FLSA and the NYLL. It also granted Agerbrink's motion for summary judgment on defendants' tortious interference claim and her motion for summary judgment as to initial damages [*6] on her unjust enrichment claim for withheld earnings (having previously granted summary judgment for Agerbrink on her unjust enrichment claim). The district court denied Agerbrink's motion for partial summary judgment on defendants' breach of contract counterclaim. On April 12, 2018, the parties agreed to voluntarily dismiss their remaining claims with prejudice. Judgment was entered on April 30, 2018. This appeal, on the misclassification issue alone, followed.

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We review a decision on cross-motions for summary judgment *de novo*, examining each motion "on its own merits." *Chandok v. Klessig*, 632 F.3d 803, 812 (2d Cir. 2011). We must "constru[e] the evidence in the light most favorable to the non-moving party and draw[] all reasonable inferences in its favor." *Costello v. City of Burlington*, 632 F.3d 41, 45 (2d Cir. 2011); *see also Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001) (when considering cross-motions for summary judgment, "all reasonable inferences must be drawn against the party whose motion is under consideration"). "Material facts are those which might affect the outcome of the suit under the governing law, and a dispute is genuine if the evidence is such that a reasonable jury [*7] could return a verdict for the nonmoving party." *Coppola v. Bear Stearns & Co.*, 499 F.3d 144, 148 (2d Cir. 2007).

The FLSA defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). "[T]he determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in economic reality rather than technical concepts, determined by reference not to isolated factors, but rather upon the circumstances of the whole activity." *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 141 (2d Cir. 2008). This Circuit "has focused on the totality of the circumstances in addressing our ultimate concern whether, as a matter of economic reality, [a] worker[] depend[s] upon someone else's business for the opportunity to render service or [is] in business for [herself]." *Saleem*, 854 F.3d at 139. While we have identified several multi-factor tests related to this inquiry, *see, e.g., Barfield*, 537 F.3d at 143, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003), *Brock*, 840 F.2d at 1058-59, *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984), we recognize that "different sets of . . . factors" may be relevant "based on the factual challenges posed by particular cases," *Barfield*, 537 F.3d at 142. We have been clear that no single factor is dispositive and have "reiterate[d] the necessary flexibility of the economic realities test." *Id.* at 143.

There are genuine disputes of material facts presented in this case. When drawing inferences in the light most favorable to Agerbrink, which the district court [*8] did not do, a reasonable jury could have concluded that she was MSA's employee. While no single element of Agerbrink's and MSA's relationship is dispositive to the FLSA inquiry, *see supra*, there exist genuine disputes regarding Agerbrink's control over her work schedule, whether she had the ability to negotiate her pay rate, and, relatedly, her ability to accept or decline work. These disputes are significant as they relate both to the "degree of control" MSA exerted over Agerbrink and Agerbrink's "opportunity for profit or loss." *Brock*, 840 F.2d at 1058.

First: Agerbrink's schedule. MSA maintains that Agerbrink "set her own schedule and worked different weeks, days, and hours for a variety of reasons, all of which were her own." Appellees' Br.

at 31; *see* J. App. 1791 (Deposition of Susan Levine: "whatever [Agerbrink] wanted to do, she could accept"). Meanwhile, Agerbrink asserts that MSA "coordinated all scheduling of [her] work with apparel clients and maintained [her] master schedule[]." Appellant's Br. at 19; *see* J. App. 1621 (Excerpts of Agerbrink Deposition: "The agent is in total control of the model. . . . We are not in charge of our schedule. They tell us we have to report everything we do to them."). [*9] Agerbrink concedes that she would contact a company directly to confirm specifics of an appointment time, but only after it was already set by MSA and the apparel company.

At this stage, the dispute should not have been resolved in MSA's favor. The district court concluded that "Agerbrink could set her own work schedule and choose how much to work, if at all." Special App. 7; *see also id.* at 10 ("Agerbrink had significant leeway in deciding whether to work, when to work, for whom to work, and for how much to work."). In a footnote, the district court noted that Agerbrink "contends that she had to keep her scheduled standing appointments and might have been penalized if she did not show up at the scheduled time." *Id.* at 7 n.1. The district court discounted Agerbrink's contention because "she also had the freedom to end her standing appointments, as she did with QVC." *Id.* But the record reflects that ending a standing appointment was not as easily done as said: Agerbrink was instructed that she had to give MSA notice of her departure, and in turn MSA would give QVC, "3 weeks notice in order to replace [her]." J. App. 1058. Agerbrink "set forth specific facts demonstrating that there is a genuine issue for [*10] trial," *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009), on the issue of whether she was able to independently manage her work schedule.

Second: Agerbrink's pay. Agerbrink asserts that she had no control over negotiating the amount an apparel company would pay for her services and that she was actively discouraged from discussing compensation with apparel companies. In fact, Agerbrink's primary manager at MSA once emailed Agerbrink to relay QVC's complaints about Agerbrink's discussion of her rate of pay, noting that "[t]hese details are private between [Agerbrink] and MSA." J. App. 1869. MSA, meanwhile, asserts that "Agerbrink alone determined her booking rates." Appellees' Br. at 42. MSA argues that, because "[t]he model has the right to say yes and the model has the right to say no," J. App. 1737, MSA does "not dictate [a model's] compensation," Appellees' Br. at 42.

The district court improperly resolved this dispute in MSA's favor. It concluded that "Agerbrink had the ultimate say about her hourly rate." Special App. 8. In support of this conclusion, the district court explained that Agerbrink could accept a lower hourly rate if "she really wanted a certain job," or, conversely, "she could hold out for her usual rate." *Id.* This [*11] "take it or leave it" approach, taken to its logical conclusion, means that *any* person has "the ultimate say" about her pay because any person has the binary choice to either work for the amount offered or not to work for that amount. It says nothing of the power to negotiate a rate of pay. The district court recognized that only MSA, not Agerbrink, attempted to negotiate for a higher rate with QVC. Special App. 4. What's more, Agerbrink testified that the binary choice to accept or reject a booking was a choice in theory only: "You never turn down a booking. . . . It's crazy to do." J. App. 1684; *see Saleem*, 854 F.3d at 142 ("To be clear, pursuant to the economic reality test, it is not what Plaintiffs *could* have done that counts, but as a matter of economic reality what they actually *do* that is dispositive."). Therefore, the issue of whether MSA "determined [Agerbrink's] rate . . . of payment," *Carter*, 753 F.2d at 12, is disputed.

As the district court properly noted, independence to determine her schedule and income are key inquiries to determining "whether, as a matter of economic reality" Agerbrink "depended upon" MSA's "business for the opportunity to render service" or was "in business for" herself. Special App. 12 (quoting [*12] *Brock*, 840 F.2d at 1059). These are

material facts. They are in dispute. As such, summary judgment was not proper on the question of whether Agerbrink was an employee under the FLSA.[2] Similarly, Agerbrink was not entitled to summary judgment on that same question.

For the foregoing reasons, we **VACATE** the judgment of the district court and **REMAND** the case for trial on the misclassification claims.[3]

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[2] Similarly, it was premature to resolve the question of whether Agerbrink was an employee under the NYLL. As the district court pointed out, the "NYLL test is similar to the FLSA test, although it focuses more on degree of control than economic reality." Special App. 13; *see Bynog v. Cipriani Grp.*, 1 N.Y.3d 193, 802 N.E.2d 1090, 1093, 770 N.Y.S.2d 692 (N.Y. 2003) (laying out the factors considered for NYLL's degree of control inquiry). The disputed facts relate directly to the degree of control Agerbrink exercised and thus summary judgment should not have been granted on her NYLL claims.

[3] In remanding, we also instruct the district court to consider whether its rulings concerning the sealing of documents and other material have satisfied its obligation to "review . . . documents individually and produce specific, on-the-record findings that sealing is necessary to preserve higher values." *Brown v. Maxwell*, 929 F.3d 41, 48 (2d Cir. 2019); *see generally Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006).

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