

# Workplace Flexibility

## Legislature Has Opportunity to Update Labor Laws to Reflect Modern Economy

A limited review of some of California’s strict wage-and-hour laws that continue to grow each year, illustrates the challenges employers have in providing employees with flexibility. From the inability to waive daily overtime and meal periods so that a working parent can leave early to attend a school performance, to essentially eliminating the ability to freelance, California workers and employers are being forced into stringent, traditional work schedules that do not reflect today’s society. The Legislature has an opportunity to intervene and update California’s outdated labor laws to reflect the modern economy.

### **DYNAMEX—THE ELIMINATION OF INDEPENDENT CONTRACTORS?**

In April 2018, the California Supreme Court issued a significant decision in *Dynamex Operations West v. Superior Court* (4 Cal.5th 903) that completely changed the way in which an individual is classified as an independent contractor versus an employee in this state. Individuals who value the freedom and flexibility that working as an independent contractor provides urged the Legislature to take action so that they could maintain their independent status. However, labor unions and trial attorneys opposed any change to the *Dynamex* decision, claiming the flexibility that such individuals wanted could easily be provided to these individuals in an employment relationship.

*Dynamex* has far-reaching, negative implications for nearly all sectors of the California economy that utilize independent contractors. In *Dynamex*, the California Supreme Court abandoned a long-established balancing-of-factors test previously adopted by the court in a 1989 decision, *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (48 Cal.3d 341). This previous

approach weighed multiple factors in their totality to account for the variety of California industries and professions, as well as diversity of California’s workers. Under *Dynamex*, the court presumes that a worker is an employee unless the hiring entity establishes all three factors of this one-size-fits-all test. This test, referred to as the “ABC Test,” has never existed before in California. It is extremely restrictive and the *Dynamex* decision marks the first time in U.S. history that any form of the ABC Test has been imposed by a court without any legislative approval.

Under the *Dynamex* decision, an individual must satisfy all three factors of the ABC Test:

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 of the same nature as the work performed.

The “B” prong of the test is the most problematic because many independent contractors work in the same line of business as the hiring entity. As such, most independent contractor relationships cannot survive under the court’s narrow view of the “B” prong.

The court decision in *Dynamex* places the question of employment classification at the intersection of important competing interests—on the one hand, the state’s interest in protecting workers, and on the other hand, every individual’s personal liberty to contract and be in business for him/herself. As indicated by the U.S. Bureau of Labor Statistics (BLS) Economic Release (June 7, 2018), individuals overwhelmingly prefer their arrangement as independent contractors, and the ABC Test adopted by the court jeopardizes that flexible work arrangement for Californians.

California is estimated to have nearly 2 million residents who work as independent contractors. These numbers are conservative as the 2018 BLS Economic Release did not include the number of individuals who supplement their income with online platforms. Many Californians are choosing to work full-time as independent contractors and others are using the opportunity to

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supplement their income. In fact, 79% of independent contractors prefer it over traditional employment, according to the BLS Economic Release.

The top reasons that motivate individuals to pursue independent work include: 1) to be their own boss, 2) to choose when they work, 3) to choose their own projects, 4) to choose where they work, and 5) to earn extra money. According to a survey commissioned by Upwork and the Freelancers' Union, a majority of freelancers who left full-time, traditional employment made more money within a year, are able to work less than 40 hours per week (on average 36 hours), and the majority believe they have the right amount of work.

*Dynamex* jeopardizes this freedom of choice for individuals and pushes them into a traditional employment model that lacks flexibility. Proponents of *Dynamex* argue that employers who want to provide flexibility to employees can do so under the current state of the law. However, California's strict labor laws do not allow for such workplace flexibility.

The following is an outline of just a few of California's strict labor laws that significantly limit workplace flexibility.

#### COMPLEXITY OF ALTERNATIVE WORKWEEK

California is one of only three states that require employers to pay daily overtime after 8 hours of work and weekly overtime after 40 hours of work. Even the other two states that impose daily overtime requirements allow the employer and employee to waive this requirement through a written agreement. California, however, provides no such common-sense alternative. Rather, California requires employers to navigate through a multi-step process to have employees elect an "alternative workweek schedule" that, once adopted, must be "regularly" scheduled. This process is filled with potential traps that could easily lead to costly litigation, as one misstep may render the entire alternative workweek schedule invalid, leaving the employer legally responsible for claims of unpaid overtime wages.

To simply attempt to provide more employee flexibility by adopting an alternative workweek, the employer first must provide advance notice of the vote for an alternative workweek, then hold a meeting 14 days prior to the vote to discuss the proposed alternative schedule. Once that is complete, two-thirds of an entire work unit must agree by secret ballot to adopt and work the selected alternative workweek schedule. A work unit might be the entire company, or a single division or department within the company. Thus, alternative workweek schedules do not provide flexibility on an individualized basis and are not even meant for a handful of employees within a department who want

flexibility; instead, these schedules are based on the wants and needs of the entire work unit.

The process becomes more onerous for employers because even if two-thirds of a work unit votes to adopt an alternative workweek, the employer then must report the results to the state Division of Labor Standards Enforcement (DLSE) within 30 days. Once the DLSE reports that the employer has adopted the alternative workweek schedule, however, there is no presumption that the employer did so properly, and the employer is not immune from liability.

Currently, there are only 35,913 reported alternative workweek schedules with the DLSE. According to the Employment Development Department's calculations for the fourth quarter of 2017, there are approximately 1,538,815 employers in California. At best, approximately 2.3% of California employers are utilizing the alternative workweek schedule option. More realistically, however, given that the information in the database is according to work unit instead of employer, it is likely that less than 1% of employers in California are utilizing this process. And, again, it does not apply on an individual employee basis.

#### LIMITATIONS OF MAKEUP TIME

Labor Code Section 513 and corresponding IWC Wage Orders provide a makeup time exception to general overtime laws. Makeup time allows employees to request time off for personal obligations and make up the missed time without triggering overtime. This exception, however, has its own set of rigid requirements that employers and employees must adhere to in order to remain legally compliant.

If the employer chooses to allow makeup time, the following conditions must be met:

- The employee cannot work more than 11 hours on another workday, and not more than 40 hours in the workweek to make up for the time off;
- The employee must provide the employer with a signed, written request for each occasion that he/she desires makeup time;
- The employer cannot solicit or encourage the employee to utilize makeup time; and
- The missed time must be made up within the same workweek.

This last hurdle is the most difficult for employees because it means that the employee must come in early or stay late during the same workweek to meet this strict makeup time requirement. But what if a last-minute personal obligation arises on a Friday and the employee's normal workweek is Monday through Friday? The employee has no ability to make up the time during that workweek or provide prior written notice for approval. Or, what

if the employee has prior obligations and simply cannot come in early or stay late that week?

Also, as discussed in more detail below, it is important to note that an employee cannot simply waive his or her meal breaks during that week in order to make up that time either. In theory, the idea of makeup time sounds like a good option, but in practice the makeup time exception does not allow employees the flexibility necessary to meet their ever-changing personal obligations and exposes employers to costly litigation if the rules are not followed meticulously.

### LACK OF MEAL PERIOD WAIVERS

The inflexibility of California's labor laws is highlighted even more through its meal break requirement. Employers must provide nonexempt employees with an unpaid meal period of not less than 30 minutes for every 5 hours worked. *See* Labor Code Section 512. The meal period must be uninterrupted, the employee must be relieved of all duties, and the employer must not impede or discourage the employee from taking the break. *See* Labor Code Section 512.

There is a small exception, however, for employees who work between 5 and 6 hours. These employees can choose to waive their meal periods by mutual consent of the employer and employee. Yet, there is not a similar alternative for employees who work a traditional 8-hour day. Even if the employee and the employer mutually agree that the employee can take an on-duty meal period, the law does not allow an employer to legally make this exception.

Many employees do not want to be forced to take an unpaid, 30-minute meal period if they can eat on-duty and leave work 30 minutes earlier. However, an on-duty meal period is allowed only under very limited circumstances whereby three express conditions must be met. The most difficult element to satisfy is the "nature of the work" element because the employer is expected to find other capable employees who can perform the job duties

during an individual's 30-minute meal period. Thus, the on-duty meal period exception very rarely applies.

California voters clearly value flexibility and do not think that employees and employers alike should have to be governed by stringent standards that have no exceptions. This was made evident by the recent passage of Proposition 11. Proposition 11 created an exception to a recent California Supreme Court ruling (*Augustus v. ABM Security Services*) that likely would have required emergency medical technicians (EMTs) and paramedics to be completely unreachable while on break.

### CALCHAMBER POSITION

The current workforce values flexibility, which is why the *Dynamex* decision is so detrimental to millions of California workers. In addition, despite proponents' arguments otherwise, California labor laws simply do not allow employers to accommodate employee requests for flexible work arrangements.

Employers should be able to provide their employees more flexibility and negotiate, through a written agreement, revocable by either party, the daily and/or weekly schedules that satisfy the needs of both employee and employer. Moreover, if a nonexempt employee wants to skip a 30-minute meal period and eat lunch on-duty in order to leave early, why should an employer be put in the awful position of telling the employee "no"?

California lawmakers should focus on policies that allow individuals the option to work as independent contractors and improve workplace flexibility for employees, while alleviating the threat of costly litigation for employers for accommodating workers' schedules.



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