

# RECENT CASES

## DYNAMEX OPERATIONS WEST, INC. V. SUPERIOR COURT

### I. INTRODUCTION

California’s Industrial Welfare Commission (IWC) has the authority to issue and amend orders setting the minimum wage for employees in any occupation, trade, or industry.<sup>1</sup> Wage orders currently set the minimum wage for all industries in the state at \$11 per hour, or \$12 per hour for employers with 26 or more employees.<sup>2</sup> They also regulate overtime pay, meal and rest breaks, and certain other incidental benefits such as uniforms.

The wage orders protect all employees, and define “to employ” as “to engage, suffer, or permit to work.”<sup>3</sup> In *Dynamex Operations West, Inc. v. Superior Court*, the California Supreme Court affirmed that this definition is a broad one, covering “all workers who would ordinarily be viewed as working in the hiring business.”<sup>4</sup> In doing so, it applied its eight-year-old decision in *Martinez v. Combs*, where the court explained the meaning of the phrase “suffer or permit to work.”<sup>5</sup> That phrase, which the wage orders have used for a century, is a “distinct and particularly expansive definition” of “to

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1. See CAL. LABOR CODE §§ 1173, 1182 (West 2018). The IWC is a part of the Department of Industrial Relations, *id.* § 70, which exists to “foster, promote, and develop the welfare of the wage earners of California.” *Id.* § 50.5. See *Lusardi Constr. Co. v. Aubry*, 824 P.2d 643, 650 (Cal. 1992) (en banc) (describing the Department’s broad rulemaking authority). In practice, however, the legislature exercises complete control over the content of the IWC’s wage orders, including the hourly wage itself. See *id.* § 1182.12 (specifying what minimum wage increases shall take place from 2017 to 2023); *id.* § 1182.13(b) (directing the IWC to amend and republish the wage orders, making the changes in § 1182.12 and no others). Although the IWC has therefore effectively ceased to exist as an independent rulemaking body, its orders remain fully valid. See, e.g., *Murphy v. Kenneth Cole Productions, Inc.*, 155 P.3d 284, 289 n.4 (Cal. 2007).

2. INDUS. WELFARE COMM’N, MW-2019, CALIFORNIA MINIMUM WAGE (2019), available at <https://www.dir.ca.gov/IWC/MW-2019.pdf>. Although old IWC wage orders are still published in the California Code of Regulations, see 8 CAL. CODE REGS. § 11000 *et seq.* (2018), the Code version is badly out of date. However, the orders have independent force of law and are “valid and operative” without being published in the Code. CAL. LABOR CODE § 1185 (West 2018).

3. See, e.g., INDUS. WELFARE COMM’N, ORDER NO. 9-2001, REGULATING WAGES, HOURS AND WORKING CONDITIONS IN THE TRANSPORTATION INDUSTRY, § 4(A) (2019), available at <https://www.dir.ca.gov/IWC/IWCArticle9.pdf>.

4. *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 7 (Cal. 2018).

5. *Id.*; see *Martinez v. Combs*, 231 P.3d 259 (Cal. 2010).

employ.”<sup>6</sup> The IWC adopted it with the intention of extending comprehensive minimum wage coverage in California.<sup>7</sup>

Notwithstanding the wage orders’ definition, in recent decades, lower courts usually applied a common-law multifactor test for employment status, known as the *Borello* test, that did not make use of the terms “suffer” or “permit.”<sup>8</sup> That test made it somewhat easier to classify workers as independent contractors who were not subject to the wage order. In *Dynamex*, the court reaffirmed *Martinez*’s eight-year-old holding that the wage orders’ own definitions, and not the common law, control the determination of employee status in all cases arising under the wage orders.

Interpreted *too* literally, though, the wage orders would encompass essentially *all* hired individuals, even those that have always been recognized as genuinely independent such as plumbers, electricians and architects. Because the court recognized that such independent businesspeople were never intended to be covered by the wage orders, it adopted the “ABC” test to distinguish these workers.<sup>9</sup> That test, new to California but familiar in many other jurisdictions,<sup>10</sup> creates a narrow but clear carve-out for such genuinely independent contractors. Specifically, a worker may be classified as an independent contractor if 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 and in fact; *and* (B) that the worker performs work 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.<sup>11</sup>

Because of the burden this test places on the hiring entity, *Dynamex* has been heralded as a novel and even unprecedented page in the book of California’s employer-employee relations.<sup>12</sup> Indeed, detractors in the state legislature have said that *Dynamex* was a radical decision that “overturned three decades of California employment law that allowed individuals to work

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6. *Dynamex*, 416 P.3d at 29.

7. *See Martinez*, 231 P.3d at 273–75.

8. *See S.G. Borello & Sons v. Dep’t of Indus. Relations*, 769 P.2d 399 (Cal. 1989) (en banc). *See also, e.g., Ayala v. Antelope Valley Newspapers*, 327 P.3d 165, 170–71 (Cal. 2014) (explaining the application of the *Borello* test).

9. *Dynamex*, 416 P.3d at 35.

10. *Id.* at 34; *see also* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 66 (2015).

11. *Dynamex*, 416 P.3d at 35.

12. *See, e.g.,* Ian Adams & Brian Jencunas, *California’s ‘Dynamex’ decision spells doom for state’s businesses and freelancers*, THE HILL, June 13, 2018, <https://thehill.com/opinion/campaign/392060-californias-dynamex-decision-spells-doom-for-states-businesses-and> [<https://perma.cc/DC38-6XN7>].

as independent contractors.”<sup>13</sup> That is simply wrong. *Dynamex*, far from being unprecedented, correctly applied existing law, which recognizes that the wage orders were always supposed to be broad in scope. Its holding is firmly rooted in the century-old text of the wage order, as interpreted by existing case law.

This case note proceeds as follows. Section II explains *Martinez*, the 2010 case that clarified the scope of the wage orders. Section III describes the facts and procedural history of *Dynamex*, and Section IV summarizes the California Supreme Court’s decision in that case. Finally, Section V makes two arguments. First, because *Dynamex* relies on the wage order’s longstanding definition of “to employ” as “to suffer or permit to work,” which was explained eight years earlier in *Martinez*, it should be applied retroactively. Second, also because of its textual basis, *Dynamex* does not directly apply to the determination of employee status under laws *other* than the wage orders. Nevertheless, it provides a forceful example of a familiar principle: laws that protect workers are intended to have a broad scope.

## II. HISTORY

In 2010, in *Martinez v. Combs*, the California Supreme Court held that the wage orders’ definition of “employee” was not circumscribed either by the common law or by federal statutory law.<sup>14</sup> Instead, the IWC had “power to define the employment relationship as necessary ‘to insure the receipt of the minimum wage and to prevent evasion and subterfuge.’”<sup>15</sup>

That power meant the IWC could define terms differently than under the common law. To hold otherwise, the court said, “would render the commission’s definitions effectively meaningless.”<sup>16</sup> Rather, the wage orders incorporated three alternative definitions of “to employ,” which were: “(a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship.”<sup>17</sup> The court said that this definition was designed to be more worker-protective than comparable federal law, and should be applied with the wage orders’ “distinct language, history and function” in

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13. See H.R. 125, 2017–18 Leg., Reg. Sess. (Cal. 2018) (proposing legislation to limit the applicability of *Dynamex*).

14. *Martinez v. Combs*, 231 P.3d 259, 269 (Cal. 2010).

15. *Id.* at 278 (quoting *Cal. Drive-in Rest. Ass’n v. Clark*, 140 P.2d 657, 665 (1943)); see also *id.* at 275–76 (discussing the deference given to definitions in IWC wage orders, and listing cases in which the court had “enforced definitional provisions the IWC has deemed necessary, in the exercise of its constitutional and statutory authority, to make its wage orders effective”).

16. *Id.* at 279.

17. *Id.* at 278. These three alternative definitions should not be confused with the three elements of the ABC test, *infra* text accompanying note 60.

mind.<sup>18</sup> In particular, the wage orders in no way incorporated the Fair Labor Standards Act's "economic realities" test,<sup>19</sup> but must be applied according to their own terms.<sup>20</sup>

The court especially emphasized the breadth of the "suffer or permit" prong of the test. That prong is satisfied if the business owner "knows that persons are working in his or her business . . . [and] fail[s] to prevent [the work], while having the power to do so."<sup>21</sup> That test originated in turn-of-the-century child labor statutes, which deliberately used strong terms to ensure that the common-law definitions would not allow employers to evade liability.<sup>22</sup> Importantly, when the IWC adopted the "suffer or permit" language to define employment outside the child labor context, it did so in the shadow of those statutes and their broad coverage.<sup>23</sup>

Yet *Martinez* made clear that this definition, while strictly broader than the common-law definition, contained some limiting principles. Although the wage order was "broad enough to reach through straw men and other sham arrangements,"<sup>24</sup> it was not unreasonably broad.<sup>25</sup> For example, it certainly did not impose liability for unpaid minimum wages on completely independent entities with which the employer conducted business. That meant the *Martinez* plaintiffs lost. These plaintiffs were strawberry pickers who sued their employer, as well as two produce merchants through which the employer sold strawberries, for unpaid wages.<sup>26</sup> The employer was discharged in bankruptcy and only the merchants remained as defendants.<sup>27</sup> But the merchants did not suffer or permit the plaintiffs to work, because the

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18. *Id.* at 279–81.

19. *Id.* at 279; *see also id.* at 274 (stating that the statute's language was "intended to distinguish state wage law from its federal analogue, the FLSA.")

20. *Id.* at 281.

21. *See id.*

22. *See id.* at 273–74 (citing *Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1129 (Okla. 1913) (explaining that Oklahoma's statute meant that employers could not "permit by acquiescence, nor suffer by a failure to hinder" child labor, and that employers were therefore liable for injuries sustained by child workers, even if the work was performed without permission)).

23. The *Martinez* court wrote:

We see no reason to refrain from giving the IWC's definition of "employ" its historical meaning. That meaning was well established when the IWC first used the phrase "suffer, or permit" to define employment, and no reason exists to believe the IWC intended another. Furthermore, the historical meaning continues to be highly relevant today: A proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so.

*Id.* at 281.

24. *Id.* at 283.

25. *Cf. id.* at 282 (noting that, unlike the court's interpretation, "[p]laintiffs' interpretation of the wage order is . . . unreasonably broad.")

26. *Id.* at 263.

27. *Id.*

merchants did not even have the power to prevent them from working.<sup>28</sup> At most, the merchants had a “downstream benefit” from the plaintiffs’ work, and the court rejected such a broad reading of the wage orders, which would create “potentially endless chains of liability.”<sup>29</sup> Therefore, at the same time that the court reaffirmed the broad reach of the wage orders, it also provided an example of a working arrangement the orders did *not* reach.

### III. FACTS

Dynamex Operations, Inc. (“Dynamex”) is a nationwide courier and delivery service, which offers services both to the public generally and to established business customers.<sup>30</sup> Customers deal directly with the company, and the company alone sets or negotiates the prices of its services.<sup>31</sup> Depending on the circumstances, drivers are paid either a flat fee, or a percentage of the price that Dynamex has negotiated.<sup>32</sup> Some drivers are assigned to specific routes, while other drivers perform on-demand work.<sup>33</sup> Dynamex dispatchers assign on-demand deliveries at the company’s discretion, and drivers are not guaranteed any specific number of deliveries per day.<sup>34</sup> Drivers are expected to wear Dynamex-branded shirts, and are sometimes required to attach Dynamex-branded decals to their vehicles.<sup>35</sup> Drivers are permitted to subcontract their assigned deliveries, and company policy permits them to work for other delivery companies if they so choose.<sup>36</sup>

Prior to 2004, all of Dynamex’s drivers were classified as employees and paid according to state wage orders.<sup>37</sup> In 2004, the company concluded that it would save money by classifying drivers as independent contractors, and did so.<sup>38</sup> In April 2005, plaintiff Charles Lee brought this action alleging that Dynamex was evading its obligations under the California Labor Code and wage orders by misclassifying employees as independent contractors.<sup>39</sup>

Relying on *Martinez*, the trial court in *Dynamex* certified the plaintiffs’ class. It found that, under the multifactor common-law test, the case would involve an individualized inquiry into Dynamex’s right to control the details

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28. *Id.* at 282.

29. *Id.*

30. *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 8 (Cal. 2018).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* *But see* *Lee v. Dynamex, Inc.*, 83 Cal. Rptr. 3d 241, 245 (Ct. App. 2008) (stating that some testimony disputed drivers’ freedom to work for other entities or to choose their own hours).

37. *Dynamex*, 416 P.3d at 8.

38. *Id.*

39. *Id.* at 9.

of the drivers' work, and would be inappropriate for class resolution. But because common questions predominated under the other two *Martinez* tests, the class action could proceed.<sup>40</sup> In particular, the court found that the simple "suffer or permit to work" test meant that a worker is an employee "if the work was performed with the knowledge of the employer."<sup>41</sup> The Court of Appeal affirmed with regard to the wage order claims, but remanded the nonwage claims for reconsideration, since the suffer or permit test came only from the wage order.<sup>42</sup> The defendants appealed, arguing that *only* the multifactor *Borello* test was appropriate for determining employee status under the wage orders.<sup>43</sup>

#### IV. CALIFORNIA SUPREME COURT DECISION

The California Supreme Court affirmed the Court of Appeal.<sup>44</sup> It held that *Martinez's* suffer or permit to work test, which covers "*all individual workers who can reasonably be viewed as 'working in the [hiring entity's] business,'*"<sup>45</sup> was the correct test for employee status under the wage order. But, the court clarified, the test was not absolutely literal. "[I]f applied generally, it could potentially encompass the type of traditional independent contractor—like an independent plumber or electrician—who could not reasonably have been viewed as the hiring business's employee."<sup>46</sup> Therefore, the court adopted the "ABC" test to distinguish these "genuine" independent contractors.

After summarizing the history of relevant case law,<sup>47</sup> the court asked whether *Martinez's* definitions were applicable outside the joint-employer context. There was no reason to think they weren't: "[o]n its face, the [suffer or permit] standard would appear relevant" to the independent contractor question.<sup>48</sup> Furthermore, *Martinez's* discussion of the standard's origin in child labor laws made it clear that it applied outside the joint-employer context.<sup>49</sup> The court duly considered each of *Dynamex's* objections, and

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40. *Id.* at 12.

41. *Id.* at 10. *See also* *Martinez v. Combs*, 231 P.3d 259, 281 (Cal. 2010) (stating that "a proprietor who knows that persons are working in his or her business . . . clearly suffers or permits that work by failing to prevent it, while having the power to do so") (emphasis added).

42. *Dynamex*, 416 P.3d at 13. The *Dynamex* court did not decide whether the suffer or permit test applied to claims not arising under the wage order. *Id.* at 7 n.5. At least one California Court of Appeal has held that *Dynamex* does not apply to such claims. *See Garcia v. Border Transp. Group, LLC*, 239 Cal. Rptr. 3d 260, 363 (Ct. App. 4th 2018).

43. *Dynamex*, 416 P.3d at 6.

44. *Id.* at 7.

45. *Id.* at 32 (emphasis and alteration in original) (quoting *Martinez*, 231 P.3d at 281).

46. *Id.* at 41.

47. *See id.* at 14–25.

48. *Id.* at 26.

49. *Id.*

found them mostly unpersuasive.<sup>50</sup> The court concluded that the “suffer or permit to work” standard *did* apply to the independent-contractor question when it arose under the wage order.<sup>51</sup> As already explained in *Martinez*,<sup>52</sup> the standard was not the result of judicial activism, but came from the text of the wage order as enacted by the IWC.

Dynamex had objected that applying the “suffer or permit” test to wage order claims, while applying the multifactor common-law test to other claims, would be unworkable. The court specifically rejected this contention.<sup>53</sup> It wrote that “a worker may properly be considered an employee with reference to one statute but not another,”<sup>54</sup> clarifying that its holding was limited to claims arising under the wage order.

However, the court gave Dynamex’s final objection substantial consideration. Dynamex argued that, read mechanically, the suffer or permit test would encompass essentially all workers, and for that reason, could not be the right test.<sup>55</sup> The court acknowledged the problem.<sup>56</sup> But it did not reject the suffer or permit test. Rather, it said that the test simply did not cover those people who “would not reasonably have been viewed as *working in the hiring business* . . . [but] instead, as *working only in his or her own independent business*.”<sup>57</sup>

The court needed a test to determine when a purported employee really *was* working in his or her own independent business. Federal courts, for example, had interpreted the “suffer or permit to work” language in the Fair Labor Standards Act to incorporate the multifactor “economic realities” test.<sup>58</sup> That test, although more inclusive than the common law test, certainly did not confer employee status on all workers.<sup>59</sup> But, as in *Martinez*, the court noted that California’s wage orders predated FLSA, and could not have been intended to incorporate the latter’s definitions.<sup>60</sup> Rather than adopt a totality-

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50. *Id.* at 27–30.

51. *Id.* at 26. The Court’s holding was limited to the (b) prong of the *Martinez* test, “suffer or permit to work.” Because that was sufficient to decide the case, the Court had no reason to address the (a) prong, “exercise control over wages, hours, or working conditions.” *Id.*

52. *See Martinez v. Combs*, 231 P.3d 259, 278 (Cal. 2010).

53. *Dynamex*, 416 P.3d at 29.

54. *Id.* *See also id.* at 30 n.20 (explaining the variety of tests in existence). Employers must *already* deal with differing definitions under different statutes, for example, FLSA and ERISA.

55. *Id.* at 29.

56. *Id.*

57. *Id.* at 33 (emphasis in original).

58. *See id.*

59. *See, e.g., Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131 (2d Cir. 2017) (finding black-car drivers to be independent contractors under FLSA).

60. *Dynamex*, 416 P.3d at 35; *see also Martinez v. Combs*, 231 P.3d 259, 279–80 (Cal. 2010).

of-the-circumstances, multifactor test, the court preferred to adopt a “simpler, more structured test.”<sup>61</sup>

The “ABC” test that the court chose was already used, in some form or another, in at least fourteen states.<sup>62</sup> The specific form it chose was modeled on the version used in Massachusetts.<sup>63</sup> Under this test, for the purposes of the wage order, any individual who is suffered or permitted to work is considered an employee, unless the hiring entity establishes *all three* parts 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 and in fact; *and* (B) that the worker performs work 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.<sup>64</sup>

With regard to the drivers, the court found that commonality of interest under the B prong was sufficient to support class certification.<sup>65</sup> Because Dynamex was a delivery company, the question of whether delivery drivers performed work outside the usual course of Dynamex’s business was “clearly” a common issue.<sup>66</sup> The court found this to be so as a matter of law.<sup>67</sup> Because common proof of the failure of any one prong would mean that all class members were employees, this was sufficient to certify the class, and so the court affirmed the Court of Appeal.<sup>68</sup> The decision was unanimous.

## V. ANALYSIS

Some California employers—and their lawyers—have described *Dynamex* as having created, in the ABC test, an unforeseeable new rule. They have claimed that the ABC test injects uncertainty into employment relations, and makes it impossible for businesses to use independent contractors.<sup>69</sup> Some have lobbied for legislative action to overrule *Dynamex* and restore the status quo, relieving businesses of the obligation to comply with minimum wage orders.<sup>70</sup>

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61. *Dynamex*, 416 P.3d at 34.

62. See Deknatel & Hoff-Downing, *supra* note 10, at 66.

63. *Dynamex*, 416 P.3d at 34 n.23.

64. *Id.* at 35.

65. *Id.* at 41.

66. *Id.*

67. *Id.* at 42.

68. *Id.*

69. See Adams & Jencunas, *supra* note 12; Avi Attal & Amir Kahana, *The Dynamex Decision: Is it the End of Independent Contractors in California?*, KAHANA & FELD, May 21, 2018, <http://kahanafeld.com/2018/05/21/dynamex-decision-end-independent-contractors-california/> [https://perma.cc/XE8A-LNQ4] (lamenting the “disenfranchise[ment]” of businesses and employers).

70. See H.R. 125, *supra* note 13.



But this reaction overstates what *Dynamex* did. Far from being unprecedented, *Dynamex* correctly applied existing law. Furthermore, it did so only in the narrow context of the wage orders.

The remainder of this case note explores these two issues. First, I argue that because *Martinez* expressly held that employee status under the wage orders is determined by the suffer or permit test, the comprehensive coverage of the wage orders has been legally unambiguous for at least eight years, if not longer. Because the ABC test serves to *narrow* the suffer or permit test from the scope it had in *Martinez*, it is fair to employers to apply that test retroactively.

Second, I consider the possibility of *extending* the suffer or permit test to non-wage-order claims. I conclude that *Dynamex* does not require changing the tests in use with regard to other statutes. Nevertheless, *Dynamex* reaffirms a general principle of statutory interpretation, long familiar in California, that remedial legislation designed for the protection of employees should be applied broadly to wage earners.

*A. The “Suffer or Permit” Test Already Applied to All Wage Order Claims; Dynamex Clarified, But Did Not Broaden, That Test*

*Dynamex* petitioned the court to hold that the ABC test does not apply retroactively, and the Chamber of Commerce filed an amicus brief in support.<sup>71</sup> It argued that *Dynamex* was a “sharp, unexpected break from prior law” that “threaten[ed] to have far-ranging impacts on numerous California employers,” and that retroactive application of the ABC test would violate due process.<sup>72</sup> It correctly stated that the ABC test was new to California, and noted the contrasts between the ABC test and the *Borello* test.<sup>73</sup> But the Chamber implicitly acknowledged that *Martinez* had cast serious doubt on the continued validity of the *Borello* test under the wage orders.<sup>74</sup> The petition was denied on June 20, 2018.

The court was right to deny the petition. The wage orders’ comprehensive coverage was already apparent from *Martinez*.<sup>75</sup> And as *Martinez* explained,<sup>76</sup> that expansive coverage dates to their first issuance over a hundred years ago, even if that coverage has not always been correctly applied. The wage orders have long defined “to employ” as “to suffer or

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71. Amici Curiae Letter in Support of Petition for Rehearing, *Dynamex*, 416 P.3d 1 (No. S222732), 2018 WL 2648503, at 1.

72. *Id.* at 2.

73. *Id.* at 6–7.

74. *Id.* at 7 (“[U]ntil the 2010 *Martinez* decision, courts and the DLSE had applied *Borello*’s distinct standard for distinguishing employees from independent contractors in the wage-and-hour context”) (emphasis added).

75. See *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 35 (Cal. 2018).

76. See *supra* text accompanying notes 21–23.

permit to work.” If the wage orders’ broad coverage required a radical choice, that choice was not made in 2018, but in 1916. That was when the IWC adopted a “suffer or permit” definition of “employ” that was *designed* to “reach[] irregular working arrangements the proprietor of a business might otherwise disavow with impunity.”<sup>77</sup>

The novel aspect of *Dynamex* — the adoption of the ABC test — essentially creates a carve-out from the “suffer or permit” test as explained in *Martinez*, so that “genuine” independent contractors are not considered employees.<sup>78</sup> Because the test places the burden on the employer to establish, by proving all three prongs, that a worker is an independent contractor,<sup>79</sup> some have viewed it as a radical departure from existing law.<sup>80</sup> It is no such thing.

Because the ABC test is an exception to the “suffer or permit” test, the plaintiff must still make the initial showing that the employer *literally* suffered or permitted the plaintiff to work, in the sense that the employer “knows that [the plaintiff is] working in his or her business . . . [and] fails to prevent [the work], while having the power to do so.”<sup>81</sup> For example, the workers in *Martinez* probably would not satisfy all three prongs of the ABC test, and so would not be considered independent contractors. But that wouldn’t suddenly make the *Martinez* defendants liable: even if the workers were employees under the ABC test, the suffer or permit test still shows that they weren’t the defendant’s employees.<sup>82</sup> *Martinez* says that businesses are not liable for the wages of workers they cannot stop from working, and nothing in *Dynamex* changes that.<sup>83</sup>

Because no one seriously disputed that *Dynamex* at least permitted the drivers to work, the court did not emphasize that initial question. And, given the “exceptionally broad” reach of the suffer or permit test when interpreted

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77. See *Martinez v. Combs*, 231 P.3d 259, 273 (Cal. 2010). The *Martinez* court explained that the original 1916 wage order prohibited anyone to “employ, suffer, or permit” work at less than the prescribed rates. But later, the orders defined “employ” to *include* “suffer or permit.” There is no reason to think this was intended as a substantive change in coverage.

78. Consider that, if the *Dynamex* court had affirmed *Martinez*’s definition *without* adopting the ABC test, the class would still have been certified, because *Dynamex* undisputedly suffered or permitted all of the drivers to work. The only way to avoid this result would have been to flatly overrule *Martinez*, at least in part. See *Dynamex*, 416 P.3d at 26 (“*Martinez* itself makes it quite clear that th[e suffer or permit] standard was intended to apply beyond the joint employer context.”)

79. See *id.* at 35.

80. See Amici Curiae Letter, *supra* note 71, at 6–7.

81. See *Martinez*, 231 P.3d at 281–82. Because the plaintiffs in *Martinez* failed to show the defendants even *literally* suffered or permitted them to work, they lost the case. Cf. *Dynamex*, 416 P.3d at 29–30 (“A business that hires any individual to provide services to it can always be said to knowingly ‘suffer or permit’ such an individual to work for the business. A *literal* application of the suffer or permit to work standard” is therefore too broad.”) (Emphasis added.)

82. See *Martinez*, 231 P.3d at 265 (referring to the plaintiffs as “Munoz’s employees”).

83. See *id.* at 281–82.

literally, that question will often be undisputed, or at least very easy for the worker to prove.<sup>84</sup> Nevertheless, *Martinez* itself showed that that the burden is not automatically met.<sup>85</sup>

*Dynamex*'s adoption of the ABC test provides employers with a way to rebut that showing and prove that a putative employee, who *has* been permitted to work, is nevertheless an independent contractor.<sup>86</sup> A worker who satisfies the ABC test, although *literally* "suffer[ed] or permit[ted] to work," is "working only in his or her own independent business"<sup>87</sup> for the purposes of the wage order. It is entirely logical to place the burden of that rebuttal on the employer.

Even if the scope of the wage orders' coverage had not been obvious *prior* to *Martinez*, employers have been on notice of the orders' broad reach since that case was decided in 2010. Following the decision in *Martinez*, some writers publicly noted not only that the court had "broaden[ed] the definition of an employer,"<sup>88</sup> but also noted the case's possible implications for independent contractor classifications.<sup>89</sup> Those writers were right: *Martinez* declared that the "suffer or permit" test determines who is an employee under the wage order, period. Nothing in either the wage order itself, or in the court's interpretation of the wage order in *Martinez*, remotely suggested that the test applies only when the defendant claims not to be a joint employer of someone else's employee.<sup>90</sup> The *Dynamex* court did no more than squarely hold what was already clearly implied.

Therefore, insofar as it departs from precedent and introduces the ABC test, *Dynamex* is best read as a moderate and well-reasoned effort to avoid placing unfair liability on businesses. Conversely, insofar as the application of the "suffer or permit" test guarantees coverage to workers and places costs on businesses, *Dynamex* hews closely to precedent and the statutory text. In other words, *Dynamex* did not expand the wage orders; the wage orders have always been expansive.

As the Chamber correctly noted in its letter brief, judicial decisions are ordinarily applied retroactively, *unless* "a decision constitutes a 'clear break'

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84. See *Dynamex*, 416 P.3d at 31.

85. See *supra* text accompanying notes 24–29.

86. See *id.* at 29–30.

87. *Id.* at 33 (original emphasis omitted).

88. Fox Rothschild LLP, *Martinez v. Combs: A New Definition of an Employer!*, CALIFORNIA UPDATE, no. 3, 2010, at 2, [https://www.foxrothschild.com/content/uploads/2015/05/updatecalifornia\\_2010thirdquarter.pdf](https://www.foxrothschild.com/content/uploads/2015/05/updatecalifornia_2010thirdquarter.pdf).

89. Michael Kun & Aaron Olsen, *California Supreme Court Expands Definition of "Employer" In Wage-Hour Cases*, WAGE & HOUR DEF. BLOG (June 4, 2010), <https://www.wagehourblog.com/2010/06/articles/california-wage-hour-law/california-supreme-court-expands-definition-of-employer-in-wage-hour-cases/>.

90. *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 26 (Cal. 2018) ("*Martinez* itself makes it quite clear that this standard was intended to apply beyond the joint employer context.")

with decisions of [the state supreme] court[.]”<sup>91</sup> Because the expansive coverage of the suffer or permit test is a straightforward application of *Martinez*, it applies retroactively, at least to 2010. If the Chamber were right that the ABC test is “a clear break from existing law,”<sup>92</sup> such that it should not apply retroactively, then there would be no escaping the suffer or permit test’s breadth. The result would be that *even* “genuine” independent contractors, like plumbers and electricians, would be covered by the wage orders for the time period between *Martinez* and *Dynamex*. That seems a counterintuitive result, and likely not what the Chamber was arguing for.

### B. *Dynamex Only Applies to the Wage Orders*

In July 2018, nine prominent companies — including both Uber and Lyft — wrote a letter to the state secretary of labor, arguing that *Dynamex* required counteraction from the political branches.<sup>93</sup> The following month, in direct response to the businesses’ letter, Assembly Member Melissa Melendez proposed a nonbinding resolution that “urge[d] an immediate suspension of the *Dynamex* decision.”<sup>94</sup> The resolution notes that “[n]early two million Californians choose to work independently,” and claims that those individuals are no longer “allowed . . . to work as independent contractors.”<sup>95</sup> The proposed resolution ultimately died without a vote.

The proposed resolution’s claims were simply false. By its own terms, *Dynamex* only addresses the applicability of the wage orders.<sup>96</sup> It leaves the tests for independent contractor status under any other law — such as unemployment insurance, workers’ compensation, federal protective laws such as ERISA, or the tax laws — unchanged.<sup>97</sup> For example, ERISA uses

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91. See Amici Curiae Letter, *supra* note 71, at 8 (quoting *Grafton Partners v. Superior Court*, 116 P.3d 479, 492 (Cal. 2005)).

92. *Id.*

93. Josh Eidelson, *Gig-economy giants ask California to save them from a ruling that may turn their contractors into employees*, L.A. TIMES, Aug. 6, 2018, <http://www.latimes.com/business/la-fi-contract-workers-20180806-story.html> [<https://perma.cc/LA5M-XR5R>]. See also Veena Dubal, *The courts decided gig workers are covered by wage and overtime protections. Now their bosses are trying to evade the law*, L.A. TIMES, Aug. 14, 2018, <http://www.latimes.com/opinion/op-ed/la-oe-dubal-gig-companies-undercut-california-wage-law-20180814-story.html> [<https://perma.cc/43R8-3HZL>].

94. H.R. 125, *supra* note 13. The resolution’s text cites the businesses’ letter as one of the reasons for action.

95. *Id.*

96. *Dynamex* declined to address independent contractor status under other sections of the Labor Code for procedural reasons. *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 7 n.5 (Cal. 2018). But its opinion relied decisively on the text of the wage order as enacted by the IWC. At least one California Court of Appeal has already held, as this Note argues, that *Dynamex* does not apply to non-wage-order claims. See *Garcia v. Border Transp. Grp., LLC*, 28 Cal. App. 5th 558, 561 (2018).

97. One important exception is *local* ordinances that set a higher minimum wage than the state does. These generally import the IWC’s definitions. See, e.g., BERKELEY, CAL., MUNICIPAL CODE § 13.99.030(C)(2) (2018); L.A. COUNTY, CAL., CTY. CODE OF ORDINANCES § 8.100.030(C)(2) (2015); SAN

traditional common-law agency criteria to define “employees” within its coverage.<sup>98</sup> This test, like California’s *Borello* test, focuses on the hiring entity’s right to control the manner and means of accomplishing the work, accompanied by numerous secondary factors.<sup>99</sup> A worker who has always been *correctly* classified as an independent contractor with respect to ERISA will not have their status changed by *Dynamex*.<sup>100</sup> The only changes required by *Dynamex* are those required by the wage order — most importantly, that the worker must be paid at least the minimum wage with overtime, and receive meal and rest breaks. These changes are unlikely to have any effect on the worker’s status with respect to the common-law test for employment, which continues to apply to laws other than the wage order.

Still, although *Dynamex* itself does not apply to claims not arising under the wage order, *Dynamex* does reaffirm a longstanding rule of statutory interpretation: statutes designed to protect workers should be interpreted broadly, with an eye towards fulfilling their remedial purposes.<sup>101</sup> That principle is by no means unique to California, but is applicable throughout the country.<sup>102</sup> In California, even *Borello* recognized the principle. There, the court found the plaintiffs to be employees under the workers’ compensation law, precisely because “the employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose.”<sup>103</sup> The court emphasized that “the ‘control’ test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service

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FRANCISCO, CAL., ADMIN. CODE § 12R.3 (2018). Because they import the IWC’s definitions, they cover the same workers.

98. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992).

99. *Id.* at 324.

100. Of course, if a worker has always been *incorrectly* classified as an independent contractor with respect to ERISA, *Dynamex* does not change that either. In either case, California courts cannot alter the federal definition.

101. *Dynamex*, 416 P.3d at 32. This principle has been applied to California employment law for decades. *See Lusardi Constr. Co. v. Aubry*, 824 P.2d 643, 649 (Cal. 1992) (en banc) (“The object that a statute seeks to achieve is of primary importance in statutory interpretation”); *Indus. Welfare Comm’n v. Super. Ct.*, 613 P.2d 579, 585 (Cal. 1980) (en banc) (“Remedial statutes . . . (i.e., the statutes governing the adoption of wage orders) are to be liberally construed.”), quoting *Cal. Grape & Tree Fruit League v. Indus. Welfare Comm’n*, 268 Cal. App. 2d 692, 698 (1969). As a general principle of statutory construction, it is far older. *See, e.g., Kramm v. Bogue*, 59 P. 394, 396 (Cal. 1899) (“This provision of the Code, as well as all others, ‘are to be liberally construed, with a view to effect its objects and to promote justice. . . . The letter of remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used.’”). The principle has been reaffirmed following *Dynamex*, both in the employment context, *see Troester v. Starbucks Corp.*, 421 P.4d 1114, 1125 (2018), and in other contexts, *see L.A. Cty. Metro. Transp. Auth. v. Yum Yum Donut Shops, Inc.*, 244 Cal. Rptr. 3d 201, 207 (Ct. App. 2019)

102. *See, e.g., Hargrove v. Sleepy’s, Inc.*, 106 A.3d 449, 457–58, 463 (N.J. 2015) (adopting ABC test); *Bostain v. Food Exp., Inc.*, 153 P.3d 846, 852 (Wash. 2007) (en banc); *Case of Sellers*, 898 N.E.2d 494, 498–99 (Mass. 2008); *Mem’l Med. Ctr., Inc. v. Tatsch Constr., Inc.*, 12 P.3d 431, 439 (N.M. 2000); *Borough of Youngwood v. Pa. Prevailing Wage Appeals Bd.*, 947 A.2d 724, 731 (Pa. 2008).

103. *S.G. Borello & Sons v. Dep’t of Indus. Relations*, 769 P.2d 399 (Cal. 1989) (en banc).

arrangements” that arise in response to changing laws,<sup>104</sup> and that “the concept of ‘employment’ embodied in the [Workers’ Compensation] Act is not inherently limited by common law principles.”<sup>105</sup> *Borello*, far from inscribing the common-law rules in stone, is prime authority for the proposition that laws protecting workers should be construed to provide the “comprehensive coverage” they were intended to have.<sup>106</sup>

Going forward, *Dynamex* provides the test for employee status under the wage order. It does not provide the test under any other law. But courts may look to *Dynamex* for a reinvigoration — but by no means a reinvention — of the principle that laws designed to protect workers should be applied to the workers they were designed to protect.

## VI. CONCLUSION

Just as this note was going to press, the United States District Court for the Northern District of California approved a \$20 million settlement between Uber and a class of its drivers.<sup>107</sup> While noting that *Dynamex* did not necessarily apply to expense reimbursement claims, which do not arise under the wage orders, the court believed that Uber’s drivers were clearly employees for purposes of the wage order claims.<sup>108</sup> The court also noted the “general rule favoring retroactivity,” though it had no occasion to expressly hold whether the rule was retroactive.<sup>109</sup> *Dynamex* will plainly shape California employment law for decades to come.

But *Dynamex* is not in any sense a radical reinterpretation of California employment law. It is a continuation of a long tradition that was exemplified, but not started, by *Borello*. Put simply, California courts apply legislation designed for the protection of workers, well, to the workers the legislation was designed to protect. *Dynamex* does no more than ensure that the minimum wage laws will, in fact, operate as they always should have.

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104. *Id.* at 404.

105. *Id.* at 405.

106. *See id.* at 406.

107. *O’Connor v. Uber Technologies, Inc.*, No. 15-cv-00262-EMC, 2019 WL 1437101, at \*3 (N.D. Cal. Mar. 29, 2019).

108. *Id.* at \*10.

109. *Id.*