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The Misclassification of Employees and California's Latest Confusion Regarding Who is an Employee or an Independent Contractor

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**THE MISCLASSIFICATION OF EMPLOYEES AND
CALIFORNIA’S LATEST CONFUSION REGARDING
WHO IS AN EMPLOYEE OR AN INDEPENDENT
CONTRACTOR.**

Peter Tran*

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INTRODUCTION

Independent contractors constitute a large number of the American workforce.¹ However, the misclassification of employees as independent contractors is a large problem affecting our nation.² Although state and federal jurisdictions have passed statutes to prevent the intentional and accidental misclassification of employees, the issue is still prevalent.³ Misclassified workers are deprived of many protections, such as workers compensation, unemployment benefits, earned vacation time, pensions, and sick leave.⁴ Furthermore, misclassified workers fall outside of the protection of most if not all wage and hour laws designed to protect employees.⁵

From an employer’s perspective, there are many incentives to classify workers as independent contractors.⁶ For example, employers can dodge various financial and legal obligations by hiring independent contractors.⁷ The financial savings alone would appeal to most people as a sensible and business savvy decision. However, the constant change in law regarding who is considered an employee versus who is considered an independent contractor has created confusion for employers, workers, legislatures, and the judicial system.⁸

California’s latest case to weigh in on this issue comes from the Second District Court of Appeal in *Dynamex*.⁹ In that

1. *Contingent and Alternative Employment Arrangements*, Bureau of Labor Statistics, <http://www.bls.gov/news.release/pdf/conemp.pdf> (last visited Jan. 8, 2015).

2. Francois Carre & Randall Wilson, *The Social and Economic Costs of Employee Misclassification in Construction* (Dec. 17, 2004).

3. See Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L. J. 111, 112 (Spring 2009) (discussing the prevalence of employee misclassification).

4. See Carre, *supra* note 2, at 9.

5. See Carre, *supra* note 2, at 9.

6. See Carre, *supra* note 2, at 8–9.

7. See Carre, *supra* note 2, at 8–9.

8. See *infra* Part II.

9. *Dynamex Operations W., Inc. v. Superior Court*, 230 Cal. App. 4th 718, review granted January 28, 2015, S222732. (Ct. App. 2014).

case, the Second District unanimously agreed that the plaintiffs of the case correctly relied upon the definition of “employee” as found in California’s Industrial Welfare Commission (IWC) wage order to determine who could be included in a class action lawsuit against the defendant.¹⁰ The *Dynamex* court based its decision upon the ruling in *Martinez v. Combs*, a California Supreme Court case that used the IWC’s wage order to define who is an “employee.”¹¹ The *Martinez* definition included three alternative and mutually exclusive definitions for employee: “(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.”¹² On January 28, 2015, the California Supreme Court granted review of the case.

The *Dynamex* defendants, however, argued that the correct definition of employee should be founded on previous common law principles, specifically the “right to control” test set forth by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (Borello).¹³ Borello’s “right to control” test looks at whether an employer has the right to assert control over “the manner and means of accomplishing the results desired.”¹⁴ Additionally, the California Supreme Court added several other factors for consideration; such as the specific type of occupation engaged in and the length of time services are to be performed.¹⁵

The *Dynamex* decision has created a sudden influx of class action lawsuits regarding the new test to determine independent contractor status.¹⁶ However, the California Supreme Court recently granted review of *Dynamex* on

10. *Id.* at 722.

11. *Id.*

12. *Id.* at 728 (emphasis added).

13. *Id.* at 729.

14. *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989).

15. *Id.* at 404.

16. See, e.g., Jonathan A. Siegel, *Controversial Dynamex Case Regarding Misclassification of Independent Contractors to be Reviewed by California Supreme Court*, THE NAT’L L. REV. (Oct. 16, 2015), <http://www.natlawreview.com/article/controversial-dynamex-case-regarding-misclassification-independent-contractors-to-be>; Jessica Perry and Lauri Damrell, *Think Your Workers are Independent Contractors? Not So Fast Says DOL*, EMP. L. & LITIG. BLOG (Oct. 16, 2015), <http://blogs.orricks.com/employment/tag/dynamex-operations-west-v-superior-court/>.

January 28, 2015.¹⁷

This Comment will analyze the two opposing viewpoints and introduce new considerations and solutions to fix misclassification problems. To determine which definition of “employee” should be used, California courts should look at the history of employee classification and the benefits and downfalls of choosing one definition over the other.

Part I of this Comment will look at the history of California’s attempts to address employer/employee relationships both legislatively and judicially.¹⁸ Part II will identify the legal issues surrounding this topic.¹⁹ Part III will analyze California’s two present tests for determining the employment relationship.²⁰ Lastly, Part IV will propose a new test that can best encompass the many different types of employment arrangements in California.²¹

I. BACKGROUND

A. *Misclassification of Employees as Independent Contractors*

The misclassification of employees is a serious and widespread issue not only in California, but also across the nation.²² It is important to understand why employers would rather have independent contractors rather than employees. Employers typically use independent contractors to reduce their overhead costs.²³ When dealing with independent contractors, employers do not have to follow some of the wage, hour, and working condition laws that normally protect regular employees.²⁴ Furthermore, independent contractors

17. *Dynamex Operations W., Inc. v. Superior Court*, 341 P.3d 438 (2015).

18. *See infra* Part I.

19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part IV.

22. U.S. Gov’t Accountability Office, GAO-09-717, *Employee Misclassification Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, at 12 (2009) (providing statistics regarding the number of employees who are misclassified as independent contractors and the financial effect of the misclassification).

23. Michael Carlin, *Discrimination Against Disabled Contractors Under the Rehabilitation Act*, 34 WHITTIER L. REV. 283, 285 (Spring 2013) (discussing the reasons why employers like hiring independent contractors).

24. *See* Buscaglia, *supra* note 3, at 112 (discussing the harm suffered by misclassification of employees).

are not protected by workers compensation, receive no benefits, and are not protected by anti-discrimination laws.²⁵

Employers may save by classifying their workers as independent contractors, but in doing so they harm the worker, the state, and the economy.²⁶ State governments are denied potential income tax revenues because employers do not withhold state and federal taxes from independent contractors.²⁷ Additionally, independent contractors are known to under-report income on their 1099 income tax forms.²⁸ Furthermore, employers are more willing to misclassify their workers to save on worker compensation premiums, which is typically based upon the number of actual employees the employer has.²⁹

Competitively, employers who misclassify their workers gain an economic advantage over other employers who properly classify their workers.³⁰ Employers who properly classify their workers pay for benefits, workers compensation insurance, and the costs of materials and equipment.³¹ Employers who do not have to bear these costs can undercut their competitors by providing cheaper services and/or goods.³² Thus, in order to remain competitive, an employer may feel compelled to cut corners and misclassify their workers.

Fault does not rest solely on employers however. Many workers wish to be independent contractors for specific non-employment benefits.³³ Less than one in ten independent contractor would prefer a more “regular” nine-to-five type of work arrangement.³⁴ One of the largest reasons why independent contractors choose to keep their status is to underreport their true earnings and avoid taxes.³⁵ To avoid

25. See Carlin, *supra* note 23, at 286 (discussing the lack of protections for misclassified employees.)

26. See Buscaglia, *supra* note 3, at 112 (discussing the personal and economic impact of employee misclassification).

27. See Buscaglia, *supra* note 3, at 112.

28. See Buscaglia, *supra* note 3, at 112.

29. See Buscaglia, *supra* note 3, at 116.

30. See Buscaglia, *supra* note 3, at 116.

31. See Buscaglia, *supra* note 3, at 116.

32. See Buscaglia, *supra* note 3, at 116 (discussing the advantages received by employers who misclassify their workers).

33. Bureau of Labor Statistics, *supra* note 1, at 4.

34. Bureau of Labor Statistics, *supra* note 1, at 4.

35. U.S. Gov't Accountability Office, GAO-09-717, Employee Misclassification Improved Coordination, Outreach, and Targeting Could Better Ensure Detection

these types of issues, California, other states, and the federal government have designed many laws, which often conflict with one another, to distinguish an employee from an independent contractor.³⁶

B. The Common Law Definition of Employee under Borello

Borello states California's interpretation of the common law test for distinguishing an employee from an independent contractor.³⁷ In *Borello*, the California Labor Commission penalized a Gilroy grower, S.G. Borello and Sons, for failure to secure workers' compensation coverage for their 50 migrant harvesters.³⁸

Under the California Workers' Compensation Act, all employers are required to provide workers' compensation coverage.³⁹ The Act only covers injuries suffered by an *employee*, which arises out of and in the course of an individual's employment.⁴⁰ Independent contractors are not protected by the Act because they are not considered employees.⁴¹ In *Borello*, the defendants argued that they were not required to have workers' compensation coverage because their harvesters were "share farmers."⁴² In their opinion, share farmers were independent contractors, not employees.⁴³ The defendants provided the plaintiffs share farmers with a plot of land that had already been prepared and cultivated.⁴⁴ The share farmers then harvested the crop on their assigned plot of land and the manner and tools they used to accomplish this task was left entirely to their discretion.⁴⁵

However, the *Borello* court ruled in favor of the share farmers, and concluded the most important factor in

and Prevention, at 10-11 (2009).

36. See Buscaglia, *supra* note 3, at Appendix (displaying all states and their statutes enforcing misclassification laws).

37. *Dynamex Operations W., Inc. v. Superior Court*, 230 Cal. App. 4th 718, 722.

38. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 401.

39. Cal. Lab. Code §§ 3600(a), 3700(b) (2014).

40. *Borello*, 769 P.2d at 403.

41. *Id.*

42. *Id.* at 400.

43. *Id.*

44. *Id.* at 401.

45. *Id.*

determining the difference between an employee and an independent contractor was whether the employer had the “right to control” the manner in which the work was completed.⁴⁶ The *Borello* court looked towards the California Labor Codes to help define “employee.” Under the Code, an employee was considered to be most persons “in the service of an employer under any appointment or contract of hire . . . express or implied, oral or written, whether lawfully or unlawfully employed . . .”⁴⁷ Additionally, the Codes defined an “independent contractor” as “any person who renders service for a specified recompense for a specified result, *under the control* of his principal as to the result of his work only and not as to the means by which such result is accomplished.”⁴⁸ Ultimately, the court sided with common law tradition and focused on the “control” aspect of the employment relationship.⁴⁹

In addition to the control test, the *Borello* court acknowledged that the test could not be dispositive in determining the employment relationship, even if it is the most important factor.⁵⁰ The court recognized that there were many types of work arrangements and that not all fit perfectly into the definitions of employee or independent contractor.⁵¹ The rigid application of the “control” test on its own was not very helpful in distinguishing these variable and borderline situations.⁵² Thus, the court endorsed several “‘secondary indicia’ of the nature of the service relationship.”⁵³

Of all the secondary indicia, the *Borello* court indicated that an employer’s ability to discharge workers at will and without cause strongly evidenced an employment relationship.⁵⁴ The court then provided eight additional factors

46. *Borello*, 769 P.2d at 404.

47. Cal. Lab. Code § 3351 (2014).

48. Cal. Lab. Code § 3353 (2014).

49. *Tieberg v. Unemployment Ins. Appeal Board*, 417 P.2d 975, 977 (1970) (discussing the level of control an employer had in an unemployment insurance hearing); *see also, e.g., Isenberg v. Cal. Emp’t Stabilization Com.*, 180 P.2d 11, 15 (1947) (same; drawing direct analogy to workers’ compensation law); *Perguica v. Indus. Acci. Com.*, 29 Cal.2d 857, 859–61 (1947) (discussing workers’ compensation).

50. *Borello*, 769 P.2d at 404.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

to consider from the Restatement Second of Agency and from the Fair Labor Standards Act:

. . . (2) whether the one performing services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the principal; (9) whether or not the parties believe they are creating an employer-employee relationship; (10) whether the classification of independent contractor is bona fide and not a subterfuge to avoid employee status; (11) the hiree's degree of investment other than personal service in his or her own business and whether the hiree holds himself or herself out to be in business with an independent business license; (12) whether the hiree has employees; (13) the hiree's opportunity for profit or loss depending on his or her managerial skill; and (14) whether the service rendered is an integral part of the alleged employer's business.⁵⁵

The court noted that similar to the control test, these factors should not be mechanically applied individually.⁵⁶ These factors and tests should be considered "intertwined" and the weight of each factor or combination of factors would depend upon the specific circumstances of each case.⁵⁷

After considering the many factors, the court held that the share farmers were employees because the defendants maintained "pervasive control" over the entire operation.⁵⁸ In particular, the court noted that the defendants chose the crops to be planted, obtained a buyer for the crops, cultivated the land throughout the growing cycle, and transported the final product to the market.⁵⁹ The court did acknowledge the defendant's arguments that the farmers had control over how they harvested the crop and had to provide their own tools for

55. *Id.* at 404, 407.

56. *Borello*, 769 P.2d at 351.

57. *Id.* at 404, 407.

58. *Id.* at 408.

59. *Id.*

the harvesting.⁶⁰ However, the court noted that the farmer's ability to control how they harvested the crop did not really matter because there was only one correct way for the farmers to do so.⁶¹ Additionally, the court felt that the level of manual labor exerted by the farmers was simple and did not require any particular level of expertise to accomplish it.⁶² Whereas independent contractors may have some level of expertise in a field, such as a plumber or an electrician, the court stated that the harvesting of crops was considered too simple and involved "no peculiar skill beyond that expected of any employee."⁶³

C. The Federal Definition of Employee

State courts could look to their federal counterparts for assistance in determining what constitutes an employee. The federal courts have been asked many times to construe the meaning of "employee" because the statutes that define it offer very little assistance in its interpretation.⁶⁴ The Fair Labor Standards Act of 1938 defines "employee" as one "employed" by an employer.⁶⁵ Additionally, the term "employer" means "any person acting directly or indirectly in the interest of an employer in relation to an employee . . ."⁶⁶ Furthermore, employ means to "suffer or permit to work."⁶⁷

To interpret the meaning of these words, the federal courts use the "economic realities" test.⁶⁸ The economic realities test looks to see whether the worker is truly dependent upon the business he or she is employed at.⁶⁹ If the employee is not dependent upon the employer, then the economic reality of the situation is that the worker is in the business solely for himself or herself.⁷⁰

60. *Id.* at 409

61. *Id.* at 408.

62. *Borello*, 769 P.2d at 408.

63. *Id.*

64. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992).

65. 29 U.S.C.S. § 203(e)(1) (2012).

66. 29 U.S.C.S. § 203(d) (2012).

67. 29 U.S.C.S. § 203(g) (2012).

68. 29 U.S.C.S. § 201 *et seq.*; *see Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961).

69. *See Goldberg*, 366 U.S. at 32–33 (analyzing the factors of the economic realities test to determine the employment relationship).

70. *Id.*

D. The California Industrial Wage Commission

The California Legislature created the Industrial Wage Commission (IWC) in 1913.⁷¹ The IWC was delegated the power to regulate hours, wages, and conditions of labor and employment “in the various occupations, trades, and industries” in which women and minors are employed in California.⁷² The legislature bestowed the IWC with broad investigatory powers to accomplish that task.⁷³ The IWC was given free access to businesses and work environments, the authority to demand sworn reports and information, the ability to inspect records, and the ability to issue subpoenas requiring the appearance and testimony of witnesses under oath.⁷⁴ If the IWC determined that women and minors in any industry were paid inadequate wages, forced to work unhealthy amounts of hours, or subject to harmful working conditions, the IWC was allowed to convene a “wage board” of employers and employees.⁷⁵ After a meeting of this wage board and supplemental public hearing, the IWC would issue wage orders fixing industry wide minimum wage for women and minors, the maximum hours of work, and the industry standard for labor conditions.⁷⁶

Today, the IWC continues to have the same powers and duties it had over a century ago, but with additional bite.⁷⁷ First, the IWC now has “legislative, executive, and judicial powers.”⁷⁸ Second, the IWC’s jurisdiction now includes all male employees, not just women and minors.⁷⁹ California’s legislature expanded the IWC’s authority in response to the passage of the Civil Rights Act of 1964, which barred employment discrimination because of sex.⁸⁰ Third, the IWC’s

71. *Martinez v. Combs*, 49 Cal. 4th 35, 54 (2010).

72. Cal. Stats. 1913, ch. 324, § 3, subd.(a), p. 633.

73. Cal. Stats. 1913, ch. 324, § 3 subd.(b), pars. 1–2, p. 633.

74. Cal. Stats. 1913, ch. 324, § 3, subd.(b), par. 2, p. 633; Cal. Stats. 1913, ch. 324, § 4, pp. 633–34.

75. Cal. Stats. 1913, ch. 324, § 5, p. 634.

76. Cal. Stats. 1913, ch. 324, § 6, subd. (a), pars. 2–3, pp. 634–35.

77. *See, e.g.*, §§ 1173 (duties of the IWC); 1174–74.5 (IWC authority to obtain records and conduct inspections); 1176 (authority to subpoena witnesses); 1178–80 (authority to convene wage boards); 1181 (obligation to hold public hearings); 1182 (authority to issue wage orders).

78. Cal. Const., art. XIV, § 1.

79. *Martinez v. Combs*, 49 Cal. 4th 35, 55 (referencing Cal. Stats. 1973, ch. 1007, § 8, 2335; Cal. Stats. 1972, ch. 1122, § 13, 2293).

80. *Id.* (referencing Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §

responsibilities were expanded to be even broader.⁸¹ The IWC now had the “continuing duty” to assess wages, hours, and labor conditions of “*all employees in this state,*” not just specific industries where minimum wage laws had previously been problematic.⁸²

*1. The California Industrial Wage Commission’s
Wage Orders*

Presently, there are eighteen different wage orders in effect in California.⁸³ These wage orders include coverage of the following industries: manufacturing;⁸⁴ personal services;⁸⁵ canning, freezing and preserving;⁸⁶ professional, technical, clerical, mechanical, and similar occupations;⁸⁷ public housekeeping;⁸⁸ laundry, linen supply and dry cleaning and dyeing;⁸⁹ mercantile;⁹⁰ post harvest handling;⁹¹ transportation;⁹² amusement and recreation;⁹³ broadcasting;⁹⁴ motion picture;⁹⁵ preparation of agricultural products for the market;⁹⁶ agricultural occupations;⁹⁷ household occupations;⁹⁸ and on-site occupations.⁹⁹ One wage order covers “miscellaneous employees,” which includes “any industry or occupation” not previously covered by any other wage order.¹⁰⁰ A general wage order institutes a minimum wage.¹⁰¹ In each wage order, “employee” is defined as “any person employed by

2000e *et seq.*).

81. *Id.*

82. *Id.*

83. *Id.* at 57.

84. 8 C.C.R. § 11010 (2014).

85. 8 C.C.R. § 11020 (2014).

86. 8 C.C.R. § 11030 (2014).

87. 8 C.C.R. § 11040 (2014).

88. 8 C.C.R. § 11050 (2014).

89. 8 C.C.R. § 11060 (2014).

90. 8 C.C.R. § 11070 (2014).

91. 8 C.C.R. § 11080 (2014).

92. 8 C.C.R. § 11090 (2014).

93. 8 C.C.R. § 11100 (2014).

94. 8 C.C.R. § 11110 (2014).

95. 8 C.C.R. § 11120 (2014).

96. 8 C.C.R. § 11130 (2014).

97. 8 C.C.R. § 11140 (2014).

98. 8 C.C.R. § 11150 (2014).

99. 8 C.C.R. § 11160 (2014).

100. 8 C.C.R. § 11170 (2014).

101. 8 C.C.R. § 11000 (2014).

an employer.”¹⁰² Additionally, each wage order defines an “employer” as any person “who directly or indirectly . . . employs or exercises control over the wages, hours, or working conditions of any person.”¹⁰³ Furthermore, “employ” under the wages orders means to “engage, suffer, or permit to work.”¹⁰⁴

2. *Enforcement of the California Industrial Wage Commission’s Wage Orders*

To enforce the IWC’s wage orders, the California Legislature included criminal, civil, and administrative penalties to all employers who failed to meet the commission’s standards.¹⁰⁵ Any employer or individual acting as an officer, agent, or employee of another who violates any provision of the California Labor Code or any IWC wage order shall be guilty of a misdemeanor punishable by a fine of up to \$100 or by imprisonment for not less than 30 days, or both.¹⁰⁶ An employer who knowingly and willfully misclassify an individual as an independent contractor is subject to a civil penalty of not less than five thousand dollars and not more than fifteen thousand dollars for each violation.¹⁰⁷ Those engaged in a pattern of these violations will be subject to increased fines between ten thousand and twenty-five thousand dollars per violation.¹⁰⁸ Employers who fail to pay adequate wages may be subject to civil action for the recovery of unpaid wages, including waiting time penalties and liquidated damages.¹⁰⁹ Furthermore, the employer will be publicly shamed: they are required to display their violation and the actions they have taken to rectify them in a prominent place accessible and viewable by all employees and the general public.¹¹⁰

E. The Dynamex Decision

In *Dynamex*, plaintiffs brought a class action suit against

102. See, e.g., 8 C.C.R. § 11010(2)(E) (2014).

103. See, e.g., 8 C.C.R. § 11010(2)(F) (2014).

104. See, e.g., 8 C.C.R. § 11010(2)(D) (2014).

105. *Martinez v. Combs*, 49 Cal. 4th 35, 56.

106. Cal. Lab. Code § 1199 (2014).

107. Cal. Lab. Code § 226.8(b) (2014).

108. Cal. Lab. Code § 226.8(c) (2014).

109. See e.g., Cal. Lab. Code § 1193.6 (2014); Cal. Lab. Code § 1194 (2014); Cal. Lab. Code § 1194.2 (2014) (setting penalties for misclassifying employees).

110. Cal. Lab. Code § 226.8(e) (2014).

Dynamex on behalf of 1,800 delivery drivers.¹¹¹ The plaintiffs in *Dynamex* had all been re-classified as independent contractors.¹¹² Prior to the reclassification, they were all employees subject to California wage and hour laws.¹¹³ The trial court certified the class of drivers, but Dynamex moved to decertify the class.¹¹⁴ Dynamex argued that the trial court incorrectly used the IWC definition of employee.¹¹⁵ If the court had instead used the *Borello* common law test of distinguishing employees from independent contractors, the class would have been decertified.¹¹⁶ The Second Appellate District held in favor of the plaintiffs,¹¹⁷ relying upon two prior California Supreme Court cases to reach its conclusion: *Martinez v. Combs* and *Ayala v. Antelope Valley Newspapers, Inc.*¹¹⁸

1. *Martinez v. Combs*

In *Martinez*, seasonal agricultural workers brought an action against a strawberry farming company and two produce merchants who the farming company sold their product to for failure to pay minimum wages under California Labor Code Section 1194.¹¹⁹ Section 1194 was enacted in 1913 along with the creation of the California Industrial Welfare Commission.¹²⁰ The workers of this case had been working without pay because the farming company had encountered financial problems.¹²¹ They eventually stopped working.¹²² A representative from one of the produce merchants came to the fields to assist the farming company in convincing the workers to return to work.¹²³ Most did not return to work, and the workers eventually filed a suit for unpaid wages.¹²⁴ The

111. *Dynamex Operations W., Inc. v. Superior Court*, 230 Cal. App. 4th 718, 721.

112. *Id.*

113. *Id.*

114. *Id.* at 721–22.

115. *Id.* at 722.

116. *Id.*

117. *Dynamex*, Cal. App. 4th at 722.

118. *Id.*

119. *Martinez v. Combs*, 49 Cal. 4th 35, 42.

120. Cal. Stats. 1913, ch. 324, § 13, p. 637 (1913 uncodified Cal. act creating the IWC).

121. *Martinez*, 49 Cal. 4th at 46–48.

122. *Id.* at 46.

123. *Id.* at 47.

124. *Id.* at 47–48.

produce merchants filed for summary judgment, arguing that they did not directly employ the workers and should not be held liable.¹²⁵ The agricultural workers argued that the produce merchants and the farming company jointly employed them under the definitions of “employ” and “employer” in Industrial Wage Order Number 14.¹²⁶ The case eventually ended up in the California Supreme Court, who unanimously concluded that the merchant-defendants did not employ the plaintiffs.¹²⁷

The *Martinez* court stated that the definition of “employ” under the IWC wage orders does not require a “master and servant relationship.”¹²⁸ Instead, the IWC uses the phrase “engage, suffer, or permit to work.”¹²⁹ This was a widely used standard at the time, and would reach irregular working arrangements an employer might create in order to avoid labeling a worker as an employee.¹³⁰ The court then took the common law “right to control” test and included it as an *alternative* to the IWC wage order definition.¹³¹ The court then finally concluded that the IWC’s definition of “employ” could mean one of three mutually exclusive definitions.¹³² First, employ could mean “to exercise control over the wages, hours, or working conditions.”¹³³ Second, employ could mean to “suffer or permit to work.”¹³⁴ This meant that an employer knew or should have known that an individual was working for them.¹³⁵ Finally, employ could also mean to “engage, thereby creating a common law employment relationship.”¹³⁶ The court recognized the importance of the “IWC control” test over the wages, hours, or working conditions, but felt that the sole application of the test without more would “substantially impair the commission’s authority” and render the wage order definitions meaningless.¹³⁷

125. *Id.* at 48.

126. *Id.*

127. *See Martinez*, 49 Cal. 4th at 78.

128. *Id.* at 57–58.

129. *See e.g.*, 8 C.C.R. §§ 11010, 11020.

130. *Martinez*, 49 Cal. 4th at 58.

131. *Id.* at 64.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 585 (2000).

136. *Martinez*, 49 Cal. 4th at 64.

137. *Id.* at 65.

The court applied this three-alternative-test and focused on whether the merchants had any “control” over the workers’ wages, hours, or working conditions.¹³⁸ The court concluded that the merchants did not employ the workers through the farming company, because the company was not employed by the merchants to harvest strawberries.¹³⁹ The farming company held itself out as a seller of strawberries, not as a management company that supervised farm workers.¹⁴⁰ Therefore, the merchants did not “employ” anyone because there was no level of supervision or control over the company or the workers.¹⁴¹

2. *Brinker Restaurant Corp. v. Superior Court*

Following *Martinez*, *Brinker* reinforced the IWC’s broad authority to regulate wages, hours, and working conditions.¹⁴² The *Brinker* court also stated that wage and hour claims were governed by “two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature” and the wage orders issued by the IWC.¹⁴³ The court further emphasized the importance of the wage orders, stating that they were to be entitled to “extraordinary deference” and had to be “accorded the same dignity as statutes,” with “‘independent effect’ separate and apart from any statutory enactments.”¹⁴⁴ If a wage order and a labor code were to overlap with one another, the two must be “harmonized” to provide greater protections to workers.¹⁴⁵

3. *Ayala v. Antelope Valley Newspapers, Inc.*

In *Ayala*, a group of newspaper circulation carriers sued the Antelope Valley Press for misclassifying them as independent contractors and other wage order violations, including IWC wage order number 1-2001.¹⁴⁶ The *Ayala* court encountered the same type of issue that occurred in *Dynamex*,

138. *See id.* at 71–77 (analyzing the facts of the case under the three-alternative-test).

139. *Id.*

140. *Id.* at 73.

141. *Id.* at 76.

142. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1026 (2012).

143. *Id.*

144. *Id.* at 1027 (quoting *Martinez v. Combs*, 49 Cal. 4th 35, 61, 68).

145. *Id.* at 1027.

146. *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014).

i.e., whether a group of plaintiffs could proceed as a putative class because they were all employees misclassified as independent contractors.¹⁴⁷ The plaintiffs could only proceed as a putative class if they were considered employees.¹⁴⁸ The plaintiffs argued that they were employees under the common law “right to control” test in *Borello*.¹⁴⁹

Here, the *Ayala* court had the opportunity to apply either the *Borello* test or the IWC wage order test to determine if the carriers were employees or independent contractors.¹⁵⁰ The court chose not to analyze which test would govern, and left that question for “another day.”¹⁵¹ Instead the court chose to use the common law because the plaintiffs proceeded solely on the basis of the *Borello* test.¹⁵²

II. IDENTIFICATION OF LEGAL PROBLEM

After *Martinez*, two separate tests exist to determine whether an individual is an employee or an independent contractor.¹⁵³ The California Supreme Court has declined to state which test should be used to determine employee status.¹⁵⁴ Is it the traditional common law *Borello* test that looks at whether an employer exercises control over the manner and means of accomplishing the result desired?¹⁵⁵ Or is it the *Martinez*/IWC test which looks at three alternatives: (1) to exercise control over the wages, hours or working conditions; (2) to suffer or permit to work; or (3) to engage, thereby creating a common law employment relationship?

III. ANALYSIS

The *Borello* and *Martinez*/IWC tests have similar characteristics. Importantly, the two different tests contain a “control” portion. These two “control” tests could mistakenly be confused to be the same test. The reality is that they are in fact, two separate tests. To clarify, the *Borello* test looks at

147. *Id.* at 529.

148. *Id.* at 530.

149. *Id.* at 531.

150. *Id.* at 530–31.

151. *Id.* at 531.

152. *Ayala*, 59 Cal. 4th at 531.

153. *See supra* Parts I.B, I.E.1.

154. *Ayala*, 59 Cal. 4th at 531.

155. *See supra* Part I.B.

how work is to be done in order to reach the end goal. For example, a plumber who is an independent contractor of a plumbing services company can set his or her own hours and make the necessary repairs and modifications to a client's plumbing network as the plumber sees fit. This plumber has control over the way he or she completes the job without following an employer's direction. A plumber who is an employee of a plumbing services company may have to work specific hours and follow specific protocols and procedures when repairing a leak or fixing a clog.

The *Martinez*/IWC's control test analyzes whether an employer controls the way a worker is paid, the hours worked, and the conditions of the work environment. If an employer has significant or total control over these aspects of the work relationship, then the workers will be deemed to be an employee of the employer. Thus, the same plumber used above would be an employee if the plumbing services company posed as an intermediary for payment but gives the plumber full autonomy over the rest of his job.

Furthermore, the *Martinez*/IWC version of the "control" test does not require the plaintiff to demonstrate additional "secondary factors" of employment such as the *Borello* test. When applying the test, the *Martinez* court looked only at whether there was control over the wages, hours, or working conditions.¹⁵⁶ The secondary factors played no role in determining whether the farming company was the employer of the harvesters.¹⁵⁷

The court contributes to the confusion between the two tests by not affirmatively stating which test is appropriate in determining the employment relationship.¹⁵⁸ The *Martinez* court focused entirely on the wage order definitions and swiftly dismissed the *Borello* test when the plaintiffs raised an argument involving it.¹⁵⁹ The court treats the two tests as if they were completely independent of one another.¹⁶⁰

Additionally, in both *Martinez* and *Brinker*, the court emphasizes the importance of the IWC wage orders and how

156. *Martinez*, 49 Cal. 4th at 71–77.

157. *Id.*

158. *Ayala*, 59 Cal. 4th at 531.

159. *Martinez*, 49 Cal. 4th at 73.

160. *Id.*

much deference should be given to them.¹⁶¹ However, the courts do not state that the *Borello* test should no longer be considered in determining the employment relationship.¹⁶² Furthermore, in *Ayala*, the court further adds to the confusion by acknowledging the two tests were separate from one another, yet refused to make a determination as to which one governs.¹⁶³ These cases have caused confusion amongst the legal community.¹⁶⁴

Based off of the *Ayala* decision, the court appears to indicate that *either* test may be used to determine the employment relationship if both tests are applicable. When an IWC wage order could apply to the type of work at issue, the wage orders apply. If a wage order does not apply, then the common law *Borello* test would be applicable.

The IWC wage orders and its statutory authority however, are applicable to all types of work.¹⁶⁵ The seventeenth IWC wage order stated, “any industry or occupation not previously covered by, and *all* employees not specifically exempted . . . are covered by this order.”¹⁶⁶ By using “all employees,” the wage order effectively brings every employee in the state of California under IWC jurisdiction.

Therefore, the choice between the two tests is essentially a toss up. Under the holding of *Ayala*, the courts will generally use the test that plaintiffs proceed under.¹⁶⁷ This however, leaves defendants at the mercy of the plaintiffs. The plaintiffs will pick and choose the test most beneficial to their case in hopes of securing a positive verdict. This would create an unfair advantage for plaintiffs and would jeopardize the

161. *Id.* at 61; *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1027.

162. *See Ayala*, 59 Cal. 4th at 530.

163. *See Ayala*, 59 Cal. 4th at 531.

164. *See* Sue J. Stott & Jill L. Ripke, Perkins Coie, *Wage Order—Not Borello—Applies in Independent Contractor Status Test Says California Court of Appeal*, PERKINS COIE (Jan. 8, 2015), <http://www.perkinscoie.com/en/news-insights/wage-order-not-borello-applies-in-independent-contractor-status.html>; Brian D. Lauter, *4 Years Later, Martinez v. Combs Still Confusing*, L. 360, (Nov. 6, 2014), <http://www.law360.com/articles/593266/4-years-later-martinez-v-combs-still-confusing>.

165. *See* 8 C.C.R. § 11170(1)(A) (2014) (stating that all other unmentioned occupations fall under IWC jurisdiction).

166. *Id.*

167. *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 531 (adjudicating under *Borello* test because plaintiffs proceeded solely on that basis).

integrity of the judicial system.

To solve this issue, it is important to analyze each aspect of the tests and see which test would most reasonably encompass the needs of the general public.

A. *The Borello Test*

Borello's "right to control" test has been the common law rule in defining the employment relationship.¹⁶⁸ However, the *Borello* test itself is not as broad in covering many different types of potential employment arrangements such as the *Martinez/IWC* test. The test however, best addresses the issue of whether an individual is an employee or an *independent contractor*.

"Employee" has been difficult for all courts and legislatures to properly define.¹⁶⁹ A better approach would be to properly define what is *not considered* an employee, which in this case is an independent contractor. The key word in the phrase "independent contractor" is "independent." Black's Law Dictionary defines "independent" as "[n]ot subject to the control or influence of another."¹⁷⁰ An alternative definition is "[n]ot dependent or continent on something else."¹⁷¹ The California codes also support this definition of independent.¹⁷² Thus, if an individual works for another person but is subject to the *control or influence* of that person, that person is not an independent contractor and is therefore an employee. The *Borello* test searches for this exact difference between the two classifications.¹⁷³

To safe guard against the abuse of this test, *Borello* inserted several secondary factors that could also find an employment relationship.¹⁷⁴ At first blush, the list of factors is daunting.¹⁷⁵ It could also be considered burdensome to go through one test followed by fourteen different factors in support of it. However, these intertwining factors used together in unison allow courts to extend the reach of the

168. *Id.* at 530–31.

169. *See, e.g., supra* Parts I.B; *supra* I.C; *supra* I.E.

170. *Black's Law Dictionary* (9th ed. 2009).

171. *Id.*

172. *See Buscaglia, supra* note 3, at 116.

173. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 400.

174. *Borello*, 48 Cal. 3d at 350–51.

175. *See Buscaglia, supra* note 3, at Appendix.

Borello test or restrict it if an overwhelming amount of factors go against the “right to control.” The test can reach the audiences it was designed to reach while still remaining reasonable. The *Borello* test is still relevant and applicable despite the rulings in *Martinez* and *Ayala*.

B. The Martinez/IWC test

The *Martinez/IWC* test is a very broad and sweeping test. The test itself comprises of three “sub-tests” to define the employment relationship.¹⁷⁶ Each one can define employee in its own mutually exclusive, though somewhat overlapping way.¹⁷⁷ Generally, this broad sweeping test will swing in favor of workers in the general public because the test does not require the simultaneous satisfaction of all three tests. Because the test itself is comprised of three mutually exclusive sub-tests, it is important to look at each sub-test individually.

1. Control Test

As stated above, the control portion of the *Martinez/IWC* test might appear to be the same as the *Borello* “right to control” test.¹⁷⁸ However, this control test looks more at how the employer is conducting their business with respect to the treatment and well-being of the person, the employee.¹⁷⁹ The *Borello* test on the other hand looks more at the details of how the work is completed.¹⁸⁰

The *Martinez/IWC* control test looks to see if an individual has control over the wages, hours, or working conditions.¹⁸¹ This could potentially reach employment arrangements that are designed by crafty employers to avoid the *Borello* test. For example, if an employer pays a worker for any reason, they have satisfied the control test.¹⁸² If they set an employee’s hours of work, they have also satisfied the test.¹⁸³ If they in any way have control over the employee’s working conditions

176. See *Martinez v. Combs*, 49 Cal. 4th 35, 64.

177. See *id.*; *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 585.

178. See *supra* Part III.

179. See *Martinez*, 49 Cal. 4th at 64 (defining “employ” in consideration of the protections needed by the “vast majority” of the state’s workforce).

180. See *Borello*, 769 P.2d at 400.

181. See *Martinez*, 49 Cal. 4th at 64.

182. See *id.* at 74 (stating that a promise to pay an individual is an offer for employment).

183. See *id.* at 48.

they have met the requirements of this test.¹⁸⁴

The result of this test however, could almost effectively eliminate the independent contractor from the state of California. The control portion of the *Martinez/IWC* test contains mutually exclusive factors.¹⁸⁵ The test requires control over the “wages, hours, OR working conditions,” not the “wages, hours, *and* working conditions.”¹⁸⁶ This can create employment relationships in areas where independent contractors typically do business. For example, a hairstylist performs services for customers in the privacy of their own home. The hairstylist may set certain fees for specific tasks such as hair coloring or a perm, but is open to bargaining over the price. The customer, a frugal and silver-tongued individual, talks the stylist into accepting an hourly amount for the service they are about to receive. Has the hairstylist and the customer unwittingly established an employer/employee relationship? Money has been exchanged as a result of the service transaction, and the customer did have some level of control over the “wage” paid to the hairstylist. The promise of a type of payment for work is considered by the California Supreme Court to be an offer of employment.¹⁸⁷ Typically, this would not be seen as an employee/employer relationship; however, the literal wording of the *Martinez/IWC* test instills doubt into this consideration.

This type of exchange should not be seen as an employer/employee relationship. Common sense should dictate over these types of situations. The customer has exhibited some of the factors of the *Martinez/IWC* control test, but such a short timeframe of work does not constitute statutory “employment.” If it did the customer would be required to obtain workers compensation coverage, pay for unemployment insurance, pay for social security benefits, and more. The *Martinez/IWC* test broadly protects California workers, but should not have such far-reaching lengths. Judicial or legislative action is required to prevent misuse of this sub-test.

184. *See id.* at 48.

185. *See id.* at 64.

186. *See id.*

187. *Martinez*, 49 Cal. 4th at 74.

2. *To “suffer or permit to work”*

The phrase to “suffer or permit to work” is a second possible sub-test to satisfy in the *Martinez/IWC* framework. Similar to the control test, this phrase can be broad and encompass many types of potential employment relationships. Unfortunately, this sub-test appears to suffer from the same problems as the control sub-test of the *Martinez/IWC* framework.¹⁸⁸ The test is broad, but can be too broadly encompassing.

The phrase “suffer or permit to work” on its face appears to encompass any type of relationship where one party allows another party to engage in work for them. By this standard, almost any type of exchange or simple service could be seen as satisfying this condition. For example, if an elderly individual allows another person to assist them across the street, they have performed a simple service and the elderly individual *permitted* them to do so. Nowhere in the text of this sub-test indicates a requirement of payment is necessary to satisfy it.¹⁸⁹ This interpretation of the “suffer or permit to work” subtest could create many unwitting employment relationships. This could especially be a problem for those who take on volunteers or un-paid interns. An employer could permit an interns or volunteers to work for them for no compensation and unknowingly open the door to potential liability. There is no statutory limitation to this test and without any form of correction its reach is far too broad.

3. *To “engage, thereby creating a common law employment relationship”*

The last sub-test of the *Martinez/IWC* relationship also suffers from problems similar to the prior two sub-tests. This phrase in it of itself is unhelpful, similar to the American Disability Act’s dead-end definition of “employer.”¹⁹⁰ The first phrase “to engage” could be broadly interpreted similar to “suffer or permit to work” and the control test.¹⁹¹ Black’s Law Dictionary defines employ as “to employ or involve oneself; to

188. See *supra* Part III.B.1.

189. See *Martinez*, 49 Cal. 4th at 64.

190. See 42 U.S.C.S. § 12111 (2008) (defining “employee” as “individual employed by an employer.”)

191. See *supra* Part III.B.2.

take part in; to embark on.”¹⁹² Based on this definition, the employment relationship appears to be created by the actions of the *worker*, not the employer. This could cause issues where individuals attempt to force their services upon another. For example, if an individual on the street approaches a vehicle stopped at a signal and begins cleaning the windows, the window cleaner may have forced an employment relationship upon the unwitting driver. This certainly could not be what the IWC intended when it issued its wage orders or what the legislature or the public intended when they gave the IWC authority to promulgate such rules.

Ideally, the second phrase of this sub-test, “creating a *common law* employment relationship,” could be interpreted as a link back to the previous common law test, *Borello*, to determine the employment relationship. *Martinez* however, treated the two tests as exclusive of one another.¹⁹³ Therefore, the test itself is circular, as it appears to reference the common law test of employment when the *Martinez* case itself appears to be the new common law standard of defining employment. This third sub-test of the *Martinez*/IWC test therefore spawns more questions, and gives little answers.

IV. PROPOSAL

A. *Both Borello and Martinez/IWC Tests Should be Combined Together to Form the “Dominant Control Test”*

Both the *Borello* and *Martinez*/IWC tests reach a broad range of potential employment relationships.¹⁹⁴ Each test however, has its strengths and weaknesses.¹⁹⁵ *Borello* could be seen as narrower for giving so much weight to the “right to control” factor, but is supplemented by several additional intertwining factors for consideration.¹⁹⁶ The *Martinez*/IWC test reaches broadly, but could create employer/employee relationships where none had previously existed.¹⁹⁷

If combined together, the two tests would amalgamate to

192. *Black’s Law Dictionary* (9th ed. 2009).

193. *See Martinez*, 49 Cal. 4th at 47.

194. *See supra* Part III.

195. *See supra* Parts III.A, III.B.

196. *See supra* Part III.A.

197. *See supra* Part III.B.

a test best suited for protecting the public without over including certain service arrangements. The test is fairly exhaustive because it uses all the positive factors of each test and combines them together.

The test begins with *Borello's* right to control test would still be used as the highest weighted factor in determining the employment relationship. It looks at the current situation of the employment agreement to determine if the employer has the right to control the employee's work output. Should this factor fail to find an employment relationship, the next step will be to use the *Martinez/IWC* tests to examine the work arrangement.

The three sub-tests of *Martinez/IWC* are different from their predecessor because each sub-test will not be mutually exclusive of one another. Now, this portion of the "dominant control" test requires only two of the three *Martinez/IWC* sub-tests to be satisfied. Thus, if an employer exercised control over the wages, hours, or working conditions of an employee *and* the employee has engaged in work with the employer, this portion of the "dominant control" test has been satisfied.

Finally, the fourteen factors of the *Borello* test will be examined together to further conclude whether an employee/employer relationship exists. This relationship does not exist where the fourteen factors, under the totality of the circumstances, overwhelmingly push the scales in favor of no employee/employer relationship.

This test of course has its downsides. On its face, the original *Borello* test and its fourteen factors appeared to be a long and time-consuming process. Judicial time and resources would be taxed even more by using the "predominate control test." Attorney's fees for litigation and appeals would also increase, providing a burden on both plaintiffs and defendants. Furthermore, a great number of lower income plaintiffs would be hard pressed and to enter into an already expensive process of litigation if their attorneys had to engage in such a time consuming test. This would go against the purpose of the test, which is to protect the very people who would be most susceptible to misclassification.

*B. The California Legislature/Industrial Wage
Committee Should Affirmatively Define "Employ"*

Alternatively, the California legislature or the Industrial

Wage committee should act quickly and decisively define what constitutes the employment relationship. The merits of either the *Borello* common law test or the *Martinez/IWC* common law test of employment could be made into a statute. This would quickly and affirmatively help the courts and the legal communities decide which test is best used to determine the employment relationship.

The downfall of this second proposal is the inability to change any potential additions without amendments to the law. This would take additional legislative and/or executive branch resources to remedy. It could also add further confusion if the present day tests are unable to account for new types of employment agreements in the future that are possible because of new technologies.¹⁹⁸

CONCLUSION

It is clear that the misclassification of employees hurts workers, state and federal governments, and other competing businesses.¹⁹⁹ To prevent misclassification, the judiciary needs to decide the most appropriate test for defining the employer/employee relationship. The recent decision in *Dynamex* has created confusion amongst the California legal community as to which of the *Borello* or *Martinez/IWC* tests are appropriate for determining what is an “employee.”²⁰⁰ Both tests have their strengths and weaknesses yet neither has been specifically endorsed by the California Supreme Court.²⁰¹ After looking closely at both tests, a new and extremely detailed test should be employed to protect the public yet uphold the freedom of being an independent contractor.²⁰² The “dominant control” test incorporates the benefits of both the *Borello* and *Martinez/IWC* tests at the cost of consuming more time to conduct thoughtful analysis of each factor.²⁰³ Regardless of the costs, the “dominant purpose test” should be employed by California

198. See e.g., *O'Connor v. Uber Technologies, Inc., et al.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (regarding the classification of Uber drivers as employees or independent contractors.)

199. See generally *Carre & Wilson*, *supra* note 2.

200. See *Dynamex Operations W., Inc. v. Superior Court*, 230 Cal. App. 4th 718.

201. See *Martinez*, 49 Cal. 4th at 64.

202. See *supra* Part IV.A.

203. See *supra* Part IV.A.

courts to prevent further harm to the state's people, businesses, and economy.