Impact of Changing Laws on Independent Contractor Status in the Veterinary Field

By **Steve Marmaduke, Esq.**

Recently, the issue of whether a worker is classified as an employee or an independent contractor has received considerable scrutiny. On April 30, 2018, the California Supreme Court issued its opinion in Dynamex Operations West, Inc. v. Superior Court (Dynamex), when it adopted new standards for determining whether a worker in California should be classified as an employee or an independent contractor for the purposes of wage orders adopted by California's Industrial Welfare Commission. Assembly Bill 5 (AB 5), a new California law effective January 1, 2020, expands the application of the Dynamex decision significantly, and will make it more difficult for California workers to qualify as independent contractors. This judicial and legislative scrutiny emphasizes how important it is to correctly classify workers as employees or independent contractors, particularly as employees are entitled to numerous rights that do not apply to independent contractors. The failure to properly classify an employee can leave an employer vulnerable to liability for payment of overtime, breaks, benefits, and paid sick days among other claims.

What is the impact of Dynamex and AB 5 on veterinarians?

As will be discussed later, the Dynamex verdict and AB 5 did not change the classification process applicable to veterinary practices. Nonetheless, there may be practical implications. At the least, an understanding of the classification process may be valuable to veterinarians as employers and employees.

To fully understand the effect of Dynamex and AB 5 on veterinary practices, some background may be helpful.

For the last 20 years, the predominant test for the determination of independent contractor status was the test set forth by the California Supreme Court in its opinion in Borello & Sons v. Department of Industrial Relations (Borello test). The Borello test made no presumption of employee or independent contractor status, but instead relied on 10 factors to determine whether a service provider was an independent contractor or an employee. Although none of the 10 factors were determinative on their own, the focus of the factors was the amount of control that the business had over the worker. If the business had control, the worker was likely to be classified as an employee. If the worker was independent of the business's control, the balance could favor independent contractor status.

In Dynamex, the Supreme Court abandoned the Borello test for the determination of a worker's right to wage and hour law protections and adopted what is referred as the "ABC test." Unlike the Borello test, the ABC test presumes the worker is an employee unless the business can demonstrate that: (A) The hiring entity does not control or direct the performance of work; (B) the person performs work outside the usual course of the hiring entity's business; and (C) the person is customarily engaged in an independently established trade, occupation, or business. It is the "B" portion of the

ABC test that is problematic for many professional employers, including veterinarians. The bottom line is that if a worker is providing services within the usual course of a veterinary practice, such as an associate, relief veterinarian, RVT, or a groomer, that worker will be classified as an employee.

The intended purpose of AB 5 was to codify and expand on the California Supreme Court's ruling in Dynamex and expand the application of the ABC test. Although AB 5 does not provide complete clarity, it will have several significant impacts. Primarily, it codifies the ABC test and the presumption that a worker is an employee. It also expands the scope of the ABC test beyond the traditional wage and hour laws. As a result, more workers will be considered employees rather than independent contractors.

AB 5 contains a number of exceptions to the application of the ABC test. For example, there are exceptions for professional services, specific occupations, business-to-business contracts, referral agencies, and the construction industry. These exceptions should not be misconstrued to imply that workers within these exceptions are independent contractors. Instead, the exception means that the Borello test, not the ABC test, will be used to classify the workers as independent contractors or employees.

Also within the exceptions from the application of the ABC test are specific occupations licensed by the State of California. These occupations include architects, engineers, doctors, dentists, lawyers, AND veterinarians, among other licensees.

Does the exception for veterinarians contained in AB 5 mean that veterinarians do not need to worry about classification issues?

Again, AB 5 and Dynamex do not change the classification test applicable to veterinarians. Simply, as of January 1, 2020, the Borello test, which had been applied prior to Dynamex, shall again continue to be applied. As a practical matter, however, the focus on the classification issue generated by Dynamex and AB 5 may have a great impact on veterinary practices.

For many years, I have received inquiries from veterinarians and others concerning classification issues. Many of the issues I have considered in the veterinary field would result in a determination of employee status under the Borello test or the ABC test. Broadly speaking, most associate and relief veterinarians should be classified as employees under the Borello test. The attention to classification issues generated by Dynamex and AB 5 may spur independent contractors to consider whether they may have been misclassified and be entitled to certain rights such as overtime, benefits, lunch breaks, etc., that they did not previously know they had. Further, federal and state agencies may look back to determine if employers correctly withheld taxes, disability, and other payments, and paid for workers' compensation benefits.

The bottom line is that it is important that veterinarians who utilize independent contractors, revisit the classification process to determine whether the classification is correct. If not, changes should be made to minimize the future liability of employers and to comply with California law. Those who have been misclassified as independent contractors may wish to consider what rights they have as employees. The next few years may bring clarification regarding the classification of independent contractors and employees as the courts and the legislature consider the issues further. If the trend continues, it is likely that employee rights will be expanded and it will become increasingly difficult (and risky) to classify workers as independent contractors. ■

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