RIDT

ANO I / 2021 / Nº 1

REVISTA INTERNACIONAL DE DIREITO DO TRABALHO

IDT
Instituto de Direito do Trabalho
Faculdade de Direito da Universidade de Lisboa

CENTRO DE INVESTIGAÇÃO DE DIREITO PRIVADO

IDT

Instituto de Direito do Trabalho
Faculdade de Direito da Universidade de Lisboa

CENTRO DE INVESTIGAÇÃO DE DIREITO PRIVADO

FICHA TÉCNICA / *TECHNICAL FILE*

Diretores
Pedro Romano Martinez
Luís Gonçalves da Silva

Subdiretora
Cláudia Madaleno

Secretária-Geral
Sara Leitão

Secretária-Geral Adjunta
Maria Leonor Ruivo

Propriedade
Instituto de Direito do Trabalho da FDUL

Morada IDT / Sede
Faculdade de Direito de Lisboa,
Alameda da Universidade,
Cidade Universitária,
1649-014 Lisboa

Periodicidade
Semestral

Nº Registo ERC
127529

Conceção Gráfica e Paginação
Equador Design - Traçando o
Inimaginável, Lda.

Directors
Pedro Romano Martinez
Luís Gonçalves da Silva

Assistant Director
Cláudia Madaleno

Secretary-General
Sara Leitão

Deputy Secretary-General
Maria Leonor Ruivo

Ownership
Instituto de Direito do Trabalho da FDUL

Address IDT / Head Office
Faculdade de Direito de Lisboa,
Alameda da Universidade,
Cidade Universitária,
1649-014 Lisboa

Periodicity
Semiannual

ERC Registration No.
127529

Graphic Design and Pagination
Equador Design - Traçando o
Inimaginável, Lda.

THE EMERGENCE OF A GIG ECONOMY: BRACE FOR (LEGAL) IMPACT – A REVIEW OF THE CASE DYNAMEX INC. V. CHARLES LEE

Catarina Granadeiro[1]

"Law cannot organize labor and industry without organizing injustice" – Frédéric Bastiat[2]

Summary: Abstract/Resumo - I. The legal quests caused by the emerging 'Gig Economy' - II. *Dynamex Inc. v. Charles Lee* - a) Background - b) Case Law regarding Classification of Workers - c) The legacy of the Dynamex case - d) The AB5 enactment - III. Impact of Dynamex and AB5 and Way Forward

Abstract:

This article analyzes the impact of the 'gig economy' in the legal framework of workers.

The emergence of a 'gig economy' triggered a debate regarding the lack of protection of the workers of nonstandard forms of employment it made possible – either through crowdwork or work allocated based on location apps.

The core issue at the forefront of this debate is the dichotomy between employees and independent workers and the desirable level of protection afforded to each.

In the United States, case law in California paved the way for a fair dichotomy between employees and independent workers by endorsing a flexible '*ABC test'* in *Dynamex Inc. v. Charles Lee*, a case decided in 2018.

---

[1] Assistant lecturer at Faculdade de Direito of Universidade de Lisboa. The author would like to thank Professor Guilherme Dray for helping with the choice of this topic and Professors Pedro Romano Martinez and Luís Gonçalves da Silva for the invitation to write in the first issue of this prestigious Digital Magazine.

[2] French Economist that lead the tantamount discussions on socialism and workforce prior to the revolution of 1848.

The ABC test was affirmed by the state legislator through the enactment of bill AB5 in January 2020.

This article provides an overview of the onset precedents which preceded the Dynamex Litigation as well as a thorough discussion of the latter. It concludes with a reference to the measures encompassed in the AB5 bill as well as a comparative reference to the potential impacts of these advances on the treatment of this legal problem in the USA and globally.

Resumo:

Este artigo Analisa o impacto da '*gig economy*' (economia '*gig*') no enquadramento legal dos trabalhadores.

O surgimento da '*gig economy*' (economia '*gig*') suscitou o debate relativo à falta de proteção dos trabalhadores das formas de emprego atípicas criadas por este fenómeno – através do chamado trabalho coletivo (*crowdwork)* e do trabalho alocado por via de aplicações (*app based work*).

A questão principal neste debate diz respeito à dicotomia entre trabalhadores e trabalhadores independentes e o nível desejado de proteção para cada uma destas figuras.

Nos Estados Unidos, a jurisprudência do Estado da Califórnia traçou a destrinça entre trabalhadores e trabalhadores independentes adotando um teste flexível conhecido por '*teste ABC'* no caso *Dynamex Inc. v. Charles Lee* decidido em 2018.

Este teste teve consagração legislativa com a lei AB5 promulgada em janeiro de 2020.

Este artigo apresenta uma análise dos precedentes jurisprudenciais relevantes anteriores ao caso *Dynamex* e procede a uma análise crítica deste último. Conclui com uma referência necessária à legislação AB5 e aos impactos da mesma no tratamento deste problema jurídico nos Estados Unidos e seus potenciais impactos no mundo.

I. The legal quests caused by the emerging 'Gig Economy'

The Gig Economy refers to a new reality capable of reversing hard-won protections of workers' rights and of promoting the exploitation of workers by more powerful economic forces. To discuss the implications of this new phenomenon, one must first establish the concept and realities contemplated within it.

The emergence of the gig or platform economy is one of the most important recent transformations to the world of work. In essence, the term 'gig economy' broadly refers to new patterns of work made possible by the ubiquity of the Internet and smartphones[3].

An important component of the gig economy is the existence of digital labor platforms, a notion which includes both web-based platforms, where work is outsourced through an open call to a geographically dispersed crowd ("crowdwork"), as well as location based applications (apps) which allocate work to individuals in a specific geographical area, typically to perform local, service-oriented tasks such as driving, running errands or cleaning houses[4].

The prima facie problem created by these new forms of work is the dichotomy between an employee and an independent contractor.

The company is at the core of the employment relationship which defines the scope of liability of the employer, its direction powers as well as the perimeters of the subjugation or dependency of the employee. The worker would traditionally be involved in the production goals herself. On this edge, the individual would integrate the company under the terms of the work performed and hence considered as a subordinated employee.

In the specifics of work performed through technological platforms, the worker is removed from the organization and production of the company: is an outsider to the market strategies, unaware of the definition of prices, subject to algorithm controls,

[3] BALANAID NI BHRAONAIN, *Empowerment or Exploitation: Legal Responses to the Gig Economy*, 6 King's Student L.Rev 2 (2019).

[4] https://www.ilo.org/global/topics/non-standard-employment/crowd-work/lang--en/index.htm

sanctioning measures and merely holds its personal effort and personal work tools and, at times, required to wear a uniform or a badge for a certain company[5].

Agencies of temporary employment, outsourcing and digital platforms are some converging examples of this new paradigm that can create new risks to workers. In a context of high unemployment and a shortage of new jobs, the so-called digital platforms follow business models which aspire to maximum profit and minimum costs of massified labor relations. At the same time, awareness grows because the gains to the economy from the operation of this type of company seem to be insignificant[6].

Taking an example that is familiar to many, Uber's business model is based upon the use of an online platform to instantly connect customers seeking transportation services with nearby drivers. Passengers can book a trip with a private driver by downloading the App, logging on and requesting a ride. From the pool of registered drivers, Uber will then locate available drivers closest to the passengers and informs them of the request. The driver has 10 seconds to accept the trip before another driver is located[7].

Uber does not consider itself to be the employer of its drivers or the provider of the transportation service itself. Problems are bound

[5] CÉSAR AUGUSTO CARBALLO MENA, *Arquitectura de la subordinación. A propósito del trabajo mediante plataformas tecnológicas*, CIELO (Comuniad para la Investigación y el estúdio laboral y ocupacional) n.º 9, 2020: http://www.cielolaboral.com/wpcontent/uploads/2020/10/carballo_noticias_cielo_n9_2020.pdf

[6] In GUILHERME DRAY IN COLLABORATION WITH CATARINA GRANADEIRO, *An introduction to Portuguese Employment & Labor Law*, Almedina 2.nd Edition (2020), pp. 163.

[7] IRINA DOMURATH, *Platforms as contract partners: Uber and beyond*, Maastricht Journal of European and Comparative Law (published November 28, 2018): https://journals.sagepub.com/doi/full/10.1177/1023263X18806485

to arise when there is a possible discrepancy between the terms supplied by Uber and how it sees itself, on one hand, and its appearance on the market on the other. Generally, these drivers are classified as independent contractors rather than employees in a standard employment relationship[8]. It is important to bear in mind that Uber alone, In the United States, has nearly half a million drivers in its fleet[9].

Besides Uber, a myriad of other companies operates in the same manner through platforms which connect providers to users that are seeking a particular good or service. With regards to the metrics of this new labor market, it is estimated that almost 2 billion people worldwide are working in the informal sector spread amongst cases of work on call, zero hour contracts, self-employment, fake independent employment, volunteer work and work in collaborative/cooperative schemes and gig work, among other atypical contractual arrangements. Bearing in mind the kinds of realities that fall within the notion of gig economy, it is worth putting its rise into context. Indeed, the gig economy emerged from a perfect storm of several interrelated developments. Advances in digital technology, the widespread availability of hand-held devices and the ever-increasing high-speed connectivity have all coincided with several cycles of economic downturn, shifts in lifestyle and generational preferences. As is often the case, this blend of factors

[8] JEREMY PILAAR, *Assessing the Gig Economy in Comparative Perspective: How Platform Work challenges the French and the American Legal Orders*, 27 J.L. & Pol'y 47 (2018), pp. 52.

[9] ORLY LOBEL, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F.L. Rec. 51 (2017), p.51.

has also laid bare strong, polarized, bivalent reactions in public debates.

There are romanticized accounts of the rise of the platform economy – those that celebrate its rise emphasize the practical benefits that it has introduced into day-to-day life and its immense potential to subvert entrenched business interests and industries ruled by quasi-monopolies. The darker account, however, provides an alarming analysis of a rising uber-capitalist system that commoditizes every human interaction. Perhaps most concerning of all, critics warn against the subversion of laws protecting those most vulnerable[10].

Regardless of whether one tilts towards the benefits or downsides of the gig economy, the unavoidable observation is that the nature of work has transformed significantly over the past thirty years. Traditionally, people used to work their entire life in the same firm or corporation and be bound by the same employment contract. While full-time jobs were the norm in industrialized countries for much of the twentieth century, they have gradually been replaced by non-standard employment relationships that offer lower pay, less predictable hours, fewer benefits, and uncertain career prospects. The Taylorism model is now seemingly outdated – corporations are fast paced and prefer dynamic and less demanding relationships with their workers.

Some authors emphasize that the individual availability that characterized the industrial worker has been largely replaced by the technological devices and a more efficient plural and diffused

[10] *Id.* ORLY LOBEL, pp. 52-53.

availability – the number, location and time fringe of each worker will correspond to the service and connection demands of users. Hence, the potential refusal by some would correspond to the acceptance by others, triggered by the need to obtain a certain remuneration[11].

Globalization, technological evolution and public policies favoring more intense competition pushed companies to seek the flexibility to hire and fire on short notice, to increase or shrink the overall size of their workforce, to adjust pay to short-term performance results, to redeploy workers within the company or to external production partners as well as to retain workers with particular skills on an as-needed basis[12].

As a result, companies progressively turned to non-standard forms of employment, primarily part-time, temporary, contract, on-call, and independent work[13]. Though often cast as a new phenomenon, non-standard employment was the norm in Western countries for much of the nineteenth and early twentieth century. Yet, the non-standard forms of employment nowadays are idiosyncratic to the extent that they are mostly based on digital platforms that lack personal and professional safeguards. Social

[11] CÉSAR AUGUSTO CARBALLO MENA, *Arquitectura de la subordinación. A propósito del trabajo mediante plataformas tecnológicas*, CIELO (Comuniad para la Investigación y el estúdio laboral y ocupacional) n.º 9, 2020: http://www.cielolaboral.com/wpcontent/uploads/2020/10/carballo_noticias_cielo_n9_2020.pdf

[12] KATHERINE V.W.STONE, *In the Shadow of Globalization: Changing firm-level employment practices and shifting employment risks in the United States*, Res. Paper 07-13 UCLA School of Law &Econ. Res. Paper Series 12 (2007).

[13] JEREMY PILAAR, *Assessing the Gig Economy in Comparative Perspective: How Platform Work challenges the French and the American Legal Orders*, 27 J.L. & Pol'y 47 (2018), p.51.

insurance against the vagaries of old age, sickness and work accidents varies in generosity according to a person's contributions.

As such, whenever the need for labor arises, imagination works fast to create new types of non-permanent jobs and atypical employment contracts that suit such need.

These trends in the world of work pose legal challenges that demand legal solutions related to the precarious nature of these forms of work and the uncertainty it casts upon the application of labor laws. More specifically, these atypical contractual creations raise problems of unprotected stable wages, social safety nets or the benefits of education and lifelong training[14]. Hence, many scholars fear that the proliferation of this type of non-standard work forms will deepen already record levels of wealth inequality.

Non-standard forms of employment are defined by the International Labor Organization (hereinafter '**ILO**') as an umbrella term for different employment arrangements that deviate from standard employment. They include temporary employment, part-time and on-call work, temporary agency work and dependent self-employment. Non-standard employment features prominently in crowdwork and the gig economy[15].

These non-standard forms of employment refer to non-permanent jobs, structured on the basis of open-ended employment contracts that have a limited duration and contrast with permanent jobs, where duration is not limited.

---

[14] In GUILHERME DRAY IN COLLABORATION WITH CATARINA GRANADEIRO, *An introduction to Portuguese Employment & Labor Law*, Almedina 2. nd Edition (2020), p. 163.

[15] https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm

Notwithstanding the fact that the ILO has been studying digital labor platforms since 2015 with a view to understanding the implications of this new form of work, as have lawmakers in various jurisdictions, the fact remains that, from a legal perspective, the outcome of such studies is still not clear.

The increase in non-standard forms of employment in the past few decades has been driven by a variety of forces, including demographic shifts, labor market regulations, macroeconomic fluctuations, and technological changes. On one hand, such technological innovations have the potential to unilaterally redistribute power within the employment relationship in favor of large companies. On the other hand, non-standard forms of employment also accommodate market changes and allow more workers to get integrated into the labor market.

Both the benefits and disadvantages must be weighed and critically assessed by the legislature and the wider public as these non-standard forms of employment necessarily entail a significant challenge to long-standing legal regimes.

This paper will analyze the decision in *Dynamex Inc., vs. Charles Lee*, a recent case decided by the Supreme Court of California, home to many of the most prominent 'gig economy' companies, and the legislation that was enacted to integrate its teachings, the AB5. The rise of 'gig' work has forced the courts to examine how these novel types of work fit into the existing employment legislation and case-law. In this seminal case, the notion of 'independent workers' was deemed consonant with an employment relationship.

A relevant preliminary point to make at the outset of this discussion is that gig workers are far from homogeneous in their background, interests, and preferences. The diversity within their needs and work patterns suggests caution and flexibility. This was well achieved in the application of a broad 'ABC' test in the *Dynamex* Litigation, as will be explained in further detail below.

The tenets of this case on how to properly categorize workers of nonstandard forms of employment have propelled a necessary legal reordering with potential global implications hence the chosen title, the emergence of the gig economy: brace for legal impact.

II. *Dynamex Inc. v. Charles Lee*

a) Background:

Dynamex Inc., vs Charles Lee (hereinafter referred to as '***Dynamex***' or '***Dynamex* Litigation**') was a case decided by the Supreme Court of California on April 30, 2018.

To provide some factual basis to the decision one must first understand the activities of *Dynamex* which propelled this litigation. *Dynamex* is a nationwide courier and delivery service based in Dallas, Texas, which has conducted business in California since 1995. In December 2004 *Dynamex* converted all its drivers to independent contractors after management concluded that such a conversion would generate economic savings for the company.

To a European company involved in the same type of business, this conversion would be a farfetched and lengthy process given the

dismissal restrictions in place in most European countries. In the United States, however, there are virtually no general legislative restriction on an employer's free right to terminate the employment relationship at any time. If there is neither a collective bargaining contract in force nor a bargaining representative selected by most of the employees, an employer and an employee are free to make whatever individual arrangements they desire, including those relating to the termination of the employment relationship. If no such arrangement, express or implied, is agreed to or contemplated by the parties then both the employer and the employee are largely free to terminate the relationship at will and without suffering any legal consequences[16]. The European job security model is in clear contrast with the American model of at will dismissal which only encompasses exceptions based on limited legislative restrictions, collective bargaining, and exceptional public policy concerns[17]. In most European countries, dismissal without just cause is null and void and the "employment at will doctrine", under which both parties (employer and employee) can quit from the employment contract for any reason and without the need for payment of any severance compensation, is rejected.

Under the new arrangement promoted by Dynamex in which drivers are now independent contractors, the drivers are required to obtain insurance through the National Independent Contractors Association (NICA) which, in turn, issues settlement checks as payment for work performed by the drivers.

[16] Dismissal Procedures, 80 Int'l Lab. Ver. 65 (1959).

[17] FRANCES RADAY, Individual and Collective Dismissal – A job security dichotomy, 10 COMP.Lab. L.J. 121 (1988).

Dynamex promulgates tables for the rates to be charged to its customers and standardizes the amounts to be paid to the independent contractors. For fixed routes, drivers are assigned a route by *Dynamex* and service the route for either a flat fee or a set amount per package. For on-demand work, drivers maintain contact with *Dynamex* using a required Nextel cellular telephone (paid for by the individual driver) and are assigned work by *Dynamex* dispatchers. In each case drivers perform pickups and deliveries using their personal vehicles but wearing *Dynamex* uniform shirts and badges. *Dynamex* retains the right to terminate drivers at any time for any reason.

In January 2005, Plaintiff Charles Lee entered into a written independent contractor agreement with *Dynamex* to provide delivery services for the company. Just three months after leaving his work at *Dynamex*, Lee filed this lawsuit on his own behalf and on behalf of similarly situated *Dynamex* drivers, alleging that *Dynamex*'s alleged misclassification of its drivers as independent contractors led to *Dynamex*'s violation of the provisions of California's Industrial Welfare Commission (hereinafter '**IWC**') Order No.9, the applicable state wage order governing the transportation industry, as well as various sections of the Labor Code, and, as a result, that *Dynamex* had engaged in unfair and unlawful business practices under Business and Professions Code section 17200.

In short, these were the essential facts that triggered the *Dynamex* Litigation and which allow us to understand the level of involvement of these workers in the course of business of this

company as well as its similarities to other on demand gig work springing with the emergence of the 'gig economy'.

b) Case Law regarding Classification of Workers

The decision starts by addressing the core legal question at stake in case law over time: the question of whether an individual worker should properly be classified as an employee or, instead, as an independent contractor[18].

Misclassification of workers has become a hot button issue due to its considerable ramifications for individual laborers, employers, and the government[19].

The distinction is particularly consequential. If a worker is classified as an employee in the United States of America, the hiring company bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance and, most significantly for the case at hand, complying with numerous state and federal statutes and regulations governing the wages, hours and working conditions of employees. On the other hand, American platform workers classified as independent contractors

[18] Dynamex Inc. v. Charles Lee, which can be accessed in: https://law.justia.com/cases/california/supreme-court/2018/s222732.html, p. 1.

[19] ABIGAIL S. ROSENFELD, *ABC to AB 5: The Supreme Court of California Modernizes Common Law Doctrine in Dynamex Operations West, Inc. v. Superior Court*, 61, B.C.L Ver. E. Supp. II.- 112 (2020).

should expect to rely almost entirely on the market for retirement pay and insurance against risks such as ill-health or injury[20].

In *Dynamex*, the Supreme Court of California premised its discussion by noting that, in some circumstances, classification as an independent worker can be advantageous to the worker as well as to the employer, noting that[21]: '*the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled*[22]'.

American states have not been passive bystanders to Uber's rise. Most have passed Transportation Network Company ('**TNC**') legislation to regulate TNCs in some form. Some of the earliest legal

[20] JEREMY PILAAR, *Assessing the Gig Economy in Comparative Perspective: How Platform Work challenges the French and the American Legal Orders*, 27 J.L. & Pol'y 47 (2018), p. 67.

[21] WILLIAM B. GOULD IV, *Dynamex is Dynamite, but Epic Systems is its foil – Chamber of Commerce: The Sleeper in the Trilogy*, 83 Mo. L. Rev. (2018).

[22] *Id.*, p. 2.

pushback to gig economy companies can be traced to State Labor Commissioners. Though most platform companies have labeled their drivers independent contractors – and thereby avoided responsibility for providing them stable pay or benefits – a number of states have contested this classification and argued that drivers should obtain the same protections as full-time employees. California has contested this classification in this 2018 *Dynamex* case but we can trace the issue of classification back to previous precedents.

Considering past case law, the Court was asked to determine, as a preliminary matter, whether the *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (hereinafter '***Borello***' or '***Borello* Litigation**') decision, which embodies the common law test or standard for distinguishing employees from independent contractors, was applicable.

In 1989, in *Borello*, the Supreme Court of California held that a farm misclassified its cucumber harvesters as independent contractors. The controversy concerned whether farmworkers hired by a grower to harvest cucumbers under a written "sharefarmer" agreement were independent contractors or employees for the purpose of the California worker's compensation statutes. The grower contended that the farmworkers were independent contractors under the *control of details test* because the workers (1) were free to manage their own labor (the grower did not supervise the picking at all but compensated the workers based on the amount of cucumbers that they harvested), (2) shared the profit or loss from the crop, and (3) agreed in writing that they were not employees.

The dispute arose after the Department of Industrial Relations served the farmer for failing to buy worker's compensation insurance. California law required such payment if the pickers were to be considered employees.

In rejecting the grower's contentions, the Court in *Borello* summarized its conclusion in the introduction of the opinion as follows: "*The grower controls the agricultural operations on its premises from planting to sale of the crops. It simply chooses to accomplish one integrated step in the production of one such crop by means of worker incentives rather than direct supervision. It thereby retains all necessary control over a job which can be done only one way. Moreover, so far as the record discloses, the harvesters' work, though seasonal by nature follows the usual line of an employee. In no practical sense are the sharefarmers entrepreneurs, operating independent businesses for their own accounts; they and their families are obvious members of the broad class to which worker' compensation protection is intended to apply*"[23].

On this basis, the court concluded the workers were employees entitled to worker's compensation as a matter of law, affirming the use of the common law 'control of work' test and by considering secondary factors outlined in prior case law.

The Supreme Court of California also emphasized the importance of statutory intent, noting that the law requires employers to purchase worker's compensation insurance to protect laborers like

[23] S.G. Borello & Sons, Inc. 48 Cal. 3d at p.345 as quoted in the Dynamex decision at p. 25.

the cucumber harvesters: "*the concept of 'employment' embodied in the workers' compensation act is not inherently limited by common law principles. We have acknowledged that the Act's definition of the employment relationship must be construed with particular reference to the history and fundamental purposes of the statue*"[24].

After considering the extent of the farmer's control over the worker's performance, analyzing secondary factors, and taking the intent of the worker's compensation mandate into account, the Court held that the pickers were employees[25]: "*Borello retains all necessary control over the harvest portion of its operations. A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting it lacks control over the exact means by which one such step is performed by the responsible workers*"[26].

Borello was crystallized for thirty years as the leading standard to assess worker misclassification under the California Wage orders.

Dynamex contended that in the wage order context, as in most other contexts, the multifactor standard set forth in the *Borello* seminal decision is the only appropriate standard under California Law for distinguishing employees and independent contractors. The court determined that the preexisting *Borello* approach regarding employees and independent contractors focused primarily upon the

[24] *Id.* At pp. 352 and 353.

[25] ABIGAIL S. ROSENFELD, *ABC to AB 5: The Supreme Court of California Modernizes Common Law Doctrine in Dynamex Operations West, Inc. v. Superior Court*, 61, B.C.L Ver. E. Supp. II.- 112 (2020).

[26] S.G. Borello & Sons, Inc. 48 Cal. 3d at pp.356-337 as quoted in the Dynamex decision at p. 31.

scope and purpose of the particular statutory scheme involved and was not '*limited by common law principles*' as the *Borello* court had once stated[27].

Subsequently, the court considered the meaning of "employ" within the state wage orders, which impacted how the court distinguished between employees and independent contractors.

In 2010, in *Martinez v. Combs* (hereinafter '***Martinez***' or '***Martinez* Litigation**'), the Supreme Court of California held that the term 'employ' as defined in Wage Order No. 14 has three valid interpretations which include: a) having authority over payments, scheduling or conditions of work, b) the suffer or permit to work standard, or c) employment relationships recognized under common law.

Martinez concerned whether plaintiff strawberry pickers could hold distributors that contracted with their bankrupt employer liable for back wages. To collect money from the suppliers, the harvesters needed to show that the distributors acted like joint employers[28].

Plaintiffs in *Dynamex* relied on the Martinez precedent maintaining that the standard or tests for employment set forth in it are applicable in the context of this litigation as well as the standard for determining the employee or independent contractor question set forth in the *Borello* Litigation[29].

---

[27] S.G. Borello & Sons, Inc. 769 P.2d at 405 as quoted in WILLIAM B. GOULD IV, *Dynamex is Dynamite, but Epic Systems is its foil – Chamber of Commerce: The Sleeper in the Trilogy*, 83 Mo. L. Rev. (2018), p. 19.

[28] Martinez v. Combs, 231 P.3ed 259, 278 (Cal.2010).

[29] Dynamex Inc. v. Charles Lee, which can be accessed at: https://law.justia.com/cases/california/supreme-court/2018/s222732.html, p. 13.

Dynamex, by contrast, took the stance that the alternative definitions of 'employ' and 'employer' discussed in Martinez are applicable only in determining whether an entity that has a relationship with the primary employer of an admitted employee should be considered a joint employer of the employee and not in deciding whether a worker is properly classified as an employee or an independent contractor. Hence, it asserted that even with respect to claims arising out of the obligations imposed by a wage order, the question of a worker's status as an employee or independent contractor must be decided solely by reference to the *Borello* standard[30].

Although it declined to answer the question whether the *Martinez* control over wages standard applied to employee classification questions, the Court in *Dynamex* held first, that the *Martinez* suffer or permit to work standard applied to questions of employee classification and, second, that the ABC test was the best method of determining whether the suffer or permit to work standard was satisfied.

As *Martinez* gave no indication that its holding applied only to the joint employer context, the Court concluded that the suffer or permit to work standard was relevant to questions of employee classification under the wage orders. Given the deliberately expansive reach of the suffer or permit to work standard, the Court then reasoned that the standard must be interpreted broadly to include within the definition of 'employee' all workers who can reasonably be viewed as working in the hiring entity's business.

[30] *Id.*, p. 13.

Thus, under *Martinez*, a worker is an employee if he or she is "employed" by an "employer," and "employ" is defined in the following manner: "(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." If any of these standards are met, the worker is an employee and not an independent contractor.

Following its decision in *Martinez*, the Supreme Court of California considered worker misclassification in the newspaper business. In 2014, in Ayala v. Antelope Valley Newspapers, Inc. (hereinafter '***Ayala***' or '***Ayala Litigation'***), the Supreme Court of California held that the trial court improperly denied class certification to newspaper carriers whose employer allegedly engaged in misclassification. The trial court failed to examine the full scope of the newspaper's control over its carriers' work performance. Moreover, the trial court neglected to distinguish between secondary factors that required individual versus communal assessment. As a result, the Supreme Court of California remanded the case.

Borello, *Martinez* and *Ayala* illustrate how the Supreme Court of California assessed worker misclassification and interpreted the scope of the employee-employer relationship under the wage orders in the years leading up to the *Dynamex* Litigation[31].

[31] ABIGAIL S. ROSENFELD, *ABC to AB 5: The Supreme Court of California Modernizes Common Law Doctrine in Dynamex Operations West, Inc. v. Superior Court*, 61, B.C.L Ver. E. Supp. II.- 112 (2020).

c) The legacy of the *Dynamex* case

As explained in the previous section, the *Dynamex* Litigation concerned the delivery drivers' alleged misclassification as independent contractors.

What sets *Dynamex* apart from the case law depicted above is that the Supreme Court of California strayed from precedent by adopting the ABC test in the absence of pre-existing state legislation or case law in California endorsing it in full[32]. To achieve this conclusion, the Court embraced the suffer-or-permit-to-work standard from *Martinez* and held that the ABC test was the appropriate means to distinguish between independent contractors and employees under state wage orders.

The Court carved this decision on the basis that the *Martinez* precedent was intended for situations other than the joint employer context: "(…) *the discussion of the origin and history of the suffer or permit to work language in Martinez itself makes it quite clear that this standard was intended to apply beyond the joint employer context. (…) Martinez observed that 'not requiring a common law master and servant relationship, the widely used 'employ, suffer or permit' standard reached irregular working arrangements the proprietor of a business might otherwise disavow with impunity. (…) Thus Martinez demonstrates that the suffer or permit to work standard does not apply only to the joint employer context, but can also apply to the question whether, for purposes of the obligations imposed by a wage order, a worker who is considered an employee*

[32] *Id.*, p. 124.

of an entity that has suffered or permitted the worker to work in its business"[33].

Dynamex argues that the suffer or permit to work standard cannot serve as the test for distinguishing employees from independent contractors for a myriad of reasons of which stands out the argument that a literal application of that standard would characterize all individual workers who directly provide services to a business as employees. Such application of the suffer or permit to work standard, therefore, would bring within its reach even those individual hires by a business – including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys and the like – who provide only occasional services unrelated to a company's primary line of business. For this reason, *Dymanex* maintains that the *Borello* standard is the only approach that can provide a realistic and practical test for distinguishing employees from independent contractors.

The court acknowledges that "*when applied literally and without consideration of its history and purposes in the context of California's wage orders, the suffer or permit to work language, standing alone, does not distinguish between, on the one hand, those individual workers who are properly considered employees for purposes of the wage order and, on the other hand, the type of traditional independent contractors like independent plumbers and electricians who could not reasonably have been intended by the wage order to be treated as employees of the hiring business. As other jurisdictions have recognized, however, that the literal*

[33] Dynamex Inc. v. Charles Lee, p. 49.

language of the suffer or permit to work standard does not itself resolve the question whether a worker is properly considered a covered employee rather than an excluded independent contractor does not mean that the suffer or permit to work standard has no substantial bearing on the determination whether an individual worker is properly considered an employee or independent contractor for purposes of a wage and hour statute or regulation"[34].

To shoulder this problem, the Court explains how the standard of 'suffer or permit to work' is significant in assessing the scope of the category of workers that the wage order was intended to protect. Accordingly, the court explained that the 'suffer or permit to work' standard allows the exclusion of a worker as an independent contractor only if "*the worker is the type of traditional independent contractor – such as an independent plumber or electrician – who would not reasonably have been viewed as working in the hiring business. Such an individual would have been realistically understood as working only in his or her own independent business*"[35].

The Court, however, conceded that the "suffer or permit to work" standard is a "term of art" that cannot be interpreted literally because it would obviously encompass workers who are traditional independent contractors and would eviscerate the commonly understood distinction between employees and independent contractors. Consequently, the Court limited the scope

[34] *Id.*, p. 54.
[35] *Id.*, p. 61.

of "suffer or permit to work", joining Massachusetts and New Jersey in adopting the ABC Test.

Under the ABC test, a worker will be deemed to have been 'suffered or permitted to work' and thus, an employee for wage order purposes unless the putative employer proves: (i) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (ii) that the worker performs work that is outside the usual course of the hiring entity's business, and (iii) that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Employers may only classify a worker as an independent contractor if the hiring entity satisfies all three conditions of the ABC test.

Presumably, criterion A will likely be the easiest factor for the courts to apply. *Borello* held that "*the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired*"[36] and the *Dynamex* decision appears to retain control as critical. Hence, prong A is similar to the preexisting common law test for employment established in *Borello* and evaluates the type and degree of control a business typically exercises over employees. A worker who is, either by contract or by practice, subject to the type and degree of control a business typically exercises over employees should likewise be considered an

[36] S.G. Borello & Sons, Inc., pp. 403-404.

employee and this does not mean just micromanagement:" "*as under Borello (…) depending on the nature of the work and overall arrangement between the parties, a business does not need to control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over genuine independent contractors. The hiring entity must establish that the worker is free of such control to satisfy part A of the test*"[37].

The second prong means that employers cannot hire independent contractors to do the same tasks employees normally do for the type of business in question. Thus, this prong expands those within the definition of employee to include almost any worker who engages in the same business as the hiring entity. Criterion B will likely be the most difficult factor for the courts to apply. This is because determining whether a job constitutes "same business", or "comparable work" may be more difficult for courts to quantify. The Court presents an example of what would fall outside prong B:"*When a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician to install a new electrical line are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make*

[37] Dynamex Inc. v. Charles Lee, pp. 68-69.

dresses from cloth and patterns supplied by the company that will thereafter be sold by it (…) or when a bakery hires cake decorators to work on a regular basis on its custom designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employee."[38].

Prong B is also particularly troublesome for any businesses, such as *Dynamex*, that use independent contractors to deliver or provide the core product or service. In applying the ABC test to *Dynamex*, the Court noted that a class of delivery drivers could be certified under prong B because the question of whether the delivery drivers were performing outside the usual course of *Dynamex's* business could clearly be resolved on a class wide basis. Indeed, delivery services – which are provided by the delivery drivers – are the very core of *Dynamex's* business.

Criterion C will not be entirely without its difficulties either. The Court explain what is pertained by prong C: "*It is well established, under all of the varied standards that have been utilized for distinguishing employees and independent contractors, that a business cannot unilaterally determine a worker's status simply by assigning the worker the label 'independent contractor' or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor*"[39].

This part of the ABC test seeks to avoid businesses hiring individuals as independent contractors when they work solely for the

[38] *Id.*, p. 70.
[39] Dynamex Inc. v. Charles Lee, pp.73-74.

employer. Thus, the test seeks to identify those workers that have taken steps on their own to create their independent business.

In making such a determination, courts must consider whether the tradesperson's business must be incorporated and whether there is a threshold advertising requirement associated with independent contractor status. For example, if a retired electrician does work for an employer, would that retired electrician be deemed an independent contractor within the meaning of criterion C?[40]. If the worker is "*simply designated as an independent contractor by the unilateral action of a hiring entity*"[41] then they will not meet this standard. That said, an employer does not necessarily have to prove that the incorporated worker obtained a license, advertised or the like to meet this prong – although these factors would be favorable. However, it is also not enough that the company does not prohibit or prevent the worker from engaging in an independent business. In short, there should be some factual evidence that the independent contractor is in business for himself or herself – such as actually providing services of the same type to other clients, having a business license or those alike[42].

All three parts of the ABC Test must be met for independent contractor classification to be deemed accurate and lawful. In *Dynamex*, the Supreme Court concluded that the "B" and "C" qualifications had not been met by the company because common

[40] WILLIAM B. GOULD IV, *Dynamex is Dynamite, but Epic Systems is its foil – Chamber of Commerce: The Sleeper in the Trilogy*, 83 Mo. L. Rev. (2018), p.22.

[41] Dynamex Inc. v. Charles Lee, p. 73.

[42] A good summary of prong C in Dynamex Litigation can be accessed here: https://www.streamkimlaw.com/dynamex-a-new-test-for-independent-contractors/.

proof existed that the work of the drivers was part of the company's core business and the drivers worked only for *Dynamex* and did not have employees of their own.

In doing so, the Supreme Court of California emphasized that the ABC test aligned more closely with the suffer or permit to work standard than the common law approach articulated in *Borello*. The court justified the move away from *Borello* by stressing the confusing, difficult to apply nature of multifactor tests – the ABC test would best operationalize the referred permit to work standard[43].

Under this precedent, the Court highlighted that employers shoulder the burden of proof in establishing that a worker is an independent contractor as it is "*appropriate and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders*"[44].

In the coming years, the use of technology will continue to transform organizational models by making workers less directly controlled. Modern work, through virtual platforms is configured with lower levels of subordination and greater freedom for workers to perform their work and choose their working hours. The archaic definition of the contract of employment does not fit the modern work organization and *Dynamex* is seen as a silver lining towards worker's protections in this new paradigm of the Labor market.

Due to the endorsement of the ABC test in California, as well as due to the fact that California is home to some of the most important

[43] ABIGAIL S. ROSENFELD, *ABC to AB 5: The Supreme Court of California Modernizes Common Law Doctrine in Dynamex Operations West, Inc. v. Superior Court*, 61, B.C.L Ver. E. Supp. II.- 112 (2020).
[44] Dynamex Inc. v. Charles Lee, p. 66.

'gig economy' titans like Uber, Lyft, Postmates and Airbnb, this is a decision of considerable importance which will require a reshaping of the way in which these companies operate and, in the short run, likely to raise their operational costs.

In addition to the cost increase, gig economy companies could also have to make some important organizational changes. This is likely the price to pay, in accordance with the opening remark by Frédéric Bastiat, to organize Labor and industry whilst also organizing and preventing injustice.

In the aftermath of the *Dynamex* Litigation the fight over reform in California, home to the fifth largest economy in the world has been particularly fierce. The technological advances driving the 'gig economy' sparked a public debate about the new imbalance of bargaining power between workers and employers, and how we want to relate to those who provide us with these very convenient services[45]. A legal response was needed to address the new precarious realities created by the phenomena of the 'gig economy'.

Through the *Dynamex* Litigation the judiciary paved the way for a fair dichotomy between employees and independent workers by endorsing a flexible test to resist the advent of the new times and the realities uncovered by the gig economy. Thus, *Dynamex* is a landmark decision when discussing the latest developments on Labor law in the USA but also abroad due to the echoes such decision might have in the treatment of analogous problems globally.

[45] BALANAID NI BHRAONAIN, *Empowerment or Exploitation: Legal Responses to the Gig Economy*, 6 King's Student L.Rev 2 (2019), p. 18.

In January 2020, the legislator in California took part of the public debate sparked by *Dynamex* and enacted AB5 legislation (California Assembly Bill 5[46]).

d) The AB5 enactment

Since *Dynamex*, lawmakers have confronted the issue of worker misclassification through statutory means in most states[47]. Legislative intervention is desired to ensure the worker's rights are protected without the need to launch a legal battle to the platforms that promote this type of work[48].

The underlying force behind the introduction of AB5, that goes by the nickname 'gig worker bill', were growing concerns about employee misclassification in the 'gig economy'. In a signing statement on September 18, 2019, Governor Gavin Newsom declared Assembly Bill 5 "*landmark legislation for workers and our economy*"[49].

AB 5 is a measure that codifies the ABC test contained in the *Dynamex* Litigation, enacted on January 1, 2020. Thus, it creates a presumption that workers should be classified as employees

[46] The legislative text of this bill can be consulted here: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.

[47] ABIGAIL S. ROSENFELD, *ABC to AB 5: The Supreme Court of California Modernizes Common Law Doctrine in Dynamex Operations West, Inc. v. Superior Court*, 61, B.C.L Ver. E. Supp. II.- 112 (2020).

[48] An especially useful opinion on the reach of the Dynamex Case can be found in this article by GUILHERME DRAY: https://eco.sapo.pt/opiniao/o-sonho-californiano-tambem-e-dos-precarios/.

[49] https://www.manatt.com/insights/newsletters/employmentlaw/landmark-legislation-ab5-codifies-dynamex-abc-test.

triggering several benefits for those workers including overtime pay, paid sick leave, worker's compensation benefits and unemployment insurance.

The intent of AB5 is to limit the ability of companies to classify workers as independent contractors rather than employees in the state of California.

The core element of this distinction as outlined above is the fact that employees get grater Labor protections whilst independent contractors do not. If workers are employees under AB5, they are also entitled to other employment benefits, including paid sick days and the protections of the unemployment insurance code. These protections come, naturally at an expense for employers.

Experts predict that shifting a transportation-related independent contractor workforce to an employee workforce can increase the cost of labor by 35% or more. With razor thin margins in most of the transportation industry, this translated to some serious cost increases to both businesses and consumers in California. Some estimate that Uber fares would need to increase by 20% or more to accommodate those increased labor costs[50].

AB5 makes the ABC test the law in California but it also expands its application beyond the wage-order claims to all provisions under the state Labor and Unemployment Insurance Codes. Hence, the ABC test is now applied to many more laws – not merely those covered by the state wage orders discussed in *Dynamex*.

[50] These statistics can be traced here: https://www.jdsupra.com/legalnews/ab5-is-now-law-in-california-now-what-86489/.

This law also contains several exemptions for certain traditionally free practitioners such as lawyers, architects, engineers, private investigators, and accountants. Exemption from AB5 does not mean that workers can automatically be classified as independent contractors by virtue of attaining a classification under a certain category of work. Rather, it means the former *Borello* test will be used to determine their classification for both wage-order and non-wage-order claims.

Assembly Bill 5 enables the California attorney general, city attorneys and local prosecutors to sue companies over violations as this legislation creates aggressive new government enforcement mechanisms. The law provides that violating businesses may be subject to injunctive relief and direct prosecution by the city attorney.

With this incorporation of the ABC test into the Labor Code, if a business fails the test and lacks sufficient capital to satisfy a misclassification judgment or award, both the government and private litigants now have a more direct basis to pursue Labor Code monetary penalties arising out of such misclassification from officers and directors personally.

Lastly, AB5 makes clear that it does not diminish the flexibility of employees to (1) work part-time, (2) work on intermittent schedules or (3) work for multiple employers. As such, for the time being, nothing in the Law prevents California employers from continuing to engage workers through other non-contractor avenues, including as needed on a temporary or part-time employment basis.

On the wake of the AB5 we can almost certainly expect to see enforcement duked out in some lengthy legal battles. App-based companies argue they offer a different employment model which is innovative and flexible and thus should be exempted from AB5. For the expected losses and the impact caused by AB5, one can also expect years of lobbying efforts for industry-related broader exemptions for App-based companies at the legislative level.

Newsom, the Governor who 'fathered' this bill has indicated he may support gig companies' proposal to create a special employment category for app-based drivers. Notwithstanding, many legal scholars, economists and other academics have reacted by urging Newsom and lawmakers not to exempt gig worker, writing that: "*California is poised to lead the country – indeed, to lead the world – with the strongest law on record to protect workers from misclassification*"[51].

III. Impact of *Dynamex* and AB5 and Way Forward

The *Dynamex* litigation and the AB5 legislation that ensued will certainly hasten the ABC test trend and expand it not only to other American states but to other types of claims. It can also have a global reach: because California's economy is the largest in the United States, legal and political developments there tend to have a ripple effect across other states, at a federal level and, at times, at a global scale.

[51] Except of this letter retrieved from: https://www.latimes.com/business/story/2019-08-30/ab5-dynamex-independent-contractors-bill.

In recent years, 20 states in the United States have already implemented the ABC test in one form or another, although primarily in relation to unemployment insurance or worker's compensation claims. Many other countries have also felt the need to adapt their labor laws to the realities of the 'gig economy'.

The discussion led by Dynamex, although not targeted by this analysis, should also take place sometime soon in most European countries[52]. Indeed, the European employment law and social policy faces a crossroads: the emergence of new forms of work – namely through platforms – and an ageing population combined with changing migration patterns which place increasing pressure on domestic social security systems. Hence, the effects of Dynamex and its comparative example will likely have a global reach[53].

A positive note of *Dynamex*/AB5 and its global impact is that it sheds light on the issue of misclassification of workers as independent contractors, a decades-long trend that has

[52] In Spain, for instance, the Supreme Court has recently decided that the existing relationship between a rider and Glovo was of an employment kind mainly due to the subjugation element. The Court concluded Glovo was not merely an intermediate in between customers and services but instead directed its riders as an employer. «*El Pleno de la Sala Cuarta del Tribunal Supremo ha declarado que la relación existente entre un repartidor ('rider') y la empresa Glovo tiene naturaleza laboral. (…) El Tribunal Supremo sostiene que Glovo no es una mera intermediaria en la contratación de servicios entre comercios y repartidores. Es una empresa que presta servicios de recadería y mensajería fijando las condiciones esenciales para la prestación de dicho servicio. Y es titular de los activos esenciales para la realización de la actividad. Para ello se sirve de repartidores que no disponen de una organización empresarial propia y autónoma, los cuales prestan su servicio insertados en la organización de trabajo del empleador*». The news on this decision can be found here: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-Tribunal-Supremo-declara-la-existencia-de-la-relacion-laboral-entre-Glovo-y-un-repartidor.

[53] JEREMIAS PRASSL, *Future Directions in EU Labour Law*, European Labour Law Journal, vol. 7, no. 3 (2016), p.323-330.

impoverished wage earners, weakened labor unions[54] and contributed to a fissured workplace amongst companies.

Besides the vociferous tech company lobbying and their claims of huge economic downfall, *Dynamex* Litigation and the AB5 represent a step in the right direction. As Guilherme Dray framed it "*Entrepreneurship is great and makes the world move. However, the defense of employment is also an investment in quality, in a future for the community and those who work. The Californian dream is a tangible dream: it joins modernity and innovation, on one hand, with the protection of employment, people and the common good on the other*"[55].

The movement to adapt labor legislation to the realities of 'gig workers' and to address the perils brought by this new paradigm of work is also underway in Portugal, where a green book on the future of work, digital platforms, social protection of independent workers and education[56] is in drafting and expected to be approved by the end of 2020, at a moment some claim is not the best momentum for employers given the impacts of the Covid-19 pandemic.

Notwithstanding, the fact remains that the 'gig economy' is not a new phenomenon, that this new protective legislative framework will shed light on a classification long held obscure and that, most importantly, it will extend labor protections to those who will likely be most affected by an incoming economic crisis: the independent workers.

[54] In the USA, under federal law, only employees can join unions and collectively bargain for wages and benefits.

[55] This quote is retrieved from this article: https://eco.sapo.pt/opiniao/o-sonho-californiano-tambem-e-dos-precarios/.

[56] *Livro verde sobre o Futuro do Trabalho*.

WWW.IDT.FDULISBOA.PT

RIDT

REVISTA INTERNACIONAL DE DIREITO DO TRABALHO

IDT
Instituto de Direito do Trabalho
Faculdade de Direito da Universidade de Lisboa