



The *Dynamex* effect: Classifying contractors in the gaming and esports industries

By Irene Scholl-Tatevosyan and Benjamin Kim

For emerging industries that rely on freelance or contracted workers, such as the esports industry, the 2018 Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* has created significant challenges when classifying workers as independent contractors. In light of *Dynamex*, esports and gaming companies with independent contractors in California should:

- Review the nature and scope of the business, including internal and external marketing of that business;
- Assess how independent contractors have been used and evaluate whether changes should be made; and
- Consider ways to mitigate legal risks and exposure.

In *Dynamex*, California adopted the “ABC” independent contractor test, which, among other requirements, mandates that an independent contractor perform work that is outside the usual scope of the hiring entity’s business. For more on the ABC test in California, see our prior alert, available [here](#).

For instance, ride sharing technology companies have consistently marketed themselves as a mobile phone “app” platform whose service connects drivers to passengers, not as a classic transportation business. The latter would mean that drivers for these “app-based” services should be classified as employees under the ABC test. This is important for esports and gaming technology companies that rely on contracted workers. For example, the game development company that hires a contractor in California to help develop a game may take on significant legal risk that the individual should be an independent contractor because that worker arguably is performing a task that is the function of the business.

Companies with operations outside California also should note that other states may follow different tests for determining whether an employee is an independent contractor or an employee. For example, while Nevada also uses the ABC test for unemployment insurance purposes, unlike California, Nevada law conclusively presumes that a worker is an independent contractor for the purpose of applying the state’s wage and hour laws, provided certain conditions are met. Some

other states use the economic realities test, which focuses on how much control the hiring entity exercises over the worker.

In the wake of *Dynamex*, esports and gaming companies should examine the nature and scope of their business as well as how they market that business externally and internally. Communications on the scope of the business should be consistent and, to the extent possible, limited to the core of the business. Limiting the scope of the business, however, can be particularly difficult for esports and gaming companies that often cross-over into multiple different industries. Given the complexities of the esports and gaming industries, such companies should review how they use independent contractors in California with legal counsel and find ways to mitigate their risks and exposure regarding the use of such workers.

For more information on the content of this alert, please contact a member of Nixon Peabody's [Esports and Gaming Task Force](#), your regular Nixon Peabody attorney or:

- Irene Scholl-Tatevosyan at itatevosyan@nixonpeabody.com or 213-629-6012
 - Benjamin Kim at bkim@nixonpeabody.com or 213-629-6090
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