Post-Dynamex Considerations For Calif. Health Care Cos.

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The California Supreme Court recently issued a landmark decision in the case of Dynamex Operations West Inc. v. Superior Court of Los Angeles County. In its ruling, the court establishes a standard that makes it extremely difficult for companies (or individuals) in California to properly classify their workers as independent contractors.

Now that this lengthy Supreme Court opinion has been digested, the questions for companies across the state in the health care industry (and otherwise) become:

1. How does the employee/independent contractor classification decision impact my business?

2. As a result of the Dynamex decision, do I now need to reclassify my workers as employees instead of as independent contractors?

Here, we analyze the Dynamex opinion from the perspective of providers in the health care field.

Many health care companies classify various types of providers as independent contractors and, sometimes even, individuals who are working side by side with others who are being treated as employees. Notably, many medical group practices (whether organized as professional medical corporations, partnerships or otherwise) initially hire physicians as independent contractors, with the expectation that the physician later will become a shareholder or partner of the practice. While this approach was risky under the previous analysis standards, the new test adopted by the court makes it virtually a guarantee that this process will be found unlawful hereafter.

In Dynamex, the court developed an employee-friendly test for determining whether a worker is an employee or independent contractor. Instead of using a broad multifactor balancing test (as California courts previously have used), the Supreme Court adopted the "ABC test," which presumes that all workers are employees unless the business can prove all of the following:

A. 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 performance and in fact;

B. The worker performs work that is outside the usual course of the hiring entity's business; and

C. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

The biggest challenge for companies in the health care industry (and likely those in many other industries as well) to satisfy the “ABC test” is complying with the requirement in part B — that the worker performs work that is outside the usual course of the hiring entity’s business. In the example above, the medical group practice clearly is in the business of providing health care services to its patients. So, any individual who works for the practice and provides health care services, such as a physician, very likely would be considered an employee under the ABC test. As a result, the only individuals who definitively would be deemed to be properly classified as independent contractors would be individuals who perform services unrelated to health care, such as a plumber performing plumbing services at the health care business’ facilities. Consequently, locum tenens and other employees who work less than a full-time schedule for the company, while simultaneously working for other companies at the same time, likely will need to be classified as part-time employees and not independent contractors.

But, open questions remain about the proper classification of providers in the health care industry. For example, it is unclear how courts will review the circumstance where a medical group that performs one specialty brings in a provider to perform services in a different specialty on a limited basis: Will that provider’s services in the other practice area be deemed work that is outside the usual course of the group’s business and can that provider be properly classified as an independent contractor as a result?

And, then, questions abound as well about what will happen to the relationship between a physician operating as a professional corporation and a medical group when the parties enter into an independent contractor agreement that expects the physician, through his or her professional corporation, to provide services to the group’s patients. Will courts ultimately determine that the physician actually is an employee of the medical group (in addition to being an owner and even potentially an employee of the professional corporation) and, if so, for what purposes will the physician be deemed an employee of the medical group? Will that classification be limited to some protections or coverages, but not others? There are a multitude of different provisions that apply to individuals deemed employees, including workers’ compensation and unemployment insurance coverage and various types of tax implications, in addition to the wage and hour issues that immediately rise to the top of consideration. So, it definitely is possible that the same worker could be considered an employee for some matters and an independent contractor for others, thereby putting the company into a difficult predicament for planning purposes, if it does not classify and treat the worker as an employee.

This court-authorized ABC approach may seem to contain a difficult (and unreasonable) test to overcome, but it now is the “law of the land” in California. As a result, all health care companies should take a step back and review how they are classifying their workers and seriously consider that all workers be treated as employees going forward. If the individuals are determined to be employees who are misclassified as independent

contractors, the company runs the risk that significant damages may be imposed on it. Such damages potentially would include unpaid wages and overtime; liquidated damages; interest, plaintiffs attorneys' fees and costs; penalties for violations of applicable federal and state labor laws (including for missed meal periods and rest breaks, and wage statement violations); and penalties for failure to pay applicable federal, state and local taxes, as well as the likely cost of extensive litigation too.

The companies, likely through assistance from employment attorneys, must determine if any individuals working for them can be properly classified as independent contractors. If not, the companies should promptly engage in the process of reclassifying their workers as employees, as necessary. And, if reclassification does become necessary, there are programs in place that can assist with the potential financial burdens. For example, in 2011, the IRS established the Voluntary Classification Settlement Program, which provides taxpayers an opportunity to reclassify their workers as employees for employment tax purposes for future tax periods with partial relief from federal employment taxes and penalties. As appropriate, eligibility for this program (and others) should be explored as part of the companies' efforts to ensure that their workforce is properly classified for all purposes. Ultimately, the time is now to act or run the risk of facing significant liability later.