



Councilmember Ben Bartlett

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CONSENT CALENDAR

March 26th, 2019

To: Honorable Mayor and Members of the City Council
 From: Councilmember Ben Bartlett
 Subject: ***Dynamex* Decision Impact and Compliance on Minimum Wage Ordinance and Paid Sick Leave Ordinance**

RECOMMENDATION

That the City Council refers to the City Manager and the Labor Commission to ensure the Berkeley Minimum Wage Ordinance (MWO) and Paid Sick Leave Ordinance are interpreted and enforced in a manner consistent with the holdings in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903.

CURRENT SITUATION

The California Supreme Court decision in *Dynamex* held that the burden is on the employer to establish that a worker is an “independent contractor,” as opposed to an “employee,” and that in order to meet this burden, the employer must establish each of the three factors in the “ABC” test. In light of the *Dynamex* decision, it is clear that many workers have been improperly misclassified as “independent contractors” when they should have been classified as employees. Employees are entitled to workers’ compensation insurance and other benefits; independent contractors are not. Since Berkeley’s Minimum Wage Ordinance and Paid Sick Leave Ordinance apply to workers who are defined as employees under the California Labor Code, the *Dynamex* decision clarified that these ordinances apply more broadly than as interpreted by many employers. The Berkeley City Council must ensure that the Minimum Wage Ordinance and Paid Sick Leave Ordinance are interpreted in a manner consistent with the holdings in *Dynamex*.

BACKGROUND

Companies have frequently misclassified workers as independent contractors to avoid paying for workers’ benefits and filing taxes. “According to the California Labor Commissioner’s website, the misclassification of workers as independent contractors costs the state roughly \$7 billion in lost payroll taxes each year.”¹ Enforcement of the *Dynamex* decision will reduce these costs and reduce misclassification by requiring employers to classify their workers as employees unless the employer establishes each of the following three factors:

¹ <https://www.latimes.com/local/lanow/la-me-ln-independent-contract-20180430-story.html>

- A. 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; and
- B. that the worker performs work that is outside the usual course of the hiring entity's business; and
- C. that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

The *Dynamex* decision is retroactive. See *Oriana Johnson v. VCG-IS LLC*, case number 30-2015-00802813 (Superior Court of the State of California, Orange County) (July 18, 2018).

Enforcement of the *Dynamex* decision will result in more workers being classified as employees entitled to the minimum wage pursuant to California's minimum wage laws in Section 1197 of the California Labor Code. Berkeley's Minimum Wage Ordinance and Paid Sick Leave Ordinance apply to employees as defined below:

- 1. In a calendar week performs at least two (2) hours of work for an Employer within the geographic boundaries of the City; and
- 2. **Qualifies as an Employee entitled to payment of a minimum wage from any Employer under the California minimum wage law**, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission, or is a participant in a Welfare-to-Work Program.

The City Council must therefore ensure that the Minimum Wage Ordinance and Paid Sick Leave Ordinance are interpreted and enforced consistently with *Dynamex*.

REVIEW OF EXISTING PLANS, PROGRAMS, POLICIES, LAWS

The Berkeley Minimum Wage Ordinance and Paid Sick Leave Ordinance define an "employee" as:

"Employee" shall mean any person who: 1. In a calendar week performs at least two (2) hours of work for an Employer within the geographic boundaries of the City; and 2. Qualifies as an Employee entitled to payment of a minimum wage from any Employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission, or is a participant in a Welfare-to-Work Program.

ACTIONS/ALTERNATIVES CONSIDERED

Because these ordinances have already been passed and are currently implemented in Berkeley, the City Council must refer to the City Manager and Labor Commission to determine how the *Dynamex* ruling applies to ensure the current laws are being interpreted and enforced properly.

Alternatives would include repealing and replacing these ordinances or only selectively enforcing them. Because these ordinances provide a solid and readily adaptable legal framework for protecting workers' rights, they should not be repealed. Selectively enforcing them is illegal.

CONSULTATION/OUTREACH OVERVIEW AND RESULTS

After consulting with multiple labor unions and social justice organizations, forty-nine of them have officially provided their support to proceed with the recommendations of this item. The organizations that have signed their support are displayed in the attachment below.

RATIONALE FOR RECOMMENDATION

The City of Berkeley has devoted itself to protecting its citizens' rights to a minimum wage and livable benefits. *Dynamex* has clarified which workers are entitled to the rights of employees under state law in a manner that should increase the number of workers classified as employees. As a result, more workers will receive the protections and benefits of employees under state law. Likewise, by ensuring that local ordinances are interpreted and enforced consistently with the *Dynamex* ruling, the City will increase the number of people protected by those ordinances.

IMPLEMENTATION, ADMINISTRATION AND ENFORCEMENT

This is a referral to the City Manager and Labor Commission to interpret and enforce the Minimum Wage Ordinance and Paid Sick Leave Ordinance consistent with *Dynamex*. Specifically: (1) placing the burden on the hiring entity to establish that the worker is not intended to receive the benefits of, and included within, the Minimum Wage Ordinance and/or Paid Sick Leave Ordinance; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test—namely (A) 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; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. Moreover, like *Dynamex*, the interpretation of the ordinances to be consistent with *Dynamex* can and should be retroactive.

ENVIRONMENTAL SUSTAINABILITY

No negative impact.

FISCAL IMPACTS

Workers in the City of Berkeley would be in better positions to support themselves financially and to contribute more to Berkeley's economic development.

OUTCOMES AND EVALUATION

It is expected that the City Council will refer to the City Manager and Labor Commission to ensure that the Minimum Wage Ordinance and Paid Sick Leave Ordinance are interpreted and enforced consistently with *Dynamex*.

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ATTACHMENTS/SUPPORTING MATERIALS

1. List of Labor Unions and Social Justice Organizations Supporting the Decision



