BakerHostetler

Waking Up in a Minefield: What To Do About "Employee" Benefits After Dynamex and California's AB 5 Legislation

A Supplement to "The AB 5 Playbook"

Introduction

California's recent decision to codify the California Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*, with some notable modifications, and formalize the use of *Dynamex*'s three-factor, burden-shifting test known as the "ABC" test, effective Jan. 1, 2020, understandably has attracted a lot of high-profile attention. California's ABC Test is used to determine whether, and when, workers must be considered "employees" of the party that has hired them[1] for various California state law purposes, such as minimum wages, meal breaks and expense reimbursement (depending on the industry involved[2]), general labor code requirements (although these take effect July 1, 2020), and unemployment compensation. For purposes of this Alert, workers who meet this ABC Test will be referred to as "*Dynamex* employees."

No doubt, complying with California's ABC Test will be disruptive, and add to organizations' labor costs. How disruptive it will be is likely to vary widely. There's a profound difference between a disruption that is manageable and one that poses an existential threat.

For an organization with one or two workers – or even one or two dozen workers – who now have to be treated as *Dynamex* employees, the decision to now make those workers employees for all purposes, or to simply stop using them altogether and hire part-time employees or temporary or seasonal employees to perform those services, is generally manageable.

Such an organization – one that finds itself with a handful of workers who must now be treated as *Dynamex* employees under California's new ABC Test – should be able to comply with California law simply by (1) now paying California unemployment compensation premiums in respect of those "new" *Dynamex* employees, (2) imposing a minimum wage/overtime "floor" on what is being paid to them, (3) providing them with appropriate rest and meal breaks, and (4) providing them with whatever other protections the appropriate California wage order requires, without having to do anything else for them and without having to change its overall relationship with them. That certainly will add unwelcome additional cost, and impose additional administrative burdens. But at least such costs and burdens are capable of being absorbed by most organizations.

1 There can be circumstances where work conditions, or a work environment, are so closely coordinated by and between two separate organizations that the workers are considered to be jointly employed by them for certain federal and state employment law purposes, but not others (including ERISA). A discussion of the "joint employment" doctrine is beyond the scope of this Alert.

2 It is worth noting that California's Industrial Welfare Commission currently has 17 different wage orders in effect (not counting the general minimum wage order) that impose different working condition standards on different industries. However, they cover the same basic topics such as wage rates, break periods, etc. That suggests that, organizations in some industries may have an easier time complying with the ABC Test than those in other industries. The wage orders are available on line at www.dir.ca.gov/iwc/wageorderindustries.htm

But an organization that has hundreds, or thousands, of such workers faces an entirely different situation. Its situation is far less manageable, and the difference-maker is cost: both direct cost, and indirect administrative and other costs. And a substantial portion of the cost difference for *that* organization involves employee benefits, because providing a *Dynamex* employee with "benefits" can – and frequently does – add 30% to 40% to the cost of utilizing their personal services. From having to pay a worker's employer-side federal employment taxes to providing the worker with subsidized health insurance, fringe benefits and the inevitable 401(k) plan, those costs can add up and threaten an organization's very existence. Moreover, even if an organization *were* in a position to take on those additional costs, it could not do so without making additional changes in its relationship with its *Dynamex* employees to make sure they also qualify as employees under relevant federal law, because an employer cannot offer employee benefits to nonemployees without potentially serious legal and economic consequences. For organizations that find themselves in this predicament, it is comparable to waking up in a minefield: one false step – in one direction, or even in another – and extremely bad things will happen. That is why the "benefits" question plays an outsized role here, and is one of the reasons why AB 5 has provoked an almost paralytic reaction from some of the dot-com organizations that call the Golden State home.

The AB 5 Playbook

The firm published an alert on Sept. 30, 2019, called The AB 5 Playbook, to bring to the business community's attention the more significant aspects of California's new ABC Test. The AB 5 Playbook can be found online at https://bakerlaw.com/ThePlaybook. While the Playbook discusses California's new law generally, it pays particular attention to the dangers posed by the B component of the ABC Test – the component that transforms a worker into an employee of the hiring party under California law if the work he or she performs is not "outside the usual course" of the hiring party's business.

The Playbook also identifies the principal exemptions that the legislation added to California's new labor and unemployment laws, which some organizations will be able to use to minimize or even avoid the need to deal with the new ABC Test. This Supplement has a different focus.

What This Supplement Adds

This Supplement is directed at those businesses, and those civic organizations (like hospitals and educational institutions), that cannot just reinvent themselves or reengineer their operations for practical reasons. Perhaps it is because they use significant numbers of nonemployee workers, dwarfing the number of their acknowledged employees, and so would have to completely rethink how they function. Perhaps it is because none of the categorical exemptions, written into the new California law at the behest of various industry groups, are available, or because those exemptions still leave the organization meaningfully exposed.[3] Or perhaps it is because, for the organization in question, refuting or avoiding the ABC Test is not an option because the nonemployee workers are integral to its operations (making the B component unavoidable[4]), or because the organization needs to exercise meaningful control over such workers for quality control, risk management or legal liability reasons (making the A component unavoidable, or even because the workers prefer being treated as independent contractors and are able to deduct their business expenses and set up their own retirement accounts).

Whatever the reason, such organizations have some major decisions to make, now that they have to treat a large percentage of their workers, *at a minimum,* as *Dynamex* Employees. Do they fundamentally change their work relationship with those workers, and turn those workers into their employees for all federal and state law purposes – and if they do, is there a way for such organizations to avoid having to provide them with employee benefits (and the substantial costs that come with them)?[5] Or should

3 California's new ABC law has categorical exemptions for (i) California-licensed professionals (doctors, dentists, veterinarians, lawyers, CPAs, engineers, etc.); (ii) non-licensed professionals- who require creativity and inventiveness (and are listed, such as fine artists, marketing and HR professionals, and graphic artists); and (iii) a small number of activities that are specially licensed under California's Business and Professional Code. Each exemption, though, has its own conditions that must be met. See California Labor Code Sections 2750.3(b), (c) and (d), respectively (as amended by AB 5). Without doubt, numerous organizations will find one or more of these exemptions to be beneficial, but none of them provides a "silver bullet" because the exemptions are based on the work being performed (or the worker performing it) rather than the industry in which the organization operates. For example, a hospital no doubt can use the exemptions for contracted-for medical staff and certain outsourced operations, but not for any nonemployee janitors, billing clerks or cafeteria workers it might have.

4 California's new ABC law also has an exemption that is specially tailored to organizations that find themselves with "B"-only *Dynamex* employees, but the exemption is more narrow than it appears at first blush. New §2750.3(e) of the California Labor Code (as amended by AB 5) permits an organization to effectively outsource "B"-only *Dynamex* employees to a third party (the exemption is known as the "bona fide business-to-business contracting" exemption), generally so long as the third party qualifies as an independent, bona fide business that holds itself out to the general public, the workers being provided remain free from the recipient organization's control or direction (i.e., they don't violate the A test), and the services the workers provide are for the recipient organization itself rather than the organization's own clients or customers (so, e.g., pizza delivery drivers, might not qualify).

5 This entire discussion has as its fundamental premise that the workers who must now be treated as *Dynamex* employees of the organization benefiting from their services are not currently being treated by that organization as its "employees" for most federal law purposes, including for federal income and employment tax purposes; employee benefit plan purposes (under the Employee Retirement Income Security Act, or ERISA); and organizing and collective bargaining purposes (under the National Labor Relations Act and Labor Management Relations Act).

such an organization simply recognize those workers as *Dynamex* employees – only – and do nothing further to turn them into its employees for federal law purposes because that is a sure way to relieve the organization of having to provide them with employee benefits? Exactly what does the law require, and what does the law permit?

What the Law Requires – and What It Permits

It pays to review the basics. A handful of animating employee benefits principles provide a helpful framework for determining what obligations an organization with substantial numbers of *Dynamex* employees has, when it comes to providing (or not providing) those *Dynamex* employees with the kinds of employee benefits with which most people are familiar, such as 401(k) plan coverage and group health insurance.

Animating Principles

Those animating "employee benefits" principles are as follows:

- **They Call Them "Employee" Benefits for a Reason.** The standard used to identify which workers qualify as "employees" for pension and other benefit law purposes is a 13-factor common law test the U.S. Supreme Court adopted in 1992 for use in ERISA matters.[6] It is *not* the ABC Test that California now uses to identify a worker as an "employee" entitled to certain protections under California law (and the ERISA test certainly does not contain a presumption in favor of treating someone as an employee), although two of the three ABC factors – the A and the B factors – are among the 13 factors the U.S. Supreme Court did identify (although those two factors are configured a little differently).[7] In fact, the ABC Test is not even used to determine who must be provided with the opportunity to save for retirement under California's own CalSavers statute; that statute relies on the common law-based definition the California Supreme Court adopted in 1989.[8]

Most important, in those situations where a worker must be treated as a *Dynamex* employee under California law, that does not mean that such a worker would automatically be considered an employee for federal benefits law purposes, unless the parties were to make substantial additional changes to their relationship in order to cause several of the 13 federal law factors to independently point in the direction of a "federal" employer-employee relationship.[9]

In *Darden*, the U.S. Supreme Court instructed organizations to use the following 13 common law factors to determine whether a worker qualifies as an "employee" for employee benefit plan purposes: (1) the hiring party's right to control the manner and means by which the work is performed (a version of California's A factor); (2) the skill required to do the work; (3) who provides the instrumentalities and tools to do the work; (4) the location of the work; (5) the duration of the parties' relationship; (6) whether the hiring party has the right to assign additional projects; (7) the extent of the worker's discretion over his/her work schedule; (8) the method of payment; (9) the worker's role in hiring and paying any needed assistants; (10) whether the work is part of the regular business of the hiring party (a version of California's B factor); (11) whether the hiring party is in business (which is markedly different from California's C factor); (12) whether the hiring party is providing "employee" benefits; and (13) how the worker is being treated for tax purposes. While the Court in *Darden* cautioned that there is "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive," that won't prevent a court from assigning more weight to one factor (e.g., right to exercise direction and control, etc.) over others.

6 *Nationwide Mut. Ins. Co. v. Darden* , 503 U.S. 318 (1992).

7 See *Darden*, 503 U.S. 318, at 322 (identifying the following 13 common law factors: hiring party's right to control the manner and means by which the work is performed (a version of the A factor); skill required; source of instrumentalities and tools; location of the work; duration of the parties' relationship; whether hiring party has right to assign additional projects; the extent of the worker's discretion over work schedule; method of payment; worker's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party (a version of the B factor); whether the hiring party is in business (markedly different from the C factor); provision of employee benefits; and tax treatment of the worker).

8 When California's General Assembly codified *Dynamex*'s ABC Test in Cal. Labor Code §2750.3(a)(1), it expressly limited the reach of the ABC Test to California's Labor Code, its Unemployment Insurance Code and the Industrial Welfare Commission's wage orders. There notably is no mention of California's Government Code, or CalSavers; that strongly suggests the CalSavers statute relies on the common law test adopted by the California Supreme Court in *S.G. Borello & Sons v. Dept. of Indus. Rel.* (1989), 48 Cal.3d 341. *Compare* 21 Cal. Gov. Code §100000(c) (CalSavers statute, defining "eligible employee" in (c)(1) thereof).

9 Federal courts, reviewing ERISA-based claims brought by workers claiming to qualify as "employees" for ERISA purposes, routinely consider and weigh any and all of the 13 *Darden* factors found to be present in the relationship. *See, e.g., Jammal, et al. v. American Family Ins. Co., et al.*, 914 F. 3d 449 (6th Cir.) (reviewing, *de novo*, and weighing various *Darden* factors), *pet. for cert. pending*, ___ S.Ct. ___ (2019).

- **Virtually All Employee Benefits Are Optional.** An employer generally has no legal obligation to offer, or provide, any employee benefits to its employees – and no obligation whatsoever to offer or provide employee benefits to workers who do not even qualify as "employees" under the relevant test. There may be market force reasons for providing employee benefits, but there are few if any legal reasons. Like any "general" rule, there are a handful of exceptions such as the Affordable Care Act; however, the exceptions are few and far between.[10]
- **The Employee Benefit Plan Rules Are a Mix of Federal Employment Law and Federal Tax Law. State Law Generally is Displaced.** Substantially all employee benefit plans are heavily regulated; that is part of the price to be paid for delivering substantial economic and tax benefits to the plan's many stakeholders, including the employer that sponsors and funds the plan and the employees who benefit from participating in it. But those regulations come from federal law. Virtually all state laws are preempted, at least when it comes to benefit plans maintained by private sector organizations, such as businesses and nongovernmental exempt organizations (such as most hospitals and charities, and many colleges and universities).
- **Most Benefit Plans Must Not Discriminate in Favor of Higher-Paid Employees in Order To Retain Their Tax Advantages.** Virtually all benefit plans that provide tax-favored or tax-free benefits, such as pension and 401(k)/profit-sharing plans, group health plans, and group term life insurance plans, are subject to special federal tax law-based nondiscrimination rules that require the plan sponsor to extend benefit plan coverage to large percentages of its lower-paid employees in order for the sponsor to extend those same benefit plans (or comparable plans) to the sponsor's "highly compensated" employees.[11] Conversely, to the extent an organization elects to not provide certain types of employee benefits to its highly compensated employees, it can provide those benefits to as many, or as few, lower-paid employees as it chooses; that would make it easy either to not provide benefits to *Dynamex* employees, or provide them with vastly different benefits, without impairing the many tax advantages such benefit plans provide.
- **Multiple Benefit Plan Structures Are Commonplace**. An organization can have multiple benefit plans, covering different subpopulations of an organization's employees, so long as the other benefit plan principles are satisfied (compliance with ERISA's minimum standards, compliance with the economic nondiscrimination rules, etc.), on a plan-by-plan basis and on an overall basis (i.e., when considering the plans together).

  There is good reason for maintaining multiple plans (which explains why large organizations do it all the time). The employee benefit laws – both ERISA and the federal tax laws – treat multiple entities as a single "employer" if they are connected by a high degree of common ownership/cross-ownership (typically, an 80% threshold applies). An organization weighing how to deal with *Dynamex* employees in significant numbers needs to consider how that particular bloc of workers fits into this much larger scheme of things.

The Need To Act Quickly and Precisely; a Related Warning

To the above employee benefits principles one must add an important "X" factor: those workers who qualify – or at least think they qualify – as *Dynamex* employees quickly will begin to have expectations. Large numbers of them will want "employee" benefits and believe (rightly or wrongly) that they are entitled to such benefits from whichever entity qualifies as the "hiring entity" in the ABC Test/equation, because, after all, *an employee is an employee* (or so they will believe). That means that soon (if not sooner), organizations that find themselves the "hiring entity" of hundreds or even thousands of *Dynamex* employees need to make very real employee benefit plan design decisions – and act on them. Should an organization make clear in its benefit plans that anyone being paid on a Form 1099 is not eligible for, e.g., health insurance and the company 401(k) plan, no matter how California law classifies them? Or should it do something else?

The situation presented by the ABC Test conjures up the ghost of a case from the 1990s, *Vizcaino, et al. v. Microsoft Corp*., 97 F.3d 1187 (9th Cir. 1996) (Vizcaino I); *reh'g en banc*, 120 F.3d 1006 (9th Cir. 1997) (Vizcaino II), *cert. denied*, 522 U.S. 1098 (1998). There, contract workers were able to sue their way into Microsoft's benefit plans

10 For instance, an employer must offer employer-sponsored group health insurance coverage to substantially all of its full-time employees, if the employer regularly employs 50 or more full-time employees, in order to avoid potentially substantial tax penalties. This requirement arose in 2014, as part of the Affordable Care Act. "Large" employers that fail to offer qualifying coverage to virtually all their full-time employees (generally, at least 95% of them) are liable for a potentially substantial federal tax penalty each month they fail to do so, under §4980H(a) of the Internal Revenue Code (the Code). A second, lesser tax penalty applies when such employers satisfy the Code §4980H(a) requirement, but their offer of coverage turns out to either not be affordable (i.e., not sufficiently subsidized by the employer) or does not provide sufficient (i.e., "minimum") value. Code §4980H(b).

11 The "economic" non-discrimination rules generally apply to all so-called "tax-qualified" plans, such as pension and profit-sharing and 401(k) plans, maintained by non-governmental organizations. State and local governments, though, avoid many of these federal tax law requirements because special exemptions were put in the Internal Revenue Code for them.

(Microsoft ultimately settled the case for about $100 million), primarily because Microsoft's benefit plans extended eligibility to "employees" without further defining that term. That effectively left it to the courts to decide who could qualify as an "employee," and when the IRS succeeded in reclassifying the workers as "employees" for payroll tax purposes, the contract workers sued for inclusion – and prevailed. Several subsequent cases, brought after *Vizcaino* but decided against the hordes of contract workers that brought them, established the principle that an organization can certainly exclude contract workers from its benefit plans, even if they can prove they qualify as "employees" in some respects, so long as its benefit plans carefully exclude them by definition.[12]

The temptation for any organization, of course, would be to simply and categorically exclude all the *Dynamex* employees. But there can be great peril in doing so – so a "simple" reaction would be a simplistic one. Some benefit plans, by their nature (due to federal tax requirements), require an employer to extend eligibility to all "employees." This actually was Microsoft's Achilles' heel in *Vizcaino*.[13]

While the rules that apply to 401(k) plans and similar "tax qualified" plans are more lenient, and are based on plan demographics (for the reasons noted above, under **Most Benefit Plans, in Design and Operation, Must Not Discriminate in Favor of Higher-Paid Employees**), it remains a problem for any organization with large numbers of contract workers because large numbers of suddenly reclassified worked will throw off the demographics of almost every employee benefit plan an organization will have, if those who must now be considered *Dynamex* employees also can qualify as "employees" for ERISA purposes (under *Darden*) and as "employees" for federal tax purposes.[14]

Here, though, with the ABC Test, the situation is trickier than it was in *Vizcaino*. Here, *Dynamex* employees do not automatically qualify as "employees" under *Darden*, or under the relevant federal tax rules; in fact, in several appearances, it appears unlikely that they could qualify, without meaningfully changing the relationships. So excluding *Dynamex* employees who are not also *Darden* employees from one's benefit plans would be fine. Conversely, including them in those benefit plans, just because they are *Dynamex* employees, but without making any further changes to cause most of the *Darden* factors to apply, would be fatal – for the benefit plans – because an organization generally can only provide "employee" benefits to workers who qualify as actual employees under the federal law standards (under *Darden*, etc.).[15] So some quick decisions are needed, but they need to be thought through, well-reasoned and carefully implemented. For, as noted initially, when one wakes up in a minefield, a "simple" misstep can cause great harm.

What To Consider: More Radical Options

While the above principles can be difficult to individually and collectively observe and follow, there are some key – and encouraging – takeaways for any organization that now finds itself with a substantial number of *Dynamex* employees, and faces (or thinks it faces) the prospect of substantial – potentially entity-threatening – disruption.

For example, for those organizations sufficiently desperate to consider doing something radical, the following two options quickly come to mind:

1. The easiest way to avoid having to provide *Dynamex* employees with employee benefits (including the offer of health coverage that the Affordable Care Act requires) is to take steps to ensure that those workers are never able to qualify as "employees" under the 13-factor *Darden* test, which is radically different from the three-factor ABC Test and is not burdened with the presumption that makes the ABC Test so difficult for organizations to avoid.[16] Particularly in those situations where workers only have to be treated as

12 *See, e.g., Clark v. E. I. Dupont de Nemours & Co.,* 105 F.3d 646 (4th Cir. 1997) (plaintiff was excluded from plan by definition); *Wolf v. Coca Cola Co.*, 200 F.3d 1337 (11th Cir. 2000) (same); and *Bronk v. Mountain States Tel. & Tel., Inc.*, 140 F.3d 1335 (10th Cir. 1998) (same).

13 Examination of the facts in *Vizcaino* reveals that at the time, one of the Microsoft plans to which the contract workers were seeking admission was an employee stock purchase plan (ESPP) under which employees can purchase employer stock at a discount without being taxed on the value of the discount. To qualify for that favorable tax treatment, though, an ESPP must be offered by the sponsoring employer to all of its employees (subject to a couple of irrelevant exceptions). *See* 26 U.S.C. §423(b)(2) (the same rule existed back in the1990s). Given that, even had Microsoft been able to exclude the contract workers, if they indeed could qualify as "employees" for federal income and employment tax purposes, it would have destroyed the favorable tax treatment of Microsoft's ESPP – for everyone, including Microsoft's acknowledged employees (they would have been subjected to federal taxes on their discounts) and for Microsoft itself (it would have underreported the income for all of its participating employees, and underpaid its employer-side FICA taxes by not treating the discounts as taxable "wage" income). *Vizcaino*, 120 F.3d 1006, at 1008.

14 The exact standards for treating a worker as an "employee" for federal income and employment tax purposes are beyond the scope of this Alert. We had to stop somewhere. However, the "tax" standards are firmly rooted in the common law, like the *Darden* standards, closely parallel them, and generally center on the presence or absence of (a) behavioral control, (b) financial control and (c) how the parties have documented their relationship.

15 See *Professional & Executive Leasing Co. v. Comm'r*, 89 T.C. 225 (1987), *affd*, 862 F.2d 751 (9th Cir. 1988) (401(k) plan disqualified because pension and profit-sharing plans must be maintained for the exclusive benefit of the sponsoring employer's employees as a matter of federal statute, and including nonemployees is prohibited).

16 This would involve continuing to treat the *Dynamex* employees as independent contractors for federal tax and employee benefits purposes, by making minimal changes to the actual work relationship – only those necessary to comply with the relevant California state standards that AB 5 has identified, such as paying unemployment compensation premiums on their behalf, following whichever of California's 17 industry-specific wage orders applies to them, and following the California labor code when dealing with them.

Dynamex employees because the B test applies to the work they perform (i.e., the work is within the hiring entity's usual course of business), it may be relatively easy to comply with California law without adding many – if any – of the remaining[17] *Darden* factors to the relationship. And there may be a side benefit: *Dynamex* employees that can be treated as 1099 workers for federal tax purposes remain responsible for their own Social Security taxes, and there is no indication in any of California's 17 wage orders (different industries/ business segments are subject to different wage orders) that the minimum wage(s) prescribed therein are net of any applicable "employer-side" Social Security taxes.

2. For those organizations that cannot pull off option No. 1 for practical reasons, it bears remembering that virtually all benefit plans are optional. Given that, an organization can easily avoid having to provide employee benefits to *Dynamex* employees (to the extent it is not practical to prevent them from also qualifying as "employees" under the *Darden* test) either by eliminating employee benefits for some or all of the organization's highly compensated employees or by eliminating those benefits altogether. An organization forced to choose between restructuring its entire business (or abandoning its business model) and restructuring some or all of its benefit plans is very likely to choose the latter.

More Moderate Options

For those organizations that are less inclined to perform radical surgery on their benefit plans but find themselves now having to deal with an entire class of *Dynamex* employees (courtesy of California's new ABC Test) seemingly without a viable alternative, the following more moderate options appear to be available:

1. Change the work relationships between the organization and the *Dynamex* employees by adding control and other key factors to make it possible to reclassify the *Dynamex* employees as employees for federal tax and benefits law purposes as well as for California law purposes, but rely on traditional employment-based screening techniques, such as scheduling and the development of a class of short-term/seasonal *Dynamex* employees, to avoid having to provide meaningful employee benefits to the substantial majority of them. While this approach no doubt would require some additional work (each rule permitting a certain type of employee to be excluded, or to routinely fall short of a prescribed eligibility rule), those costs are much more attractive than the costs likely to be incurred simply by transforming all *Dynamex* employees into employees for all purposes.
2. Separate the *Dynamex* employees into two categories – committed, high-performing workers the organization is willing to transform into full-time employees for federal tax and benefits law purposes (as well as for California state law purposes), and newer or lower-performing workers who can be left as independent contractors for federal tax and benefit plan purposes and would be relegated to providing less strategically critical services (seasonal work, occasional work, etc.) So long as the work being performed by the two categories of workers maintained some differences (e.g., type of work was different, scheduling was different, etc.), the organization would only have to extend its existing employee benefit plans to those in the committed/full-time category.
3. For those organizations that not only have to now live with an entirely new class of *Dynamex* employees but feel compelled by market forces (low unemployment, high screening/training costs in the event of high turnover, etc.) to actually provide those employees with a competitive benefits package, transform the entire class into full-fledged employees for federal tax and benefits purposes by changing key relationships but create a segregated platform of largely self-financed/ funded employee benefit plans for that class that is more responsive to transient workers who move into and out of the traditional employment relationship.For example, an organization could make a relatively affordable health plan coverage offer to its *Dynamex* employees, without heavily subsidizing it, by limiting the coverage to narrow network provider plans.Similarly, an organization could make a free-standing 401(k) plan available to its Dynamex employees that has an employer contribution commitment which is very different from the one made in the organization's regular 401(k) plan but which contains plan features that are responsive to the special interests and needs of a more itinerate workforce (rules that permit account balances to be retained post-employment, rules that make it easier to roll in outside balances, an employer contribution formula that is based on accumulated years of service

17 An organization could accomplish this objective by excluding all or substantially all of its highly compensated employees from its employee benefit plans (no doubt, in exchange for paying them additional cash and equity-based compensation), thereby enabling the organization to add the *Dynamex* employees, as a class, to the organization's employee headcount while systemically excluding them from those same plans in order to avoid incurring the additional benefits cost(s).

to enhance retention, etc.). As with option No. 1 (above), this too would require some additional work, such as monitoring plan demographics to make sure the overall plan structures satisfied all the relevant nondiscrimination rules, but those costs would be quite modest by comparison.

4. There are many, many more refined options available. But the above benefit plan-related choices – both the radical ones and the more moderate ones – illustrate that AB 5 is not necessarily the End of the World so long as an organization considers carefully what to do, and then acts with a fair amount of precision.

Conclusion

California's new ABC Test certainly may not be welcome, or convenient, for many organizations that have committed to using large numbers of (until now) nonemployee workers in their businesses, but it is feasible to find a rational way forward. Employee benefit costs aren't (or don't have to be) the showstopper that many fear – unless, perhaps, one procrastinates or acts impulsively and without careful consideration.

For More Information and Guidance

This information is intended to be a starting point for helping businesses consider their options. For further guidance and for customized legal advice, please contact any of the following attorneys:

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