The Dynamex ABC Test: Approaches to Measuring Control and Direction

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The recent ruling by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court,* has brought California in line with other states who rely on a so-called "ABC Test" to determine whether a worker is an employee or independent contractor. The assumption underlying this test is that all workers are considered employees, unless all three of the following factors are met: (A) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work 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 for the hiring entity.

In this article, I offer strategies to systematically evaluate Factor A and the concept of *control*. These strategies are rooted in scientifically-sound data collection approaches, such as job analysis, commonly used to measure various aspects of the work environment, including compliance with wage and hour requirements. The following text provides examples of the different ways in which control and direction may be exerted by an employer and experienced by a worker. In addition, a review of selected methods to measure and quantify the expression of this concept are discussed.

Operationalizing "Control"

When evaluating this factor, it is important to recognize that the way in which control manifests itself is often dependent upon the industry as well as the company. Operationalizing the concept of control so that it can be measured usually requires an in-depth understanding of the individual company's operations. Knowing, for example, the process of customer order generation and the method in which work is assigned to independent installation technicians can inform an assessment of the extent to which a cable company is "directing work".

Some forms of control are more evident, such as operating manuals and guidelines. When evaluating control, these materials serve as part of an initial assessment. Other forms of control, such as direction and supervision, may require a more in-depth inquiry. For example, supervision that may not appear in printed materials may manifest in the nature and content of interaction between the worker and the company. The daily communication between the two parties can be measured and tracked, as well as the nature of that interaction. For example, knowing who initiates contact and the specific information being shared may be necessary to accurately characterize the communication. A delivery driver relaying updates regarding unexpected road construction to an operator, for example, is an entirely different communication than a driver contacting a manager to ask for approval before leaving a high value package at a specific location. Frequency, duration, and the nature of the communication are all important factors to measure.

Observation Study

One approach to capture these data is through observation study. This approach involves "shadowing" workers performing their job and recording detailed information about the activities they perform. The method generates a detailed work record which includes a description and the duration of all activities performed as well as the work context. This method can be particularly useful for gathering systematic and precise information about communication between parties. An example of a partial record from an observation study appears in Table 1, which includes several activities involving communication between the worker and the company. Table 2 is an example summary

of the frequency and duration of the interaction observed during four full-shift observations.

Table 1: Example of Partial Observation Record Tracking Interaction Between Worker and Company[1]

Task Duration	Task*
0:02:00	Discuss yesterday's deliveries with other drivers.
0:08:30	Scan and place packages onto truck from belt.
0:10:40	Talk to technology department regarding problem with scanner.
0:01:50	Discuss delivery route with another driver.
0:02:40	Place packages onto truck from belt.
0:01:10	Discuss status of package from yesterday with Shipping Manager [Driver states that package was wet so he gave it to Quality Assurance Department per policy].
0:03:10	Close truck doors.
0:04:20	Exit warehouse.
7:45:40	Deliver packages on route.
0:01:50	Concurrent Activity: Call Shipping Manager to ask for clarification regarding package destination.
0:00:50	Concurrent Activity: Receive call from Warehouse Manager [Warehouse Manager indicates that package on driver's truck is not supposed to be delivered today].
0:00:50	Open warehouse door and drive in.
0:00:30	Park truck in warehouse.
0:13:10	Review number of packages not delivered with Warehouse Manager and discuss financial consequences to driver.
0:02:20	Review tomorrow's deliveries list in warehouse office.
0:00:50	Discuss unknown address with Shipping Manager [Driver states address on package does not exist].

*Red text indicates interaction with Company
[1]Data is illustrative and is not intended to reflect any particular company or employee.

Table 2: Example of Frequency and Duration Analysis for Four Full-Shift Observations

		Analysis of Time Worker Spent Interacting with Company		
Observation Number	Total Observation Time	Frequency of Interactions with Company	Total Time Spent Interacting with Company	Percent of Work Day Interacting with Company
1	9:41:00	6	0:07:00	1.3%
2	11:33:00	2	0:03:00	0.5%
3	8:21:00	1	0:04:00	0.9%
4	8:20:00	3	0:10:00	2.1%
Average	9:28:45	3	0:06:00	1.2%

Self-Report Data Collection

Alternatively, self-report methodologies, such as an interview can be useful for collecting data that help characterize the level of control between a worker and a company. Workers have direct knowledge of their relationship with the company, including the frequency with which they interact with company employees, and the nature of those interactions. They can also report of the degree to which their work activities are controlled by the company and the ways in which this occurs. Again, the concept of control may require industry specific knowledge to ensure that the question wording enables workers to adequately describe their relationship with the company. For example, answering the question, "does the company control your work?", may result in a different response than, "How do you determine the order in which you provide cable installation services to the list of customers you received from the order management system? And "What factors do you consider when making this decision?" Asking open-ended questions like these allow employees to describe their own experiences uniquely and precisely and often help to provide a full understanding of the work and its context.

Another source of self-report data useful in the analysis is what we call the employer's "points of contact". These are company employees who directly interact most frequently with workers. Points of contact can work in multiple departments,

divisions, and locations within a company. For example, cable installation workers may call the logistics department when they are seeking information about a particular job, or the technology department if they are having problems with their computer. The frequency and nature of the interactions may differ by department, making it important to gather information from as many points of contact as possible. Relevant data regarding the interaction with the workers can be gathered from the points of contact side through observation and/or from self-report methods such as questionnaire and interview. This information can be particularly useful because it provides an alternate perspective to the workers' perceptions and experience.

Summary

Data collected from multiple sources using different methods, such as those presented above, can provide a substantial amount of information and a robust perspective on key factors relevant to an independent contractor classification, such as control. These data can assist in understanding and assessing the extent to which the company controls and directs the worker, which can help business leaders determine whether to classify workers as employees or independent contractors, or help the court determine whether existing independent contractor classifications are appropriate. For additional information regarding an independent contractor assessment, see Chapter 4, "Employment Classification" in Hanvey, C.M. (2018). *Wage and Hour Law: Guide to Methods and Analysis*. New York, NY: Springer.