WHO IS AN EMPLOYEE? NEW STANDARD FOR 2 MILLION WORKERS SPURS CLASH AT CALIFORNIA CAPITOL

Source: The Sacramento Bee

Ashley Hutton Stanfield's favorite thing about her job is the freedom to work in the "nooks and crannies of my day." Four years ago, after leaving her career at a medical devices company to raise her children, Stanfield became a sales consultant for Arbonne International, a multi-level marketing firm that makes beauty and nutrition products.

Stanfield said she coaches about 1,000 clients per month on how to use and sell a 30-day health regimen. But she can manage her business from the dining room of her Fair Oaks home, between dropping her kids off and picking them up from camp, or take a phone call while running on the treadmill at the gym. She has leisurely breakfasts with her family in the morning and finishes up what she needs to after putting her two daughters to bed.

"I was able to achieve more with this opportunity than I ever could have achieved in that other life," Stanfield said. "I'm present in every moment."

Arrangements like Stanfield's are looking more uncertain after a California Supreme Court ruling on independent contractors in April. That unanimous decision, adopting a new "ABC test" for defining employees, threw nearly three decades of legal precedent up in the air.

It could take years, and plenty more litigation, to sort through all of the implications of the case. Business groups estimate, based on federal labor bureau data, that there are nearly 2 million Californians classified as independent contractors — ranging from truck drivers to construction workers, hairstylists to journalists.

Stanfield worries the decision could wipe out the lifestyle she's built for herself, which she said allows her to earn more money than she did in a traditional job while working on her own terms.

So does the California business community, which is facing down increased costs for salaries, benefits and regulations, such as minimum wage and overtime, if more workers are declared employees. It is now intensely lobbying the Legislature to suspend the court ruling and develop its own method for determining who is an employee.

On June 20, six dozen companies and industry groups sent a letter to Gov. Jerry Brown and lawmakers expressing concern that a "wide range of industries throughout California will be exposed to costly litigation and will have limited resources to maintain their business. Innovation and investment in California's economy will be limited or reduced."

"There's an awful lot of confusion out there," said Allan Zaremberg, president and CEO of the California Chamber of Commerce.

Organized labor is pushing back with equal vigor, aiming to defend what it considers a rare win for workers in an economic environment it believes has increasingly turned against them.

Two days after the business community letter, four dozen unions and allied organizations sent their own missive to Brown and the Legislature, urging them not to touch the decision. They argue it clarifies ambiguous standards that employers have used for years to misclassify workers.

“All this did was say, here’s where the line is. It’s still up to companies and workers to decide what side of the line works for them,” said Caitlin Vega, legislative director for the California Labor Federation. “Why would the Legislature intervene to take one more thing away at a time when workers are struggling so much to get by?”

The court case dates back to 2004, when Dynamex, a package and documents delivery company, converted all of its drivers to independent contractors after management concluded the move would save money.

Four months later, a group of drivers sued, claiming they performed essentially the same tasks in the same manner as when they were employees, but without the protections of the California Labor Code and wage orders.

The California Supreme Court ultimately ruled in favor of the drivers this past spring. It based the decision, however, on a new standard that had never been used in the state. Under the test, a worker is only properly considered an independent contractor if:

(A) They are “free from the control and direction” of the company that hired them when they perform their work.

(B) The work they perform falls “outside the usual course” of the hiring company’s business.

(C) They have their own independent business or trade beyond the job for which they were hired.

Catherine Fisk, a law professor at UC Berkeley, said it’s a substantive change from the old California standard, established in 1989, which considered nine different factors. The ABC test is a simpler way to determine who is an independent contractor, she said, but it will almost certainly result in more workers being deemed employees.

The number of independent contractors has exploded over the past 30 years, Fisk said, as companies figured they could lower labor costs, and keep them lower, if they contracted out work. The classification removes the pressure to provide annual raises to employees and eliminates the responsibility for additional costs like payroll taxes, unemployment insurance taxes and worker's compensation insurance.

"The ABC test is an effort to restore what arguably the law was 50 or 75 years ago," Fisk said.

Business groups are most concerned about the B factor of the test. They believe it could make independent contracting nearly impossible, because the "usual course" of a company's business — its core practices — could be interpreted so broadly.

As Arbonne International corporate counsel Karen Tegger put it: Is Arbonne's essential function to manufacture and distribute health and beauty products or is it to sell them?

The company's position is that its salespeople are independent contractors because they decide "exclusively on their own terms how much they want to work," Tegger said, "as long as it follows our policies and procedures."

"They're entrepreneurs. They have their own business," she said.

Arbonne is not sure how the Dynamex ruling will affect its approximately 30,000 consultants in California, though Tegger did not go so far as to say the company could not function in the state if they were reclassified as employees.

Obvious questions now abound about the emerging "gig economy," where workers are hired on app platforms like Uber, Postmates or TaskRabbit to drive, deliver food or perform errands.

Zaremberg of CalChamber also points to a wide array of traditional sectors where the decision could have widespread effects: Coaches and referees for youth sports programs. Art and music instructors that teach part-time at multiple schools.

He brings up the example of a restaurant that wants to hire a freelance graphic designer to make its menu. Does designing a menu fall within the “usual course” of a restaurant’s business that must be performed by an employee?

“If the worker is an expert in a certain area, but works for 10 different businesses, is it practical to be an employee of 10 different businesses?” Zaremberg said.

The California Supreme Court adapted its ABC test from a standard used in 22 other states. But critics note that all of those states adopted their regulations through the legislative process, not the courts.

Zaremberg said all but one of the states also have a broader B factor that an includes an “or,” allowing workers to perform a similar function as the hiring company’s “usual course” of business if it is at a different location.

Business groups are now asking the Legislature to a conduct a public review and update of California’s wage orders, which are more than a decade old, to clarify industries that should be exempt from employee classifications because don’t they fit the model anymore.

“Let’s bring the rules up to date for the economy and the technology,” Zaremberg said. “The users of these services are at risk.”

Senate President Pro Tem Toni Atkins and Assembly Speaker Anthony Rendon have given no indication they are interested in working on the issue this month as the Legislature finishes work for the year.

Lawmakers will face pressure from labor organizations not to undermine the Dynamex ruling, which they contend has the potential to level the playing field for workers who have been taken advantage of for a long time.

Vega of the California Labor Federation said many companies have benefited from the risky strategy of misclassifying workers, undercutting the competition that played fairly with employees and driving them out of the business. The trend has devalued traditional employment and weakened unions, she said, as everything becomes a “side hustle.”

“They don’t want to have any responsibility to you as an employee, but they want to have control over how you do your job,” Vega said.

She believes business groups are portraying the court decision as a bigger deal than it is, because it “means a lot of money to a lot of powerful corporations.” They will adjust, she said, as they always have.

“An independent contractor is supposed to be someone who chooses to go into business for themselves,” Vega said. “You can’t be forced to take that risk.”