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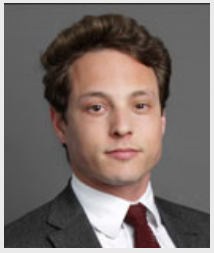
California Employment Laws 2020:

Your Survival Guide

December 18, 2019

PRESENTED BY:

Kirstin Muller



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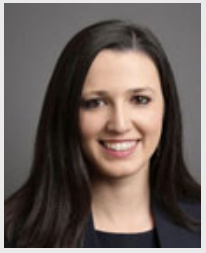

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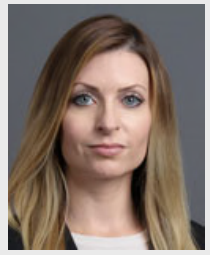

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Overview

- Introduction
- Minimum Wage Increases
- Independent Contractor Law (A.B. 5)
- Arbitration Agreements
- California Consumer Privacy Act of 2018
- EEO

Minimum Wage Increases

- **California minimum wage will increase**
  - $13.00 per hour on January 1, 2020 for employers with 26 or more employees
  - $12.00 per hour for smaller employers with 25 or fewer employees
  - Increases continue until January 1, 2023

- **Federal minimum wage stays at $7.25 per hour**

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Independent Contractor Law

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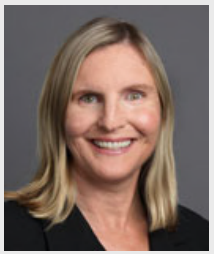

Dynamex Operations West Inc. v. Superior Court

- California Supreme Court, 4 Cal.5th 903 (April 30, 2018)
- Starts with the presumption that a worker who performs services for a hiring entity is an employee for purposes of claims for wages and benefits under the Wage Orders
- Adopted the ABC test to distinguish an independent contractor from an employee

Assembly Bill No. 5 (A.B. 5)

- Approved by the Governor on September 18, 2019
- **Purpose:** To codify the *Dynamex* decision and clarify the decision's application in state law
  - For the Labor Code
  - For the Unemployment Insurance Code
  - For the Wage Orders of the State Industrial Welfare Commission
- A person providing labor and services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates the ABC test

Public Policy Behind The ABC Test

The new law is intended to prevent:

1. Harm to employees who lose significant workplace protections
2. Unfairness to employers who must compete with companies that misclassify
3. Loss to the State of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for Workers' Compensation, Social Security, unemployment and disability insurance

"Misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income equality."

The ABC Standard

Hiring entity must prove all three to properly classify a worker as an independent contractor:

A. The worker is free from the control and direction of the hiring entity in connection with performance of the work.

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

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

The A Part - Control

- Much like the focus of the old *Borello* test
- Who controls the work?

The B Part – Usual Course of Business

- The most troubling factor
- Clear examples offered by the California Supreme Court: the plumber brought in to fix the retail store's plumbing is an independent contractor; the cake decorator brought into a bakery is not an independent contractor
- The website developer hired to design the website for your small accounting business is an independent contractor
- A software engineer hired to help other developers finish a project at your database company is not an independent contractor

The C Part – Same Work for Others

- Can be satisfied if the worker is performing the same work for other companies
- Not just getting a business license, a business card or using their own tools

Retreat to *Borello*

- However, there are many exceptions.
- If the exceptions apply, then the determination of employee or independent contractor status shall be governed by the old test adopted in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.

The *Borello* Factors

The most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker, both as to the work done and the manner and means in which it is performed

The Exceptions to the "ABC" Test of A.B. 5: An Overview

- A.B. 5 specifically excludes more than 20 professional and licensed positions from A.B. 5 and *Dynamex*
- Regarding the exceptions, A.B. 5 author Assm. Lorena Gonzalez has stated:

> *"The exceptions we have included will ensure that independent contractors in professions where people have the ability to negotiate for themselves — such as doctors, lawyers, insurance agents, real estate agents, accountants, hairstylists and freelance journalists — are protected."*

The Business-To-Business Exception

The *Dynamex* test does not apply to:

- a bona fide business-to-business contracting relationship
- which meets 12 separate criteria

Bona fide *(adj.)*: genuine, real

Note: This subdivision does not apply to an individual worker, as opposed to a business entity

The Business-To-Business Exception: Major Takeaways

1. You need a written contract
2. Contract must specify that contractor is free from your control
3. Ensure contractor has:
   - Appropriate licenses and tax registrations
   - Other clients
   - Advertisements (web presence)
   - Tax ID number

Consequences For Non-Compliance

- **In California:**
  - Fine between $5-15k per worker
  - Missed meal/rest break penalties
  - Unpaid OT
  - Ancillary Violations (Paystubs, Waiting Time)
  - Worker's Comp Penalties, Damages
  - Unemployment Insurance Penalties
  - PAGA Penalties
- What about an arbitration agreement?

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Arbitration Agreements

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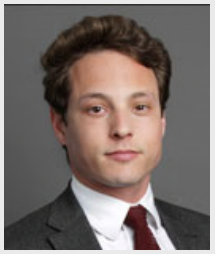

Contractual Arbitration: What Is It?

- Essentially private court

- Agreement by the parties to submit disputes to binding arbitration before a neutral arbitrator (often a retired judge)

Arbitration: Pros/Cons

- Streamlined process, more controlled discovery, generally less expensive than litigating (time)
  - **But:** Employers must pay arbitration costs (can be $30,000+)
- Confidentiality
- Decided by arbitrator instead of jury (which can be unpredictable)
- Class action waivers

Challenges to Enforcement

- **Substantive Unconscionability** – What does the agreement say?
  - *Armendariz* factors:
    - Neutral arbitrator
    - Adequate discovery
    - Availability of all types of relief
    - Written arbitration award that permits limited judicial review
    - Employer pays arbitrator's fees, all arbitration costs
- **Procedural Unconscionability** – How is the agreement implemented?

Implementation Considerations

- Hidden in dense employment packet?

- Mandatory/optional? - Recent *Diaz* case (continued employment as implied acceptance of an arbitration agreement)
  - But what about A.B. 51?

California Assembly Bill 51

- Takes effect January 1, 2020
- Forbids employer from requiring arbitration of FEHA or Labor Code claims as condition of employment (also forbids requiring affirmative opt out)

Doesn't This Violate the FAA?

- Likely yes. Governor Brown vetoed two very similar bills on the grounds that they would not be upheld as they conflicted with the FAA
- Case Seeking Injunction: *US Chamber of Commerce et al. v. Becerra et al.*, Eastern District of CA, Case No. 2:19-at-01142

What Are The Options?

1. Implement mandatory arbitration agreements before January 1, 2020
   - Agreements entered into before then will still be effective

What Are The Options?

2. Modify the agreements so that there is an affirmative opt *in* procedure
   - Some employees who opt in and others who don't—one of the biggest benefits, class action waiver, will be blunted

What Are The Options?

3. Suspend the use of arbitration agreements until the legal uncertainty is resolved

What Are The Options?

4. Continue as usual and hope the law is found invalid

What Are The Options?

4.b. Argue that AB 51's FAA carveout means the arbitration agreement in question is not subject to the law

- Law would thus be limited to contracts not involving interstate commerce
  - *But:* "transportation worker exemption"

- "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 *et seq*.)."

What Are The Options?

- Continue as usual and hope the law is found invalid
- Argue that the FAA carveout means the arbitration agreement in question is not subject to the law
  - Law would thus be limited to contracts not involving interstate commerce
    - *But:* "transportation worker exemption"
- Modify the agreements so that there is an affirmative opt *in* procedure
- Implement mandatory arbitration agreements before January 1, 2020
- Suspend the use of arbitration agreements until the legal uncertainty is resolved

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California Consumer Privacy Act of 2018

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CCPA - Background

- Governs collection, retention, disclosure, and sale of “personal information”
- Response to high-profile data breaches
- A compromise bill
- One of the strictest privacy regulation schemes in the country

Who Is Covered By The Act?

- **"Businesses": For-profit entities**
  - Annual gross revenues exceeding $25 million; or
  - Buys, receives for commercial purposes, sells, or shares for commercial purposes, the personal information of 50,000 or more consumers, households, or devices; or
  - Derives 50% or more of its annual revenues from selling consumers' personal information
- **What about non-profits and smaller businesses?**

Exemptions

- **A.B. 25**
  1. Information collected and used in the employment context
  2. Until January 1, 2021…
- **Gramm-Leach-Bliley Act (GLBA)**
- **Health Insurance Portability and Accountability Act of 1996 (HIPAA)**

What Obligations Are Imposed By The Act?

- **Depends on who "personal information" is collected from**
- **"To Dos" for employees and job applicants:**
  1. Limited obligations until January 1, 2021
  2. Disclose:
     - Categories of information being collected
     - Purpose for which the information will be used
  3. Timing of Disclosure

"To Dos" For Non-Employee Consumers (outside of the "employment context")

1. **Disclose:**
   - Categories of information being collected
   - Purpose for which the information will be used
   - Include a summary of rights in the disclosure
2. **Update Privacy Policies**
3. **Provide an "Opt-Out" Link if Business Sells Information**

Additional Consumer Rights

- Right to Request More Information
- Right to Request Deletion of Information
- *Unless the law is amended, these additional rights and obligations will apply to information collected from employees and job applicants beginning Jan. 1, 2021*

“Verifiable” Consumer Requests

- Offer consumers two methods for submitting requests
- Respond to requests within 45 days
- May be made up to two times in a 12-month period

Enforcement and Liability

- Six months after effective date
- Attorney General can bring enforcement actions for non-compliance
  - Must provide 30 days' notice and opportunity to cure

Looking Ahead

- Impending regulations
- Ballot initiative for Nov. 2020

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Equal Employment Opportunity

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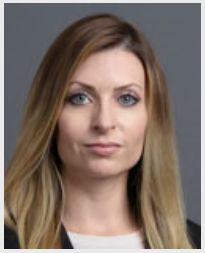

A.B. 9: Stop Harassment and Reporting Extension ("SHARE")

- Previously, employees had *one year* to file DFEH charge alleging FEHA violation
- A.B. 9 extends deadline to bring forward complaint of harassment, discrimination or retaliation under the FEHA to *three years*
  - Employee has one year after receiving right to sue to file suit
  - Extends deadline *six times* the federal standard and *three times* the current CA standard
- Resulting problems
- Best practices

S.B. 778: Sexual Harassment Training – Compliance Extended to 2021

- #MeToo 2019 legislation required employers with 5 or more employees to provide classroom or other "effective interactive training and education" re: sexual harassment prevention training to supervisors and non-supervisors by January 1, 2020
- S.B. 778 extends deadline until January 1, 2021:
  - *Supervisory* employees - at least *two hours*
  - *Non-supervisory* employees - at least *one hour*
- Must train within six months of hire
- Training required every two years
- Employers who provided requisite training in 2019 need not provide refresher training again for such employee until two years

A.B. 749: No More No "Re-Hire"

- Employers often include no "re-hire" clauses in settlement agreements for closure
- A.B. 749 prohibits settlement agreement from restricting employee right to seek employment with employer with whom employee is settling a claim
- Only applies to agreements between employers and "aggrieved persons," i.e., person who has filed a claim against employer in court, administrative agency, or through employer's internal complaint process
- Severance agreements offered to employee upon termination can still include a no "re-hire" provision as long as not offered to settle employment dispute and employee has not yet raised a claim
- No re-hire clause permitted if good faith determination aggrieved person engaged in sexual harassment or sexual assault
- Can refuse to re-hire if legitimate non-discriminatory, non-retaliatory reason

S.B. 142: Lactation Accommodation Updates

- Existing law requires reasonable efforts to provide use of a room, other than a bathroom, in close proximity to work area
- New law, mirroring San Francisco's lactation accommodation law, expands existing law to also require:
  1. Shielded from view;
  2. Free from intrusion while in use;
  3. Safe, clean and free of hazardous materials;
  4. Surface for breast pump and personal items;
  5. Sitting area;
  6. Access to electricity, sink with running water, and refrigerator;
  7. Multi-purpose room takes precedence over other uses.
- Denial of lactation break time or non-compliant space = $100 penalty per violation
- Employer must develop and implement policy regarding lactation accommodation and make available to employees
- 50 employees or less - exempt *if* prove compliance causes undue hardship due to *significant* difficulty or expense

A.B. 1223: Living Organ Donation Update

- Existing law requires *private* employer to permit employee to take a *paid* leave of absence, not exceeding 30 business days in a year, for organ donation
- A.B. 1223 requires *private* or *public* employer to grant an additional *unpaid* leave of absence, not exceeding 30 business days in a year, for organ donation
- *Public* employees must exhaust sick leave before taking unpaid leave
- Update written leave policy/handbook

S.B. 188: CROWN Act Prohibits Hairstyle Discrimination

- Expands FEHA definition of race to include traits historically associated with race, such as hair texture and "protective hairstyle" (e.g., braids, locks, and twists)
- First legislation of its type in the United States
- Legislature concluded grooming policies prohibiting natural hair, including afros, braids, twists and locks have a disparate impact on Black employees
- Update handbook and grooming policies

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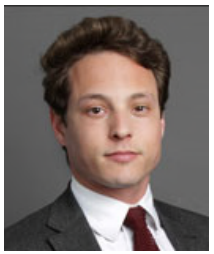

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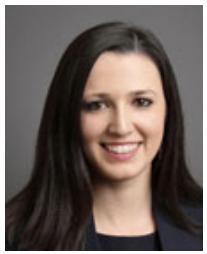

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