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LAW OFFICES, APC

2020 EMPLOYMENT LAW UPDATE

HIGHLIGHTS IN THIS ISSUE

- AB–5: Independent Contractors and the Potential Effect on the California Franchise Economy.
- AB–51: Is California's New Attempt to Ban Mandatory Arbitration Agreements Legal?
- SB–142: California's New Employee Lactation Policy Requirements.

OVERVIEW OF NEW LAWS AFFECTING CALIFORNIA EMPLOYERS

This Newsletter details California's new laws that alter employer obligations with regard to minimum wage, overtime, worker classification, hiring practices, employee benefits, and more.

As you will see, California took a drastic step in an attempt to regulate the "Gig Economy" with Assembly Bill No. 5 ("AB-5"). This bill will have radical implications for all companies that do business in California and will change the way employers classify their workers.

Over the past year, the California legislature also enacted several laws that regulate employment arbitration agreements, and require employers to update their employment practices. Businesses and organizations must be aware of these changes to ensure they are compliant in the upcoming year.

Unless otherwise specified, all laws are effective **January 1, 2020**.

If you have any questions about the new laws explained in this Newsletter, or any other employment issues, please contact our offices! Our team is always prepared and ready to help your business face the difficult legal landscape in California.

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AB-5: THE "ABC" TEST REDEFINES WHO MAY BE AN INDEPENDENT CONTRACTOR

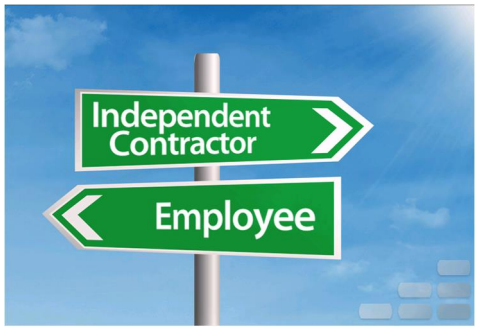
Codifying *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903

Probably the most publicized and controversial bill to effect the employment landscape this new year is AB-5. In an attempt to regulate the "gig" economy - like Uber and Lyft - the California legislature enacted AB-5 which requires employers to use a three-pronged test to determine whether workers may be classified as independent contractors rather than employees.

This law codifies the 2018 California Supreme Court ruling in *Dynamex Operations West, Inc. v. Superior Court,* which held that the burden falls on the business to prove that their independent contractors satisfy all three parts of what is now known as the ABC Test. The following three factors make up the ABC Test:

A. The worker must be free from control of the hiring entity in connection with the performance of their work and in the actual performance of their work;
B. The worker must perform work that is outside the usual course of business of the hiring entity; ***AND***
C. The worker must be customarily engaged in an independent business of the same nature as the work they perform.

Dynamex held that all workers are employees unless the hiring entity can prove that the worker meets all three parts of the ABC Test.



The Risks of Misclassification

Misclassification of an employee as an independent contractor carries substantial financial consequences. Employees, unlike independent contractors, are entitled to meal breaks, rest breaks, and overtime. Failure to provide meal or rest breaks, or pay overtime can result in significant penalties.

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Exceptions in AB-5

AB-5 contains several exceptions to the ABC Test. This Newsletter discusses just some of the exceptions. If you have specific questions about how AB-5 affects your business or if a specific exception applies to you, please contact our offices.

"Business to Business" Exception

AB-5 creates an exception that allows business entities to contract to provide services to other business entities without those workers being subject to the ABC Test. However, in order to meet this exception, business-to-business contractors must meet 12 very specific requirements that are set forth in the statute.

Licensed Broker-Dealer

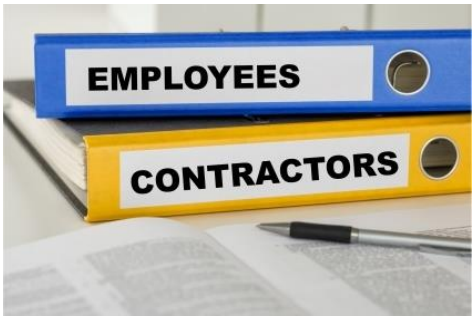
Licensed securities brokers or investment advisors and their agents who are registered with the SEC or FINRA are exempt from the ABC Test.

Other exempt professions include attorneys, accountants, architects, doctors, engineers, licensed real-estate agents and private investigators.

Best Practices After AB-5

Employers must now be increasingly sensitive to worker classifications. No doubt, misclassification issues will be the subject of a whole host of new lawsuits.

Moving forward, we recommend that businesses conduct a thorough audit of their worker classifications to ensure that their independent contractors are properly classified.



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AB-5'S POTENTIAL EFFECT ON CALIFORNIA'S FRANCHISE ECONOMY

The word franchise is not mentioned anywhere in AB-5, yet many have argued that AB-5 could create unintended liability for franchisors. The concern is that under this new law, franchisors may be held liabile for wage and hour claims by franchisee employees.

Others believe that these concerns are misguided. We believe AB-5 will not alter the franchise landscape because the ABC Test does not determine whether franchisee employees are also, or "jointly", employed by a franchisor. Instead, AB-5 states that all workers are employees unless the worker can meet all three parts of the ABC Independent Contractor Test. The issue of employee classification is irrelevant when determining joint liability.

The one Court which has opined on this subject agreed. In *Salazar v. McDonalds*, the Court found that the *Dynamex* ABC test had no bearing on the issue of whether a franchisee employee was also employed by the franchisor. The Court explained that this was an issue of joint employment, not misclassification of an employee as an independent contractor. *Salazar v. McDonalds Corp.* (2019) 939 F.3d 1051, 1058.

About five years ago, the California Supreme Court specifically addressed the issue of joint employment in the franchise setting and found that a franchisor could only be liable to franchisee employees "if it retained or assumed a general ***right of control*** over factors such as hiring, direction, supervision, discipline, discharge, and relevant day to day aspects of the workplace behavior of the franchisee's employees." . *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474. It is likely that this opinion will hold true post AB-5.

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LAWS REGULATING ARBITRATION AGREEMENTS

California passed three new laws regulating arbitration agreements. The most significant is AB-51, which imposes penalties on companies who require or mandate their employees to sign arbitration agreements. The remaining two new laws regulate these arbitration agreements in less impactful ways.

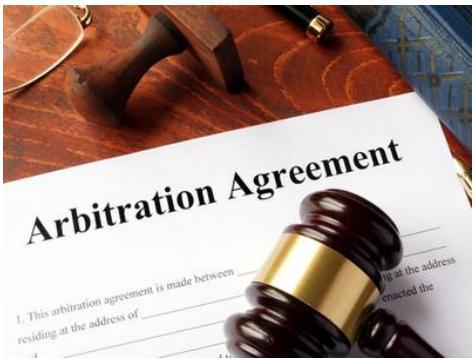
AB-51: California's New Attempts to Invalidate Arbitration Agreements

In 2018, the California legislature passed AB-3080. AB-3080 was similar to AB-51 in that it attempted to invalidate arbitration agreements in the employment setting. Governor Brown vetoed the bill on the basis that it unlawful because it contradicted and would be pre-empted by the Federal Arbitration Act ("FAA"), a federal law that favors arbitration as a matter of public policy.

Despite these concerns, Governor Newsom signed AB-51, which criminalizes and penalizes employers who force employees to sign arbitration agreements as a condition of employment. Neither opt-out provisions nor similar clauses that allow employees to withdraw their assent to arbitration obviate AB-51. Even more daunting is that a violation of AB-51 can also result in PAGA penalties, that can rapidly escalate potential damages.

How Does AB-51 Impact Me and My Company?

AB-51 does not actually invalidate arbitration agreements. Rather, the bill punishes companies who force their employees to sign arbitration agreements but does not invalidate the agreements themselves. It also states that companies cannot retaliate against an employee for their refusal to sign an arbitration agreement. Retaliation against an employee could subject the company to liability for violation of the FEHA.



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AB-51 is Likely Preempted by the FAA

Under federal law, a state cannot pass a law that directly contradicts existing federal law or pass a law that regulates an area which Congress has effectively created complete authority.

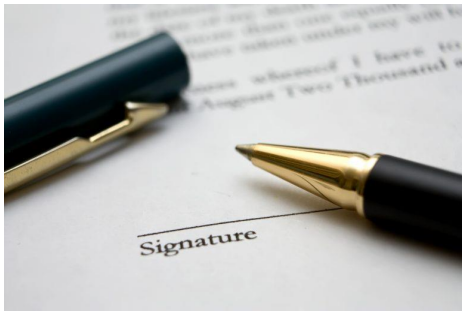
As mentioned previously, Governor Brown vetoed AB-3080 because he believed it would be preempted and in direct contradiction with federal law. This opinion was echoed in a United States Supreme Court opinion, wherein Justice Ginsberg succinctly states that "when parties agree to arbitrate, the FAA supersedes state laws." *Preston v. Ferrer* (2008) 552 U.S. 346, 360. Congress, though its adoption of the FAA and other laws governing arbitration agreements, has effectively assumed plenary (complete) authority over the enforceability of arbitration agreements.

Supporters of AB-51 may argue that it does not run afoul of federal law because the law contains a carve out that states that it does not cover arbitration agreements that are governed by the FAA. This position will be tough to embrace in light of the numerous court rulings that hold that federal law preempts all state laws that discriminate against arbitration agreements on their face or accomplish the same objective by disfavoring arbitration contracts. *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 137 S.Ct. 1421.

Best Practices: What Should Employers Do Moving Forward?

Until challenged in federal court, AB-51 is valid law. Beginning on January 1, 2020, all employers could face penalties if they require employees to sign arbitration agreements as a condition of employment or retaliate against employees for refusing to sign.

The best practice for all employers is to have your employees sign arbitration agreements ***before*** January 1, 2020. Thereafter, employers should consider using voluntary arbitration agreements.



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SB-707 Recovering Arbitration Costs

Under this new law, if an employer fails to pay arbitration costs within 30 days of when the payment is due, the employer will be deemed to have materially breached the agreement and waived the right to require arbitration.

AB-749 Prohibition on "No Rehire Clauses"

AB-749 bans settlement agreements clauses that prohibit the signing employee from being rehired. The law provides an exception for when the employee was found to have engaged in sexual harassment or assault.

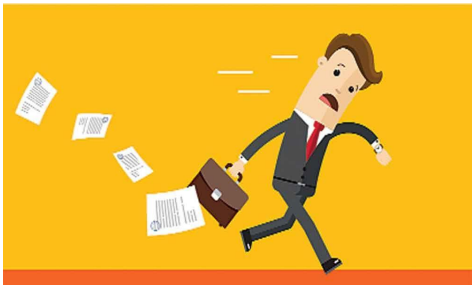
NEW OBLIGATIONS ON EMPLOYERS

SB-142 Lactation Accomodation

Modeled after the San Francisco law, California adopted SB-142 and expanded the obligations on employers to provide lactation time and sanitary areas for their employees.

All employers - regardless of size - must now provide time and an area (other than a bathroom) for their employees to produce breast milk. The area provided must be clean, safe, free from interruption, and free from toxic and hazardous materials. The area must have access to electricity, contain a surface to place a breast pump, and include a refrigerator to store breast milk or a cooler. The location must also have access to clean running water.

Employers with 50 or fewer employees who feel that this new law will create an undue hardship on their business can apply for an exemption.



The law also mandates that employers include a lactation policy in their employee handbooks. Our firm has already drafted a policy that is compliant with the new law, please contact our office to have us update your handbooks!

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DISCRIMINATION, HARASSMENT, RETALIATION, AND EMPLOYEE SAFETY

AB-9 Harassment Statute of Limitations Extended to Three Years

Currently, an employee has one year from the date of the alleged incident to file a claim for harassment, discrimination, or retaliation with the DFEH. AB-9 extends this period to ***three years***.

SB-188: The "Crown Act" – Protecting Hairstyles

SB-188 expands the definition of "race" under the Federal Employment and Housing Act ("FEHA") to include protected hairstyles. Protected hairstyles include braids, locks, and twists. Dress codes that restrict or discriminate against protected hairstyles would now be deemed discriminatory under this new law. Employers can now be held liable for discrimination if they ban or retaliate against an employee for wearing certain hairstyles.

Employers must be sure to update their dress code policies, and harassment and discrimination policies to reflect this change.

SB - 778 New Sexual Harassment Training Requirements

Last year, the California legislature passed SB - 1343 which required that employers provide sexual harassment training to their employees by January 2020. SB - 778 extends the deadline to January 1, 2021.

Under the new law, employers with five or more employees must provide one hour of sexual harassment prevention training to nonsupervisory employees and two hours of such training to supervisors by January 1, 2021. This training must take place at least once every two years.

SB-530 Harassment Prevention Training Requirements for the Construction Industry

This new law requires that the Division of Labor Standards Enforcement create and promulgate recommended harassment and discrimination prevention policies and training requirements for the construction industry.

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AB-547 Sexual Violence and Harassment Prevention Training for Janitors

This law enhances sexual harassment protections for janitorial workers. The bill requires janitorial service employers to register with the Division of Labor Standards Enforcement.

The bill also empowers the Director of the Department of Industrial Relations to set up a training advisory committee. The committee will assist the director to compile a list of qualified originations and peer trainers that employers will be required to use when providing sexual violence and harassment prevention training to janitorial employees.

AB-1804 and 1805 Health and Safety

Previously, employers would only have to report employee hospitalizations to the California Division of Occupational Safety and Health ("CDOSH") if the employee was in the hospital for at least 24 hours. AB-1805 removes the "24 hours" requirement. Now, employers ***must report all*** employee hospitalizations. Further, AB-1804 requires that the employer submit the report of the incident through the CHOSH website.

AB-1805 also updates the definition of "serious exposure" to mean exposure to a hazardous substance that has a "realistic possibility" of death or serious physical harm (versus current law requiring "substantial probability" of death/serious harm).

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CHANGES TO WAGE AND HOUR LAWS

Minimum Wage Increase

On January 1, 2020, the state minimum wage increases to $12 per hour for employers with 25 or fewer employees and to $13 per hour for employers with 26 or more employees. This is not a new law — SB-3 was signed in 2016. Please also check your local minimum wage ordinances as they may require a higher minimum wage than the state.

THE MINIMUM WAGE REQUIREMENTS

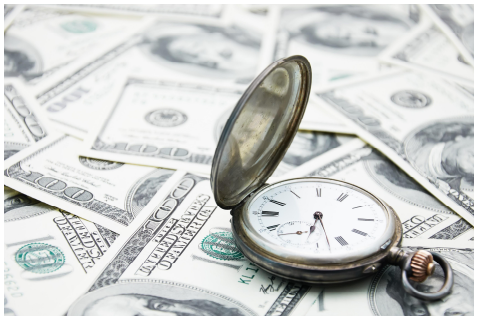
For California employers, the minimum wage is increasing as follows:

Effective Date	Large Employers	Small Employers
January 1, 2020	$13.00	$12.00
January 1, 2021	$14.00	$13.00

For employers ***inside the city of Los Angeles***, the minimum wage is increasing as follows:

Effective Date	Large Employers	Small Employers
July 1, 2020	$15.00	$14.25
July 1, 2021	$15.00	$15.00

Employers have a continuing obligation to notify their employees of the minimum wage increase by posting the Minimum Wage Order (MW-2017) at their worksites.



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AB-1554 Flexible spending Accounts Notification

AB-1554 requires that employers notify employees participating in flexible spending accounts of any deadlines to withdraw funds before the plan year's end in at least two different ways. Methods of notification include email, telephone, text message, mail and in-person.

SB-286 and 671 Employee Paydays in Specific Industries

SB-286 will allow professional baseball teams in California to pay park employees on the next regular payday after the season's end without facing penalties for untimely wages. Similarly, AB - 671 allows employers to pay "print shoot employees" final wages on their next regular payday rather than immediately upon the last day of the photo shoot.

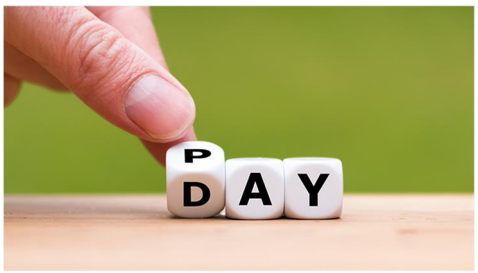
AB-673 Penalties for Missed or Late Paydays

AB 673 provides that penalties for late payment of scheduled wages (weekly, biweekly, or semimonthly) shall be recovered by the Labor Commissioner, payable to the affected employee, as a civil penalty or by the employee as a statutory penalty in a hearing before the Labor Commissioner. The affected employee may also enforce civil penalties for late payment of wages through the Private Attorneys General Act ("PAGA") actions. However, the affected employee cannot also recover statutory penalties for the same violation.

What this means for California employers: The penalties for late payment of scheduled wages (as opposed to final wages) now carries significant penalties.

SB-688 Expanding Labor Commissioner Authority

Current law allows the Labor Commissioner to issue a citation and recover penalties, restitution of wages and liquidated damages from employers who pay employees less than the minimum wage. SB 688 expands that authority, authorizing the Labor Commissioner to issue citations and recover amounts owed by an employer who has paid less than minimum wage, or less than the amount owed pursuant to a contract.



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EXPANDED LEAVE

AB-1748 Leave for Airline Employees

Flight deck and cabin crew employees of airline companies will now be eligible for protected leave under the CFRA so long as they meet three requirements. First, they have worked for the employer for 12 or more months. Second, they must have worked or been paid for at least 504 hours over the last 12-months. Last, they must have worked or been paid for at least 60 percent of the applicable "monthly guarantee," which means they worked at least 60 percent of the minimum number of hours scheduled in a given month.

AB-1223 Organ Donor Leave

Current law requires employers with 15 or more employees to provide 30 days of paid leave in a one-year period when an employee participates in an organ donation. AB - 1223 requires employers to provide an additional unpaid leave of absence of up to 30 days per year.

SB-30 Expanding the Definition of Domestic Partnership

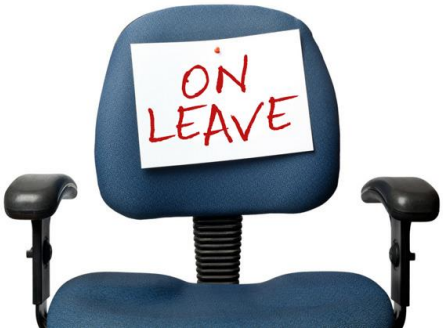
This bill removes the requirement that persons be of the same sex or of the opposite sex and over 62 years of age in order to enter into a domestic partnership. This expanded definition means more employees will be eligible to take leave guaranteed to spouses such as paid sick leave, and paid family leave.

SB-83 State Disability Insurance Increase

SB-83 increases the amount of state disability insurance an individual may receive from six weeks to eight weeks.

SB-271 Unemployment Insurance for Motion Picture Employees

Motion picture production employees will now be able to count temporary employment outside of the US towards unemployment eligibility so long as they meet certain requirements.



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The employee must be a California resident, hired and dispatched from the state, and intends to return to the state to seek re-employment when the out of state work is complete.

MISCELLANEOUS

AB-25 California's Consumer Privacy Act as Applied to Employers

In 2018 the California Legislature passed the California Consumer Privacy Act which goes into effect on January 1, 2020. As a part of the act, businesses are required to disclose or delete private information upon an individual's request.

As written, the Act could allow employees to request that their employer delete their personnel information. AB-25 clarifies that employee data is exempt from this law until January 2021. Accordingly, employees cannot request employers to delete their information under the Consumer Privacy Act

AB-406 Employment Development Department Administrative Requirements

By January 1, 2025 the EDD must provide the paid family leave applications in multiple languages.

AB-333 Whistleblower Protections

This law adds a section to the Welfare and Institutions Code granting whistleblower protections to "patient's rights advocates" who provide patient services at county mental health centers.

AB-61 Restraining Orders for Employees

Existing law allows police, immediate family members and roommates to ask the court to remove firearms and ammunition from people they believe to pose a danger. AB - 61 expands current law to co-workers. Employees or teachers of secondary or postsecondary schools can now file a petition for a gun violence restraining order as well. The employee must get approval from their employer before obtaining the order.

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SB-322 Protections During Investigations

SB-322 creates protections for employees during the course of California Department of Public Health ("CDPH") investigations. Under this new law, health facility employees will be able to discuss possible regulatory violations or patient safety concerns with the CDPH investigator without fear of retaliation.

B-267 Infants and The Entertainment Industry

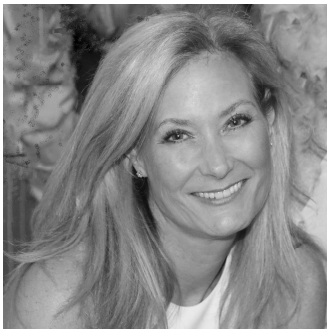
Current law requires that infants younger than one month obtain a certification from a physician and a surgeon in order to work in any motion picture set or location.

AB-267 will expand this law beyond just motion pictures and require the same certification for infants to work in the "Entertainment Industry." Entertainment Industry is defined in the law as any motion picture which will include film, television, commercial and apply regardless of medium.

AB-203 Valley Fever Awareness Training

Employers must now provide training on Valley Fever awareness and prevention to construction employees in counties where Valley Fever is highly prevalent.

If you have any questions about these new employment laws, please do not hesitate to call our office!



DEBORAH BIRNDORF ZEILER

Debbie Birndorf Zeiler has been practicing law for more than twenty years, including ten years at major law firms. She represents employers in all aspects of employment law, including defense of harassment and discrimination claims, wage claims, wage and hour class actions, disability claims, and misappropriation of trade secrets. She also drafts and reviews employment contracts, severance agreements, employee handbooks, and personnel policies and provides counseling.

Debbie earned her B.A. from UCLA, her M.B.A. from NYU, and her law degree from Washington University in St. Louis, where she graduated in the top of her class.

Debbie has been named a **2019 Super Lawyer** in Employment and Labor. She was previously awarded the **Super Lawyer** honor in 2013, 2015, 2016, 2017 and 2018. She has also been named one of the **Top Employment and Labor Attorneys** in Los Angeles and one of the **Top Women Attorneys** by ***Los Angeles Magazine***. Birndorf Law Offices was recognized by ***Los Angeles Magazine*** as one of the **Best Law Firms in Los Angeles**.

Super Lawyers Los Angeles Magazine

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JONATHAN ASSIA

Jonathan Assia joined Birndorf Law Offices in August 2018. After earning his B.A. in Philosophy from UCLA in 2015, Jonathan ventured to the east coast where he graduated cum laude from Boston University School of Law. During his time in law school, Jonathan externed with a Federal District Court Judge, where he learned about litigation from a judicial perspective, and was published in Boston University School of Law's Review of Banking and Financial Law. Following his graduation, Jonathan returned to Los Angeles where he became a member of the California Bar Association and now practices management side employment law as Ms. Birndorf's associate. In his short time with the firm, Jonathan has assisted with everything from large class actions to day to day client consultation. In his free time, Jonathan is an avid golfer, classical music enthusiast, and dedicated sports fan.

MONICA SMITH

A native of Atlanta, Monica has been Ms. Birndorf's assistant, office manager, paralegal and life saver for over ten years.

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