

CA Employment Law Updates

Presentation for the California Furniture
Manufacturers Association (CFMA)

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Notice

This presentation is intended to provide general information.

No part of it should be construed as legal advice to be applied to any specific factual situation.

For advice on any legal issues or matters, you should seek legal advice.



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Outline

- Assembly Bill 5: Independent Contractor Classification
- Arbitration Agreements
- The New Cares Act Benefit Program
- Families First Coronavirus Response Act (FFCRA)
 - Emergency Paid Sick Leave
 - Emergency Family and Medical Leave Expansion Act
- Return to Work in the Time of COVID-19

Assembly Bill 5: Independent Contractor Classification

What is AB5 and what does it do?

- AB5 is an Assembly Bill signed by Governor Newsom on September 18, 2019 making it much more difficult for a business to classify a worker as an independent contractor
- AB5 codifies the application of the “**ABC**” test from the California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* to determine if workers in California are employees or independent contractors for purposes of the Labor Code, the Unemployment Insurance Code, and the Industrial Welfare Commission (IWC) wage orders
- Under the ABC test, a worker is considered an employee, and not an independent contractor, unless all three of the following conditions are satisfied:
 - “**A**” — the person 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 the work and in fact; **and**
 - “**B**” — the person performs work that is outside the usual course of the hiring entity’s business; **and**
 - “**C**” — the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

What was the test prior to *ABC/Dynamex*?

- Prior to *Dynamex*, independent contractor status was determined by a multi-factor test derived from the California Supreme Court decision in *S.G. Borello & Sons Inc. v. Department of Industrial Relations*
- *Borello*'s principal factor is “whether the person to whom services is rendered has the right to control the manner and means of accomplishing the result desired”
- There are additional factors such as: the worker’s purchasing of his or her own equipment; assumption of his or her own risk for profit and loss; the operation of an independently established business that serviced other companies; the degree of permanence of the relationship; the requirement of particular skill or licensure; and how the parties defined the relationship
- None of the factors was dispositive, and the factors might be weighted differently in different circumstances, which provides employers with some flexibility and arguments in support of their classification
- Both the *ABC* test and *Borello* test assume that the worker is an employee and the hiring entity must prove that the worker is an independent contractor
 - **ABC test imposes a significantly higher burden on companies than the *Borello* test**

AB5 Exemptions

- AB5 Exemptions
 - Insurance brokers
 - Physicians, surgeons, dentists, podiatrists, psychologists and veterinarians
 - Attorneys, architects, engineers, private investigators
 - Accountants
 - Securities broker-dealers, investment advisors, and their agents
 - Direct sales salespersons as described in Unemployment Insurance Code Section 650
 - Real estate licensees
 - Hairstylists, barbers, electrologists, estheticians, and workers providing natural hair braiding
 - Workers performing repossession services for repossession agencies
- *Even if* an exemption applies, does not automatically mean that the person is an independent contractor
 - A company still has to satisfy the *Borello* test

Consequences of Misclassifying

- Hefty penalties
 - The penalties range from \$5,000 to \$15,000 per violation
 - If a pattern and practice of violations is found, penalties can range from \$10,000 to \$25,000 per violation
- Tax liability
- Coverage under benefit plans
- Workers' compensation costs
- Penalties and liability for paying for injury
- Overtime and other wage and hour liability
- Liability for discrimination and harassment under federal, state, and local statutes
- Willful misclassification is defined as voluntarily and knowingly misclassifying an employee as an independent contractor

Legal Challenges to AB5

- California Trucking Association challenged AB5: Court has granted preliminary injunction
- Uber and Postmates challenged AB5: On February 10, 2020, Court denied plaintiffs' request for preliminary injunction
- Challenge by freelance journalists, arguing that AB5 infringes on First Amendment rights because it treats them differently than writers who produce other types of speech, such as marketing copy: TRO has been denied
 - But according to LA Times (2-7-2020), Assemblywoman Lorena Gonzalez (author of AB5) may relax rules for freelance writers and photographers
- Uber/Lyft: Protect App-Based Drivers and Services Act
- Litigation continues

Arbitration Agreements

AB 51– Arbitration Agreements

- Prohibits employers from requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the FEHA or other specific statutes governing employment (such the Labor Code) as a condition of employment, continued employment, or the receipt of any employment-related benefit
 - Essentially bans mandatory arbitration agreements
- Prohibits employers from threatening, retaliating or discriminating against, or terminating any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of specific statutes governing employment
- Should not impact arbitration agreements entered into prior to January 1, 2020
- Does not apply to post-dispute settlement agreements or negotiated severance agreements
- In an attempt to address federal preemption issues, AB 51 provides that nothing in the bill is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*)
- Chamber of Commerce challenged AB 51 and on February 6, 2020, the Court granted a preliminary injunction

The New CARES Act Benefit Programs – 4 Major Takeaways

The New CARES Act Benefit Program – 4 Major Takeaways

- On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (CARES Act) was signed into law, providing an estimated \$2 trillion stimulus package to address the COVID-19 pandemic
- Pandemic Unemployment Assistance (“PUA”)
 - More workers are eligible for unemployment benefits through PUA
 - Those who would not otherwise be eligible for UC or extended benefits through regular state or federal programs
 - Covers individuals who become unemployed, partially unemployed or unable to work because of a specific COVID-19 related-reason
 - Includes self-employed workers, independent contractors, workers who do not have long enough work histories to qualify for state benefits, workers seeking PT benefits
 - Retroactive to losses on or after January 27, 2020 and continues until December 31, with a max benefit of 39 weeks

The New CARES Act Benefit Program – 4 Major Takeaways (con't)

- Pandemic Unemployment Compensation (“PUC”)
 - Benefits increased by \$600 no matter the worker’s prior earnings or benefit level
 - PUC benefit will supplement regular UC benefits, up to July 31, 2020
- Pandemic Emergency Unemployment Compensation (“PEUC”)
 - Benefits are extended by 13 weeks
 - Benefits available through December 13, 2020
- Short-Time Compensation Program (“STC”)
 - Encourages use of STC programs, employers avoid layoffs
 - 10-60% reduction allowed
 - Min. of two employees and 10% of workforce or unit affected
 - Health and retirement benefits remain the same as before
 - Participating workers receive supplemental \$600 PUC

Families First Coronavirus Response Act (FFCRA)

FFCRA

- Effective April 1, 2020 through December 31, 2020
- Applies to employers with **less than** 500 employees; but exemption for employers with 50 employees (must satisfy conditions)
- Potential exemption for an employer who “... produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.” See DOL FAQs Q. 56
- Employer paid benefits but reimbursement through refundable tax credits
 - Retain appropriate documentation; see <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>
- FFCRA Poster: Post it!
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- Department of Labor, FAQs: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

FFCRA: Paid Sick Leave

- **Paid Sick Leave** – means paid leave because:
 1. Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 – the current Safer-At-Home Orders by state and local officials do consist of a quarantine or isolation order
 2. Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, including those who may be particularly vulnerable to COVID-19
 3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
 - **Reasons 1 through 3 above:** *paid at employee's regular rate of pay*; employee is entitled to a maximum of \$511 per day, or \$5,110 total over the entire paid sick leave period
 4. Employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, including those who may be particularly vulnerable to COVID-19
 5. Employee is caring for employee's child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons
 6. Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services
 - **Reasons 4 through 6 above:** *paid at 2/3 of employee's regular rate of pay*; employee is entitled to a maximum of \$200 per day, or \$2,000 total over the entire paid sick leave period

FFCRA: Expanded Family and Medical Leave

- **Expanded Family and Medical Leave** – means paid leave under the Emergency Family and Medical Leave Expansion Act because employee is caring for employee's child because the school is closed, or childcare provider is unavailable due to coronavirus
- Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 12 weeks of paid expanded family and medical leave
- First two weeks of this leave is unpaid but employee may take paid sick leave for the first ten days of that leave period as discussed under paid sick leave (paid at 2/3). Alternatively, employee may substitute any accrued vacation leave or sick leave the employee has under company's policy (paid at regular rate)
- For the following ten weeks, the employee will be paid at 2/3 of the employee's regular rate of pay for the hours the employee would be normally scheduled to work
 - However, employee will not receive more than \$200 per day or \$12,000 for the twelve weeks that include both paid sick leave and expanded family and medical leave when the employee is on leave to care for the employee's child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons
- Intermittent leave allowed only if the employer agrees

Return to Work in the Time of COVID-19

Return to Work in the Time of COVID-19

- How to Resume Business Operations
- Environmental and Physical Considerations
- Others' Health Considerations
- Practical Realities: Hiring Issues
- Practical Realities: HR Issues
- Practical Realities: Sick Leave Considerations
- Disability Related Inquiries and Medical Exams

General Questions: How to Resume Business Operations

- What social distancing protocols should employers consider?
 - Staggered scheduling
 - Work station reassignment
 - Hallways, stairways
 - Plexiglass shields, tables, other barriers
 - Elevators
 - Common areas (lunch rooms, time clock stations, workplace fitness centers)
 - Shared equipment, supplies
 - Door handles
- What employee guidelines will be required?
- What policies need to be updated as employees return to work?

Practical Realities: Environmental and Physical Considerations

- What logistical considerations should employers consider when preparing for the physical return of its workforce?
- What employee guidelines will be required for safety or prevention measures?

Practical Realities: Others' Health Considerations

- What should employers consider in requiring the use of personal protective equipment (e.g., masks, gloves, etc.) in the workplace?
- What should employers consider in screening the health of its employees, such as through taking employee temperatures?
 - Customers? Workplace visitors?
- What if an employee has a temperature or otherwise presents COVID-19 symptoms?
- What if an employee refuses to consent to health testing?
 - California Consumer Privacy Act
- What if an employee is concerned with another employee's presence in the office because the employee is exhibiting COVID-19 symptoms?
- If and when a vaccine for COVID-19 is available, can employers require vaccination?

Practical Realities: Hiring Issues

- How should employers conduct employee interviews when hiring?
- When hiring, may employers screen applicants for COVID-19?
- May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?
- May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?
- May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms associated with it?
- May an employer postpone a new hire's start date or withdraw a job offer because the individual is at higher risk for COVID-19 (e.g., 65 years old, pregnant, etc.)?
- Given remote work, how can one validate I-9s?

Practical Realities: HR Issues

- Are there any steps employers should take to address workplace harassment related to COVID-19?
- What if an employee does not want to participate in business travel due to COVID-19 concerns?
- What steps should an employer take if an employee returns from a high risk travel area?
- What if an employee refuses to report to work because they object to taking public transportation, live in or must travel to work through a “hot spot,” or have other such COVID-19-related concerns?
- May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor’s note certifying fitness to return to work?

Practical Realities: Sick Leave Considerations

- What if an employee becomes ill with COVID-19 or is placed on an order of quarantine after we reopen?
- What if an employee has to take care of someone who is ill with COVID-19 after we reopen, or has to take care of a dependent child whose school is closed due to COVID-19?

Practical Realities: Disability Related Inquiries and Medical Exams

- How will COVID-19 impact the Americans with Disabilities Act (ADA)?
- What should employers consider if requiring that employees stay home if they have COVID-19 symptoms?
- If an employee discloses that he or she has COVID-19, to whom may employers disclose the identity of the employee?
- What if an employee was already receiving a reasonable accommodation prior to COVID-19 and now requests an additional or altered accommodation?
- Should employers still engage in the interactive process during the pandemic?
- Can the pandemic itself be a relevant consideration in deciding whether a requested accommodation can be denied because it poses an undue hardship?

Additional Guidance

- [Faegre Drinker's Employer Guide: Return to Work in the Time of COVID-19](#)
- [LaborSphere: A Faegre Drinker Labor & Employment Blog](#)
- CDC: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- WHO: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
- NIH: <https://www.nih.gov/health-information/coronavirus>
- OSHA: <https://www.osha.gov/SLTC/covid-19/>

Thank you

Questions?

