



LANDEGGER BARON LAW GROUP

EXCLUSIVELY REPRESENTING EMPLOYERS

EMPLOYMENT LAW WORKSHOP 2020 LEGAL UPDATE

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Employment Law, Advice, Litigation and Solutions

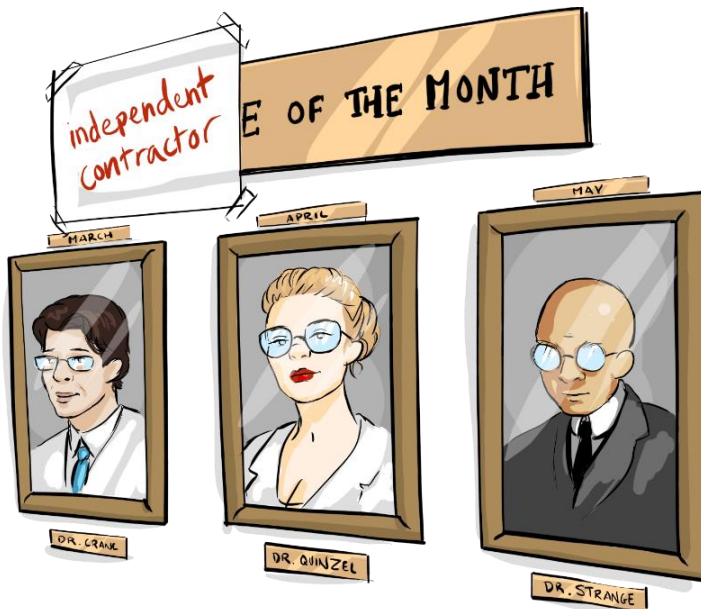
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2020 Legal Update for Employers

The California Legislature and Governor Gavin Newsom were busy in 2019:

- * The State Legislature sent 1,042 bills to Governor Newsom to sign, and he signed 870 of them, vetoing 172 of them.
- * Of the 870 bills signed, many will directly affect California employers and employees.

Independent Contractors



Employee v. Independent Contractor

- * Generally employment laws do not apply to Independent Contractors (IRS Form 1099).
- * Person performing work for another will be presumed to be an Employee.
- * Labor Code 2750.3 (aka AB 5)- Effective 1/1/2020 (codified [Dynamex Operations West, Inc. v. Superior Court of Los Angeles](#)- April 30, 2018).

Employee v. Independent Contractor

- * **The ABC Test-**

- * To overcome presumption, hiring entity must prove all three:
- * (A) worker is free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact;
- * (B) the worker performs work that is outside the usual course and scope of the hiring entity's business (different than the typical work); 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.

Legislative Reaction to *Dynamex*

- * **(AB 5)** codifies and expands *Dynamex* beyond the Industrial Welfare Commission Wage Orders to the California Labor Code and Unemployment Insurance Code.
- * AB5 creates a number of exemptions for specified occupations from the application of *Dynamex* and instead provides that the pre-*Dynamex* multifactor *Borello* test will continue to apply to those occupations (rather than the stricter ABC test).

AB 5 Exemptions:

The following **professions** are exempt (from the *Dynamex* test):

- * Insurance brokers licensed by the state;
- * Physicians and surgeons;
- * Dentists;
- * Podiatrists;
- * Psychologists and veterinarian licensed by the state performing professional or medical services to or by a healthcare entity;
- * Lawyers;
- * Architects;
- * Engineers;
- * Private investigators and accountants who hold an active license;
- * Security brokers registered with the SEC;
- * Salesperson provided commissions are based on actual sales (Unemployment Insurance Code, section 650);
- * Commercial fishermen; and
- * Newspaper distributor and carriers.

AB 5 Exemptions, cont.

Certain ***contracts for “Professional Services”*** are “exempt” if the following factors are established:

- * The individual maintains a business location separate from the hiring entity;
- * The individual has a business license and any other required license, if any (6 month grace period);
- * The individual sets their own rates;
- * The individual sets their own hours;
- * The individual does the same type of work for other entities or holds themselves out as available to work for other entities; and
- * The individual exercises discretion and independent judgment.

AB 5 Exemptions, cont.

- * Professional Services, cont. (limited list)
 - * Marketing Professionals
 - * Human Resources Administrator
 - * Travel Agents
 - * Graphic Designers
 - * Grant Writers
 - * Fine Artists
 - * Photographers and Photojournalists (not in motion picture and no more than 35 projects per year)
 - * Freelance writers and editors (no more than 35 per year)
 - * Licensed hairstylists, barbers, cosmetologist, estheticians.

AB 5 Exemptions cont.

Subcontractors in the construction industry if the following criteria are met:

- * The subcontract is in writing;
- * The subcontractor is licensed CSLB (trucking subcontractors are not required to have a contractor's license);
- * The subcontractor has required business license or business tax registration, if requires;
- * The subcontractor maintains a separate business location;
- * The subcontractor has authority to hire and fire others;
- * The subcontractor assumes financial responsibility for errors (bonds, insurance, warranties, etc.);
- * The subcontractor is customarily engaged in an independently established business of the same nature of the work performed.

AB 5 Exemptions cont.

- * Business to Business Relationships (not individuals unless a bona fide sole proprietorship)
 - * Service provider free from control and direction;
 - * Provides services directly to the contracting business and not to customers of the contracting business;
 - * Contract in writing;
 - * Business license or tax registration, if required;
 - * Separate business location;
 - * Engaged in an independently establishes business;
 - * Service provider actually contracts with other businesses
 - * Service provider advertises and holds itself out to the public;
 - * Service provider has no other financial relationship with contracting business;
 - * Can negotiate own rates;
 - * Can set its own hours and location of work; and
 - * The type of service provided does not require a CSLB license.

Mandatory Arbitration Agreements

(AB 51) Adds Section 432.6 to the Labor Code, outlawing mandatory employment arbitration of claims by job applicants or employees. AB 51, as written, prohibits mandatory arbitration agreements for *any* discrimination claims covered under the Fair Employment and Housing Act (not just sexual harassment) and for *any* claims under the Labor Code (including wage and hour and other protections). This was the same bill vetoed over and over by Governor Brown, as it was a clear violation of the Federal Arbitration Act.

Law is currently stayed. Stay tuned.



Sexual Harassment



FEHA- Statute of Limitations

(AB 9) Stop Harassment and Reporting Extension (“SHARE”) Act.

- * On January 1, 2020, the statute of limitations for an employee to file an administrative complaint for discrimination, harassment and retaliation with the State’s Fair Employment and Housing Act (FEHA) is extended from one-year to three years.
- * The bill will not revive “lapsed claims.”



Sexual Harassment - Training Requirement

Extended Deadline

(SB 1343) Effective 1/1/2019, all employers with at least (5) five employees were required to provide sexual harassment training to all employees by 1/1/2020. Specifically, employers were required to provide:

- (1) at least two hours of sexual harassment training to supervisory employees; and
- (2) at least one hour of training to non-supervisory employees by January 1, 2020, and then once every two years thereafter.

(SB 778) Amended the compliance deadline, now requiring compliance by 1/1/2021, and clarified that supervisors who received training in '18 or '19 do not need to provide training until 2 years later.

Sexual Harassment Training for Janitorial Workers

(AB 547) Requires the Director of the Department of Industrial Relations to convene a training advisory committee to assist in compiling a list of qualified organizations that janitorial employers must use to provide in-person sexual violence and harassment prevention training every other year.



Sexual Harassment Training for Seasonal or Temporary Employees

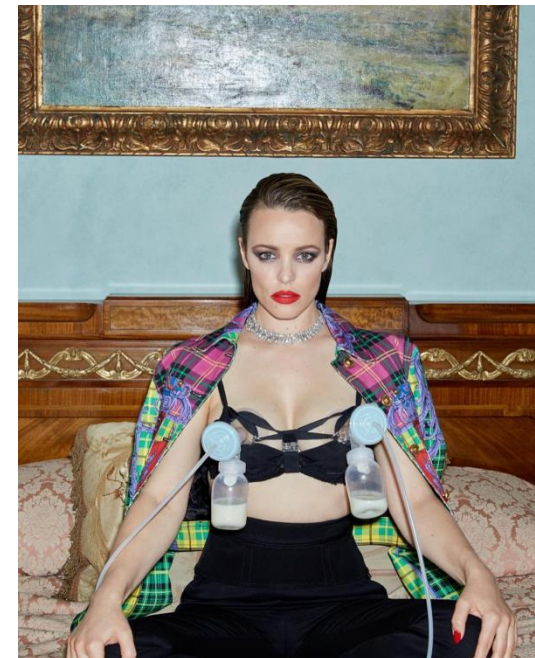
(SB 530)

- * Employers with seasonal, temporary, or other employees hired to work for less than six months have until January 1, 2021, to provide training under existing sexual harassment training and education requirements.
- * Allows for employers in multi-employer collective bargaining agreements to satisfy anti-harassment training by verifying that they have received requisite training under existing sexual harassment training and education requirements.

Lactation Accommodation

(SB 142) Under current state law, the location for an employee to express breast milk may not be a “bathroom” and must be in a private location in close proximity to the employee’s work area. The new law adds:

- * Room must be shielded from view and free from intrusion;
- * Safe, clean and free of hazardous materials;
- * Contain a surface to place breast pump and personal items;
- * Contain a place to seat;
- * Access to electricity or alternative devices;
- * Access to a sink with running water and a refrigerator (or other cooling device) for storing milk.
- * If a multipurpose room is used, lactation must take precedence over other uses.
- * Requires a written policy to be distributed upon hire and upon inquiry by an employee.



Settlement Agreements

(AB 749) Prohibits employment settlement agreements from prohibiting an employee/claimant from obtaining future employment with the defendant employer.

- * Settlement agreements may not contain a “no rehire” provision.
- * An employer may still lawfully prohibit or restrict an employee from obtaining future employment with the settling employer, if the employer has made a good-faith determination that the employee engaged in sexual harassment or sexual assault.
- * Any settlement agreement that violates this prohibition shall be deemed void as a matter of law and against public policy.



Extension of Paid Family Leave Benefits

(SB 83) Beginning on July 1, 2020, the maximum duration of paid family leave (PFL) benefits individuals may receive from California's State Disability Insurance program will extend from six to eight weeks.

- * The new law becomes effective July 1, 2020, and remains effective until January 1, 2021.



The Crown Act

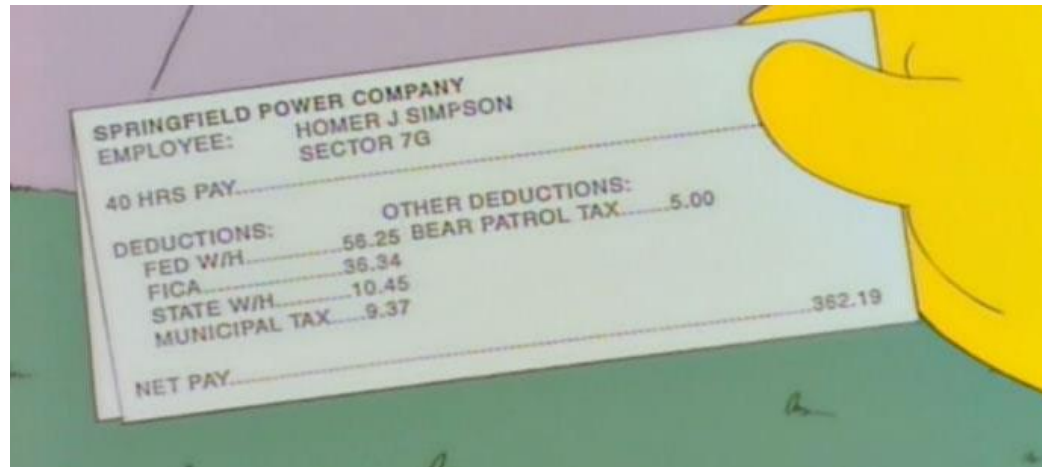
(SB 188) The Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act, becoming the first state to ban discrimination on the basis of hairstyles associated with race. The CROWN Act adds hairstyles that are closely associated with race to the class of protected racial characteristics under state law, including hair texture and protective hairstyles such as locks, braids, and twists (not an exhaustive list).



CROWN
Coalition

Labor Code Penalties

(AB 673) Expands Labor Code §210 by allowing an employee to recover a penalty from the employer for the late payment of wages during employment (in contrast with § 203).



Labor Code Penalties

- * Under prior law only the Labor Commissioner was permitted to seek penalties.
- * \$100 for the first violation and \$200 for each subsequent violation plus 25% of the wages paid late.
- * If employee earns \$1,250, employee can recover \$400 (\$100 plus \$300).
- * Employee does not have to share with State (contrast with PAGA).
- * Employee must choose recover under §210 or PAGA.

Wage Claims

- * (SB 688) – Expands the Labor Commissioner’s citation authority to include citations for the failure to pay wages promised by contract/agreement.
- * Previously , the Labor Commissioner only had authority to adjudicate claims that an employee was not paid at least the minimum wages required by law.

Mileage Rate

The standard mileage rate will stay be reduced from 58.0 cents per mile to 57.5 cents per mile.



California Minimum Wage

- * SB 3 increased California's minimum wage each year on January 1, from 2017 to 2022. Goal: \$15.00 per hour by 2022 (for larger employers).
- * Beginning January 1, 2020, the state minimum wage for employers with 26 or more employees became **\$13.00** per hour (25 or less employees is **\$12.00** per hour).



Local Minimum Wage

- * Local municipalities, cities and/or counties have set their own higher minimum wage for employees who work a certain number of hours per week within city limits.
- * City of Los Angeles: Effective July 1, 2020, **\$15.00** per hour for employers with more than 25 employees (average number of employees employed during the previous calendar year), and **\$14.25** for employers with 25 or less employees within the City.

Local Minimum Wage

- * Los Angeles County – same schedule as Los Angeles City applies to employees working in unincorporated areas of Los Angeles County (Marina del Rey, Calabasas adjacent, Universal City, Valencia, Newhall, etc.).
- * Check your local city ordinances for minimum wage ordinances that differ from California.
- * Ex.: Malibu, San Francisco, Pasadena, Palo Alto, San Diego, etc.

California Minimum Wage

YEAR	FEDERAL (since 2009)	CALIFORNIA (effective January 1)		LOS ANGELES (effective July 1)	
		26 or more	25 or fewer	26 or more	25 or fewer
2017	\$7.25	\$10.50	\$10.00	\$12.00	\$10.50
2018		\$11.00	\$10.50	\$13.25	\$12.00
2019		\$12.00	\$11.00	\$14.25	\$13.25
2020		\$13.00	\$12.00	\$15.00	\$14.25
2021		\$14.00	\$13.00		\$15.00
2022		\$15.00	\$14.00		
2023			\$15.00		

ANNUAL SALARY REQUIREMENTS FOR EXEMPT CALIFORNIA EMPLOYEES

	2017		2018 (January 1 st)		2019 (January 1 st)		2020 (January 1 st)		2021 (January 1 st)		2022 (January 1 st)	
Annual Salary	25 or Fewer	26 or More	25 or Fewer	26 or More	25 or Fewer	26 or More	25 or Fewer	26 or More	25 or Fewer	26 or More	25 or Fewer	26 or More
	\$41,600	\$43,680	\$43,680	\$45,760	\$45,760	\$49,920	\$49,920	\$54,080	\$54,080	\$58,240	\$58,240	\$62,400
Weekly Salary	\$800	\$840	\$840	\$880	\$880	\$960	\$960	\$1,040	\$1,040	\$1,120	\$1,120	\$1,200

*Unless the Dept. of Labor increases the minimum salary to a level higher than the California State minimum.

Mandatory Retirement Savings Program

(SB 1234) Enacted in 2016, it requires a workplace retirement savings program, (CalSavers,) for private sector workers whose employers do not offer a retirement plan.

Compliance deadlines, by business size:

<i><u>Size of Business</u></i>	<i><u>Deadline</u></i>
Over 100 employees	June 30, 2020
Over 50 employees	June 30, 2021
5 or more employees	June 30, 2022

Reporting of Serious Occupational Injury, Illness or Death

- * (AB 1804) Effective January 1, 2020, employers are required to immediately report any serious occupational illness, injury or death by telephone or by an online mechanism that is in the works. Until then, employers must report by telephone or e-mail.
- * Failure to report is subject to \$5,000 civil penalty.
- * Existing law requires employers to report any workplace injury or illness resulting in lost time beyond the date of injury or illness, or that requires medical treatment beyond first aid, within 5 days of the employer's knowledge.

Organ Donation Leave

- * Under current law, employers with 15 or more employees are required to provide eligible employees with 5 days of paid leave for bone marrow donation, and 30 days of paid leave for organ donation.
- * Starting in 2020, (AB) 1223 expands leave for organ donation. Employers are required to provide a maximum of 30 business days of unpaid leave *in addition* to the original 30 days of paid leave in a single year.

Workplace and School Gun Violence Restraining Orders

- * (AB) 61- Effective September 1, 2020, (a) an employer or (b) a coworker who “has substantial and regular interactions with the person (being restrained) and (with) approval of their employer” may seek an ex parte Court order for one-year, or renewed gun violence restraining order against an employee/co-worker.

How To Manage The Risk

Employment Policies – Employee Handbook

- * Draft and implement policies that comply with the law
- * Uniform and unbiased application of the policies
- * Regularly review and update policies - Ideally every year

Train HR Staff and Management to recognize risks

- * Seek Legal Assistance – If unsure about a situation, seek assistance before acting, but do not delay.
 - * If Termination involves an employee who complained about anything.
 - * Promptly investigate complaints. No disciplinary action until investigation is done.

How To Manage The Risk

- * Proper Documentation
 - * Personnel File
 - * Payroll File
 - * Performance/Reviews
- * Employment Practices Liability Insurance (EPLI)
 - * Workers Comp and General Liability do not provide full coverage.
 - * Generally, EPLI does not cover Wage and Hour.

Thank you for attending!

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