

## Resources

### New California Employment Laws to Take Effect in January 2020 and Beyond

December 20, 2019

**Independent Contractors Worker Status.** AB 5, is one of the most significant and widely publicized bills to emerge from this year's Legislature. It codifies and expands the ABC test established by the California Supreme Court in the 2018 *Dynamex decision*. The ABC test requires a worker to be classified as an employee unless the employer can establish all three of the following criteria:

A. The worker is free from the hiring entity's control and direction in connection with the performance of the work, both under the contract for the performance of the work and in actually performing the work;

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

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

AB 5 carves out special exceptions from the ABC test for certain professions and industries. If an exception is applicable, the more flexible common law multi-factor "Borello test" typically applies, focusing on the entity's control over the worker. While the bill provides clarity for some of the excepted categories, several excepted groups are subject to complex requirements involving numerous criteria.

AB 5 is expected to result in the need for employers to reclassify the vast majority of independent contractors as employees.

**Arbitration Prohibition.** For agreements entered into, modified, or extended on or after January 1, 2020, AB 51 will prohibit any business from requiring that a job applicant or employee waive any right, forum, or procedure for a violation of the FEHA or Labor Code, including any requirement that an individual "opt-out" or take affirmative action to preserve such rights. AB 51 will make actionable any threatened or actual retaliation against an individual who refuses to consent to the forbidden requirements.

Proviso: this new law may well be of limited application in three important ways:

1. It applies only to contracts executed, modified, or extended on or after January 1, 2020. Agreements already in existence appear to enjoy the benefit of a grandfather provision.
2. It carves out arbitration agreements—mandatory or voluntary—that otherwise are enforceable under the Federal Arbitration Act ("FAA"). That means that if an arbitration agreement is valid under the FAA, the new law will not operate to invalidate it. **The fact is that most arbitration agreements are enforceable under the FAA.**
3. Finally, even without the express FAA carve-out language, the new law also is of limited impact because it is subject to FAA preemption.

**Arbitration Fees.** Employers will be required to pay the costs and fees associated with arbitration. If an employer fails to pay the arbitration fees, then the employee may withdraw from the agreement or seek the employee's attorneys' fees and costs. A failure to pay arbitration fees will constitute a material breach of the agreement.

**Settlement Agreements Future Employment Restraints.** AB 749 will prohibit settlement agreements that restrict an employee's right to seek employment with the employer with whom the employee is settling a claim. (i.e., employers should remove "No Rehire" provisions in settlement agreements.)

**Penalties for Failure to Pay Wages.** AB 673 will authorize an *employee* to pursue a private right of action to recover penalties for the late payment of wages through the Private Attorneys General Act (PAGA) and will remove the authority for the Labor Commissioner to recover civil penalties in an independent civil action. The bill will prohibit the employee from also recovering statutory penalties for the same violation.

**Reporting Occupational Injuries and Illnesses.** AB 1804 will require employers to report *serious* workplace injuries, illnesses, or death immediately by telephone or through an online platform to be developed by the Division of Occupational Safety and Health. Until the online platform is available, employers are permitted to make these reports by telephone or email. Noncompliance carries a \$5,000 civil penalty.

## Discrimination, Harassment and Retaliation Protections for 2020

California's Legislature has increased employee protections against workplace discrimination, harassment, and retaliation with a new set of laws that extends the statute of limitations, increases employee benefits for certain employees, and clarifies protections for certain protected characteristics.

**FEHA Administrative Exhaustion Extension.** AB 9 will extend the period within which an aggrieved person may file a complaint for discrimination, harassment, retaliation, etc. with the DFEH **from one year to three years**. AB 9 does not revive lapsed claims, but it is not clear what effect it will have on claims arising in 2019. Given this statute of limitations extension, it will become especially important for employers to keep detailed, accurate and contemporaneous employment-related documentation.

**Sexual Harassment Training.** SB 778 extends the deadline for non-supervisory employee training from January 1, 2020, until January 1, 2021, and confirms—in a much-needed clarification—that those supervisors who received training in 2018 need not be trained again until 2020.

**Paid Family Leave Expansion.** Under SB 83, beginning July 1, 2020, the California Paid Family Leave benefit will be extended for six to eight weeks, paralleling an increase in San Francisco's Paid Parental Leave benefit.

**Lactation Accommodation.** California passed a lactation accommodation bill to expand the requirements beyond the 2018 bill. Current law provides that an employer must provide a reasonable amount of break time to allow employees to express breast milk. The break time shall, if possible, run concurrently with any break time already provided to the employee. Such break time that does not run concurrently with authorized rest time under existing law is unpaid.

SB 142 specifies that the break time shall be provided "each time such employee has need to express milk."

Also currently, employers must provide a location other than a bathroom for lactation accommodation. SB 142, modeled after San Francisco's lactation accommodation ordinance, creates expanded accommodation requirements for employers. Specifically, a lactation room must be close to the employee's work area, shielded from view and free from intrusion. The room itself must:

1. Be safe, clean and free of toxic or hazardous materials;
2. Contain a surface to place a breast pump and other personal items;
3. Contain seating; and
4. Have access to electricity

Additional requirements:

- Employers must provide access to a sink with running water and a refrigerator suitable for storing breast milk close to employee's workspace.
- Employers must create and implement a lactation accommodation policy, including publishing the policy in the employee handbook and providing the policy when an employee asks about or requests parental leave.

- A denial of lactation break time or space a violation will subject the employer to a \$100 penalty per violation.

**Civil Action Damages: Gender, Race Ethnicity.** SB 41 aims to narrow the consequences of observed differences in the pay of groups defined by gender or ethnicity. This bill will apply to personal injury and wrongful death cases and will forbid any reduction in damages resulting from an estimation, measure, or calculation or past, present, or future damages for lost or impaired earning capacity **that is based on a person's race, ethnicity, or gender.**

**Hairstyle Discrimination.** Under the FEHA, it's unlawful to discriminate on the basis of race—and SB 188, known as the Crown Act, prohibits discrimination against employees and students based on their natural hairstyles. The Act expands the FEHA's definition of race to include traits historically associated with race, such as hair texture and "protective hairstyle" (e. g., braids, locks, and twists).

This bill aims to chip away at "Eurocentric" professional norms by addressing "workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks." The Legislature has concluded that these policies "have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group."

Employers should review their workplace dress code and grooming policies to ensure they abide by this amendment and consult legal counsel for any necessary changes.

**Organ Donation Leave of Absence.** AB 1223 will require employers to grant an employee an *unpaid* leave of absence—in addition to the existing 30 days in a one-year period *paid* leave—for the purpose of organ donation. A public (not private) employee will be required to first exhaust all available sick leave before taking the unpaid leave

## Minimum Wage Increases on January 1, 2020

Don't forget that January 1, 2020, California's minimum wage increases to \$13 per hour for employers with 26 or more employees and \$12 per hour for employers with less than 26 employees. California's minimum wage is set to increase at the beginning of each calendar until 2023 when the minimum wage will be \$15 per hour for all employers.

Employers should also keep in mind an increase in the minimum wage increases the minimum salary rate for exempt employees. Employees who are classified as exempt under the administrative, executive, and professional exemptions must be paid at least two times the state minimum wage. As such, employers with 26 or more employees must pay exempt employees at least \$54,080 annually and employers with less than 26 employees at least \$49,920.

Employers must also update their posters and notices with the minimum wage increase.

Employers should also note many cities and counties, including San Francisco and Los Angeles, have enacted their own minimum wage requirements, including providing employees with notice of minimum wage increases.

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