LABOR & EMPLOYMENT WORKFORCE WATCH

Locke Lord LLP

A GUIDE TO THE EMPLOYMENT LAW DEVELOPMENTS MOST LIKELY TO IMPACT YOUR BUSINESS

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Hot Issue for 2020: U.S. Supreme Court to Rule on Sexual Orientation and Gender Identity Discrimination

by Paul G. Nason

As employers head into 2020, the most closely-watched federal employment law issue is whether Title VII of the Civil Rights Act of 1964's prohibition against discrimination "on the basis of sex" includes sexual orientation and gender identity. Although twenty-five states, including California, New York, Illinois, Massachusetts and Rhode Island, currently have laws protecting employees from sexual orientation and gender identity discrimination, there is currently no federal protection from such discrimination.

On October 8, 2019, the United States Supreme Court heard oral arguments on three combined cases involving these critical issues. In *Zarda v. Altitude Express*, the Second Circuit Court of Appeals ruled in favor of a skydiving instructor who claimed he was terminated because he was gay. In *Bostock v. Clayton County*, the Eleventh Circuit Court of Appeals reaffirmed its precedent that Title VII does not prohibit discrimination based on sexual orientation. In *R.G. & G.R. Funeral Homes v. EEOC*, a case involving the termination of a male employee after he declared he would transition to dressing as a female and undergo sex re-assignment surgery, the Sixth Circuit Court of Appeals held that Title VII prohibits gender identity discrimination.

Proponents argue that "on the basis of sex" necessarily includes sexual orientation and gender identity, and a determination that such types of discrimination are prohibited by Title VII is consistent with the Supreme Court's prior decisions finding same-sex harassment and sex-based

stereotypes to be illegal under Title VII. Opponents argue that the inclusion of sexual orientation and gender identity in Title VII is the purview of Congress, not the Supreme Court.

Legal pundits have observed that the oral arguments reflected a closely divided Court with Justice Neil Gorsuch being the likely swing vote in a 5-4 decision. The Supreme Court is not expected to issue its decision until late June 2020. A decision holding that sexual orientation and gender identity are protected categories under Title VII will likely have far-reaching implications and will undoubtedly increase the number of administrative charges and lawsuits filed asserting such discrimination.

CCPA for Employers: 2020 Point of Collection Notices

by Sean Kilian

The California Consumer Privacy Act (CCPA) became effective on January 1, 2020, creating a host of new data privacy rights for individuals, including the rights to have businesses disclose and delete personal information they collect. Due to an amendment to the CCPA last fall, different rules apply to personal information collected by an employer from an individual in his or her capacity as an employee, but only temporarily. This article summarizes the CCPA's key data privacy obligation for employers in 2020: providing point of collection notices to employees (in addition to applicants, independent contractors and other statutorily-specified categories of workers).

Under the CCPA, employers must notify California employees of the categories of personal information to be collected, and the purposes for which the categories of personal information will be used. Employers must provide employees with this notice at or before the point at which the personal information is collected. Aside from this obligation, the CCPA generally does not apply to the personal information an employer collects from an employee, except that employees, like consumers, may institute a civil action for data breaches.

To prepare point of collection notices, employers must consider the types of personal information they collect from employees and why and when they collect it.

The CCPA broadly defines "personal information" to mean information that identifies, relates to, or is reasonably capable of being associated with a particular individual or household. The categories of personal information identified by the CCPA include identifiers (such as names, SSN's, and email addresses), protected classifications, commercial information (such as records of purchases), biometric information, internet activity information, geolocation data, audio and visual data, employment-related information, education information, and inferences drawn therefrom. The purposes for collection will vary between businesses, although most employers will likely use personal information to process benefits and payroll, and evaluate applicants and employees for hiring and promotion.

The California Attorney General has published proposed regulations that give employers guidance as to the content of point of collection notices, although the proposed regulations have not yet been approved. Per the proposed regulations, notices should use plain language, utilize a format that is easy to read, be available in languages the business uses in its ordinary course, be accessible to individuals with disabilities, and be made available to employees before their information is collected.

Employers should also keep in mind that because they must provide notices at or before the point at which personal information is collected, this means they cannot collect new categories of personal information, or use personal information collected for a new purpose, without first providing the employee a new notice. In fact, the proposed regulations require employers to obtain explicit consent from employees before using information for a purpose that was not previously disclosed to the employee in the point of collection notice.

The requirements for point of collection notices are likely to change over time, and indeed they already have. When the CCPA was signed into law in 2018, it did not distinguish between personal information that a business collects from a consumer and personal information that a business collects from its own employees. In other words, at first, every right the CCPA grants to consumers was initially intended to apply to employees, including the rights to disclosure and deletion.

There are good reasons for treating employee information differently from consumer information. For example, it would be difficult to honor an employee's elections as to direct deposit or benefits if the employee had the right to require an employer to delete his or her personal information. Likewise, it would be difficult to conduct an effective workplace investigation if the victim knew that the perpetrator had a right to disclosure of any information about them. Accordingly, the above-mentioned amendment established that most CCPA rights do not apply to personal information an employer collects from an employee.

However, the amendment is set to automatically sunset after one year. This means that unless the CCPA is amended again or replaced with something entirely different, employees would again be entitled to all consumer rights under the CCPA effective January 1, 2021. Going forward, employers should pay close attention to changes in this area of the law.

Employers Are Reminded to Review Compliance With the Now-Effective New Overtime Rules as Soon as Possible

by Robin G. Shaughnessy

As most employers are aware, properly classified exempt employees are not eligible for overtime pay under the federal Fair Labor Standards Act (FLSA) for hours worked over 40 in a workweek. Non-exempt, hourly employees, however, must be paid time and one-half for any hours worked more than 40 in a workweek. Employers are reminded that, in September 2019, the Department of Labor released its final rule for determining overtime eligibility under the FLSA. The final rule became effective on January 1, 2020, and employers are now expected to be in compliance.

To recap, the final rule updated the earnings thresholds necessary to exempt executive, administrative and professional employees from the FLSA's minimum wage and overtime pay requirements. More specifically, the rule raised the standard salary level from the previous level of $455 per week (equivalent to $23,660 per year for a full-year worker) to $684 per week (equivalent to $35,568 per year for a full-year worker). The new rule also raised the total annual compensation requirement for "highly compensated employees" from the previous level of $100,000 per year to $107,432 per year.

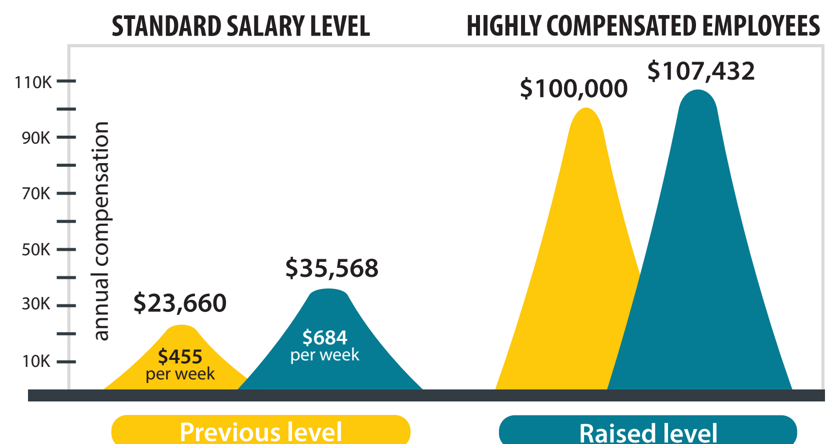
Importantly, the new rule allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the salary threshold. To qualify, these payments must be paid at least annually.

The new rule does not address periodic increases to the salary thresholds, although the Department of Labor intends to propose updates to the salary threshold regularly to ensure that these levels continue to provide useful tests for exemption. Updates are not automatic and would require notice-and-comment rulemaking, so employers need not worry about changes to the salary thresholds any time soon.

The rule is estimated to extend overtime protections to more than one million workers who were not previously eligible for overtime wages under federal law. For this reason, employers are advised to review the salaries of their exempt employees as soon as possible to ensure compliance with the new rule. Specifically, employers should determine whether to increase the salaries of exempt employees earning less than $684 per week or convert them to non-exempt employees. Employers should also determine whether such employees are paid nondiscretionary bonuses and incentive payments that may count toward the new salary thresholds. To the extent employers decide to convert employees from exempt to non-exempt, one cost-saving consideration is to closely monitor overtime worked by the newly categorized employees. To the extent overtime can be limited or capped, such measures may help minimize the impact of a reclassification.

Employers are also reminded that meeting the salary threshold does not automatically make an employee exempt from overtime pay; employees must also fulfill one of the exemptions in the standard duties test.

Finally, employers are advised to consult with local counsel regarding any state-specific laws that may be applicable and which are in addition to those imposed by the FLSA.



What to Expect From OSHA in 2020

by Rufino Gaytán III

The Occupational Safety and Health Administration (OSHA) stayed busy in fiscal year 2019. OSHA trained a record 1,392,611 workers on safety and health requirements through its various educational programs. OSHA also helped small employers identify 137,885 workplace hazards through its On-Site Consultation Program, which OSHA estimates protected 3.2 million workers from potential harm. Of particular note to employers, OSHA also continued a trend of increased onsite inspections, conducting 33,401 inspections to address hazards related to trenching, falls, chemical exposure, silica and other hazards. Employers should not expect much to change in 2020.

OSHA recently released its regulatory agenda for 2020. The highlights of the agenda include the following OSHA priorities:

- Mechanical Power Presses: OSHA plans to publish a Request for Information (RFI) in July 2020 soliciting information from the public regarding potential updates to its standard for mechanical power presses. Potential revisions include addressing the use of hydraulic or pneumatic power presses and potential technological updates to the standard, which is approximately 40 years old.
- Powered Industrial Trucks: In March 2019, OSHA issued an RFI to assess whether to make changes to the existing standards for locations of use, maintenance, training and operation of powered industrial trucks (fork trucks, tractors, lift trucks and motorized hand trucks). The current standard relies on 50-year-old standards issued by the American National Standards Institute (ANSI). OSHA also intends to propose updates for the design and construction of powered industrial trucks, which would acknowledge and account for changes to the ANSI standards over the last 45 years, as well as relevant technological advancements. For example, there are currently 19 types of powered industrial trucks, but the current standard only covers 11 types. According to OSHA, the purpose of these proposed updates is to improve worker safety and health by ensuring that its standards reflect current industry practice and state-of-the-art technology.
- Lock-Out/Tag-Out: OSHA will analyze comments received in response to the RFI it issued in May 2019 regarding the use of computer-based controls of hazardous energy (e.g., mechanical, electrical, pneumatic, chemical and radiation). Although

computer-based controls are now common due to the modernization of equipment design, the use of these controls conflicts with the current OSHA lock-out/tag-out standard. OSHA may hold a stakeholder meeting and open a public docket to explore the issue.
- Prevention of Workplace Violence in Health Care and Social Assistance: OSHA intends to initiate a Small Business Regulatory Enforcement Fairness Act (SBREFA) review panel this month to address the creation of a standard addressing workplace violence in the health care and social assistance industries. This process began in December 2016, when OSHA issued an RFI soliciting information regarding the impact of workplace violence and prevention strategies, which OSHA currently addresses under Section 5(a)(1) of the Occupational Safety and Health Act, i.e., the "general duty clause." In January 2017, OSHA granted petitions for a workplace violence standard submitted by a coalition of labor unions and by the National Nurses United.
- Crystalline Silica: Under the current rule for Occupational Exposure to Respirable Crystalline Silica in the construction industry, construction employers can perform certain tasks by using dust control methods known to be effective (i.e., Table 1 of the standard). Employers who follow Table 1 correctly need not measure their workers' exposure to silica and are exempt from the permissible exposure limit (PEL). Depending on the information received in response to the RFI issued in August 2019, OSHA may revise Table 1 to account for:
  - the effectiveness of control measures not currently included for tasks and tools listed in Table 1; and
  - tasks and tools involving exposure to silica that are not currently listed in Table 1, along with information on the effectiveness of dust control methods in limiting worker exposure to silica when performing those operations.

- Walking-Working Surfaces: OSHA intends to clarify the requirements for stair rail systems to make them clearer. OSHA plans to issue a Notice of Proposed Rulemaking in April 2020 to address confusion caused by this standard.

Employers should note that OSHA's 2020 agenda could change, as the agency may drop some of these efforts or take on new priorities throughout the year. However, the agenda also serves as a barometer for OSHA's enforcement priorities this year. Employers should consider how OSHA's 2020 regulatory priorities and proposed changes might affect their workforces and whether updating their current practices might prevent future OSHA enforcement actions. Before making any changes, employers should consult with legal counsel to ensure compliance with OSHA standards, directives, and guidance.

Employment Law Consequences of the UK General Election

by Nicholas Dent

The general election in the United Kingdom took place on December 12, 2019, and resulted in a landslide majority of 80 seats for Boris Johnson and the Conservative Party.

The principal consequence of the election is that, three years after the Referendum, Brexit will finally happen and the United Kingdom will leave the European Union, in all likelihood on January 31, 2020.

From an employment law perspective, the short-term consequences of the Conservative victory are much less radical than if the Labour Party had won, which would have heralded a significant rebalancing of UK employment law in favour of unions and employees. As it is, the short-term plans for employment law reform in the Queen's Speech (the announcement of the legislative programme) were fairly unsurprising and mostly a repetition of initiatives already announced. The plans include:

- A change in immigration rules to introduce a points-based system by 2021 for newly arrived EU citizens to be aligned with non-EU citizens;
- Increased protection for employees returning from maternity leave in the event of the redundancy of their role, so that the right to be given any suitable available vacancy will now continue to apply for six months following their return from maternity leave;
- A reduction in the flexibility of employers to use "zero hours contracts" (in which the employer has no obligation to provide work but the employee has an obligation to be available in the event they are required);
- A new right to neonatal leave and pay to support parents of premature or sick babies;
- A proposal to make an employer's default position be acceptance of any employee request for flexible work arrangements, unless the employer has good reason to reject the request;
- A plan to limit the disruption caused by strikes in the railways sector.

In the longer term, there will likely be some divergence between UK law and European Union employment law, but in the short term all European-derived legislation will be carried forward into domestic UK law. There is a broad political consensus that the European-derived discrimination legislation will remain in place and the only likely changes by the current government will be to loosen protections for agency workers, adjust some portions of the working time legislation and perhaps clarify TUPE (the legislation covering transfers of employees on a business transfer or outsourcing). The precise weight to be given to judgments of the European Court of Justice remains politically sensitive and to be determined.

There is also a question as to whether there will be a second Scottish independence referendum at some point. In short, there should be no dull moments in the on the other side of the Pond for the foreseeable future!

Year in Review: Notable 2019 Decisions Impacting Arbitration Agreements

by Jeffrey M. McPhaul

2019 saw courts issue several significant decisions that have implications for employers nationwide who rely on arbitration agreements with their workforce.

The nation's highest court decided a trio of cases in the first quarter involving the Federal Arbitration Act (FAA). In the case of *Henry Schein, Inc., et al. v. Archer & White*

Sales, Inc., the Court rejected the "wholly groundless" exception used by some courts to refuse to send cases to arbitration, and held that when the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision. As we discussed in our July edition of Labor & Employment Workforce Watch, the Supreme Court expanded the transportation workers' exemption under the FAA to include independent contractors providing interstate transport in the case of *New Prime Inc. v. Oliveira*. As a result of this decision, employers relying on arbitration agreements with transportation workers, whether independent contractors or employees, will need to determine the enforceability of those agreements under applicable state law. Lastly, the Court built on its 2018 decision in *Epic Systems Corporation v. Lewis*, which validated the use of class action waivers under the FAA, in the case of *Lamps Plus, Inc. v. Varela*. In Lamps Plus, the Court was confronted with the issue of how explicit an arbitration agreement must be to permit class arbitration. In *Lamps Plus*, the lower courts found the arbitration agreement at issue to be ambiguous as to whether class arbitration was permitted, and, as a result, held that the parties could institute class arbitration proceedings. In reversing the lower courts' decisions, the Supreme Court held that ambiguity is not enough to allow for class arbitration: "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."

In the case of *In re JPMorgan Chase & Co.*, the Fifth Circuit Court of Appeals weighed in on an important issue that has divided courts across the country– if an individual signed a valid arbitration agreement, should they still receive notice of a Fair Labor Standards Act (FLSA) collective action even though they are required to pursue any claims they may have in arbitration? The Fifth Circuit resoundingly answered "No" to this question, holding it was error for the court to send notice to individuals with valid arbitration agreements that are precluded from participating in the case filed in district court. Though this issue is now settled in the Fifth Circuit, courts continue to grapple with and reach conflicting conclusions on this issue. The only other appellate-level court to take up the issue is the Seventh Circuit Court of Appeals, which is set to provide further appellate guidance in the pending case of *Susie Bigger v. Facebook, Inc.*

In the wake of the #MeToo movement, some states enacted laws prohibiting mandatory arbitration of sexual harassment claims. The case of *Latif v. Morgan Stanley & Co. LLC, et al.*, addressed the validity of a New York state law that aimed to prohibit the use of mandatory arbitration agreements in sexual harassment cases. The *Latif* Court held that New York's law was inconsistent with and preempted by the FAA, and the parties' agreement to arbitrate was enforceable pursuant to the FAA. The plaintiff in the *Latif* case has sought *en banc* review by the Second Circuit Court of Appeals. The *Latif* decision may provide a preview for how other courts will address the interplay between the FAA and state statutes aimed at limiting employers' ability to require arbitration of certain disputes. One such decision is currently brewing in California. On December 30, 2019, U.S. District Judge Kimberly Mueller granted a temporary restraining order delaying the enactment of Assembly Bill 51, which was set to take effect January 1, 2020, and would prohibit mandatory arbitration of claims under the California Fair Employment and Housing Act and other statutes governing employment.

As we previously reported, the National Labor Relations Board was also busy dealing with arbitration issues in 2019. In *Prime Healthcare Paradise Valley LLC*, the Board ruled that an arbitration agreement that did not explicitly limit an employee's ability to file charges with the Board violated the National Labor Relations Act (the NLRA). In *Cordúa Restaurants, Inc.*, the Board held that an employer's implementation of arbitration agreements that included collective action waivers in response to an FLSA collective action, as well as warning employees that they would be discharged if they did not accept such an agreement, was not a violation of the NLRA.

As these decisions make clear, employers should take great care and involve counsel in deciding whether to implement arbitration agreements, what to include within the scope of those agreements, and the specific language to be utilized in the agreements.

Non-Compete Agreements: One Size May Not Fit All

by [Andrew Reed]

In December 2019, the Economic Policy Institute (EPI) released a report that revealed a continued increase in the use of non-competition agreements in the workplace. According to the EPI study, between 36 and 60 million American workers have entered into non-competition agreements that, to varying degrees, would operate to preclude the employee from accepting employment with or providing services to a competitor. However, the landscape for whether a non-compete agreement is *enforceable* is consistently changing under specific state laws. Nonetheless, while non-competition laws may vary from state to state, several common requirements are present in most state's analyses of enforceability.

1. Consideration – Like any contract, a non-compete agreement must be supported by adequate consideration. Many states have determined that merely the initiation of or continuation of an employment relationship is sufficient consideration for a non-compete agreement. Other states, such as Texas, require the non-compete agreement be tied to or part of another enforceable agreement. Most often, this comes in the form of a confidentiality or non-disclosure agreement whereby an employer provides an employee with its confidential and/or trade secret information, in exchange for a limited non-compete agreement.
2. Reasonableness – In addition to adequate consideration, most jurisdictions view non-compete agreements with disfavor and require them to be narrowly tailored to the information sought to be protected or the employment relationship at issue. Specifically, a non-compete is more likely to be enforced if it is drafted to be no more restrictive than reasonably necessary to protect the business interests of the employer in time, geography, and scope. For example, most jurisdictions uphold covenants of 1-3 years in duration, although enforceability depends on the specific facts at issue. Geographic restrictions in a non-compete should generally cover only the territory in which the employee had responsibility or the territory of the business about which the employee received confidential information, but, again, enforceability will depend on a number of factors. Finally, the more narrowly tailored the scope of activities in a restrictive covenant, the more likely it is to be enforced.
3. State-Specific and Fact-Specific Determination – While non-compete agreements are enforceable to some extent in most states, some jurisdictions, such as Oklahoma, North Dakota, and California, have complete or severe restrictions on *any* form of non-compete agreements. Other states, such as Massachusetts, Illinois, and New Jersey, have recently enacted laws that operate to ban non-compete agreements against low wage earners or workers that are classified as "non-exempt" under applicable wage and hour laws. Other states have legislative bills currently pending that could greatly affect the prospective enforceability of non-compete agreements in that jurisdiction. For this reason, non-competition agreements drafted with the intent to be used in multiple jurisdictions present complications and potential enforceability issues.

The use of non-compete (or non-solicitation) agreements by employers may provide great benefit to an employer by preserving the quality of the employer's workforce, protecting the integrity of confidential and trade secret information, and preventing unfair competition in the marketplace. However, state-specific requirements and ever-changing statutory and common law standards make it more important than ever to carefully tailor and draft these agreements to ensure the best chance of enforceability.

Status of Sick Leave Ordinances in Texas Cities

by [Kimberly F. Williams]

The City of Dallas Earned Paid Sick Time Ordinance (the "Dallas Ordinance") went into effect on August 1, 2019 for employers with six (6) or more employees. To allow employers time to become compliant with the Dallas Ordinance, the City of Dallas stated it would not enforce the Dallas Ordinance, except for violations of the anti-retaliation provision, until April 1, 2020. A lawsuit was filed in the United States District Court for the Eastern District of Texas challenging the validity of the Dallas Ordinance and seeking an injunction to stay the Dallas

Ordinance pending a ruling on the merits of the lawsuit. The court is currently considering whether an injunction is appropriate, but has not ruled on the issue. Therefore, the Dallas Ordinance is still in effect and there is no indication as to if (or when) the court may issue its ruling on the injunction. Accordingly, employers should be prepared to fully comply with the Dallas Ordinance prior to the April 1, 2020 deadline. Please see previous Locke Lord publications for detailed information regarding the Dallas Ordinance's requirements and compliance with such requirements.

Similar sick leave ordinances in Austin and San Antonio have been stayed. The San Antonio ordinance was stayed on November 22, 2019 when a court granted a temporary injunction. The Austin ordinance was stayed pending review by the Texas Supreme Court. Briefing with the Texas Supreme Court was final January 7, 2020. It is unclear whether or when the stays will be lifted. Many commentators believe the Texas Supreme Court will find the Austin ordinance to be unconstitutional. Because of the stays, compliance with the Austin and San Antonio sick leave ordinances is not necessary at this time, but the status of these ordinances should be monitored by employers with operations in those cities.

Commentary: Five Degrees of Independent Contractor Misclassification

by Richard Reibstein

The following is a condensed version of a commentary by the author that was published in Law360.com on December 16, 2019. © Copyright 2019, Portfolio Media, Inc., publisher of Law360. It is republished here with permission. A version of the full commentary can also be found here.

"Independent contractor misclassification" is a phrase that is misunderstood, misapplied, and misused. It is used to cover an array of disparate forms of IC misclassification: unpardonable; uninformed; unprepared; unintentional; and unjust.

The phrase may be warranted in situations where companies engage in indefensible conduct, such as where workers are paid under the table or there is no viable argument for paying a worker on a 1099 basis. But the same term also is applied in a few states that de-legitimize IC relationships that are lawful under the laws in most other states and under all federal laws governing ICs. When used in this latter context, the phrase "IC misclassification" is not only unsuitable, but legally unjust.

There are at least three other types of IC misclassification falling between unpardonable and unjust. Thus, the phrase is best understood in the context of a spectrum with at least five degrees of IC misclassification:

Unpardonable – when a business knows it has no reasonable basis for classifying workers as ICs but does so anyway (indefensible wage theft).

Uninformed – when a business has no reasonable basis for classifying workers as ICs but has not taken the time to learn the legal requirements.

Unprepared – when a business understands generally the applicable tests for IC status, is unclear whether or not particular workers are ICs, yet has chosen to classify the workers as ICs without taking any meaningful steps to enhance its level of IC compliance.

Unintentional – when a business tries to understand and satisfy the applicable tests for IC status but, despite good faith efforts, it erroneously misclassifies the workers, usually because it has failed to dot its i's and cross its t's in structuring, documenting, and implementing its IC relationships.

Unjust – when workers are properly classified under federal and most state laws but one of the few overly restrictive state law tests for IC status applies or where a state law test is dependent on a single factor that is not clearly defined.

A recent example of unjust IC misclassification – A.B. 5

Recently, California enacted new legislation, Assembly Bill 5 (A.B. 5), which became effective January 1, 2020. That law codifies the California Supreme Court's decision in *Dynamex Operations West v. Superior Court*, which was issued on April 30, 2018. As we noted in a blog post that day, *Dynamex* created a so-called ABC test similar to the labor standards test for IC status in Massachusetts. This type of ABC test requires companies to satisfy each of three strict criteria in order to establish independent contractor status, dramatically changing decades of settled law in California.

The new California A.B. 5 test and the long-established Massachusetts labor standards test for IC status differ substantially from all other states' ABC tests. In every other state that has an ABC test, the "B" prong has two

alternatives: the work performed must either be "outside the usual course of the business for which such service is performed or . . . performed outside of all the places of business of the enterprise for which such service is performed" (emphasis added). However, the "B" prong of the Massachusetts labor standards test and the California test under *Dynamex* and A.B. 5 requires that a company prove that the contractor's work is outside the usual course of business in order to establish IC status. It should be noted that the legislature carved out over fifty industries from the *Dynamex* ABC test. For the businesses with independent contractors in those fifty industries, the legislation now provides that the former test, which weighed and balanced a number of factors, remains the standard for independent contractor status.

However, in a reasoned article entitled "Complexity Is the Cost of California's Worker Classification Law," which appeared in *Law360* on October 24, 2019, Professor Edward Zelinsky expressed the view that many of the exemptions in A.B. 5 are "opaque" and "ambiguous." There are many other deficiencies of A.B. 5. One is that each exempted company must satisfy all of up to 12 specified conditions. For example, business-to-business contractors must meet each and every one of 12 specified conditions to qualify for an exemption. Few business-to-business contractors, however, can realistically satisfy every single one of the 12 respective conditions for an exemption from the ABC test. Thus, A.B. 5 is not only more complex than the test it supplanted, it also is under-inclusive in the types of professions and industries it exempts. Finally, it is overly rigid in terms of requiring businesses to fit into a fixed, multi-factor business structure if they wish to qualify for an exemption.

There is an additional and equally compelling reason why A.B. 5 is unjust: an overwhelming number of ICs would prefer *not* to be turned into employees, but would rather remain ICs, at least according to two independent studies conducted by the federal government. In a lengthy report to Congress on the contingent workforce, the U.S. Government Accountability Office indicated that it had asked an array of workers the question: "Would you prefer a different type of employment?" 85.2% of independent contractors responded "No" to the question. Similarly, in a 2018 Bureau of Labor Statistics study entitled "Contingent and Alternative Employment Arrangements," ICs were asked whether they preferred an IC work arrangement or a traditional employee work arrangement. Of those who responded, 89.9% of ICs indicated they preferred IC status.

Even though laws like A.B. 5 are overly restrictive, there are ways to maintain legitimate IC relationships in California and other states. Companies can use a process such as IC Diagnostics™ to restructure, re-document, and re-implement IC relationships in a manner that enhances compliance with IC laws in a customized and sustainable manner, consistent with a company's business model.

UPCOMING EVENTS

Locke Lord

Employer Update Breakfast Briefing

Join Locke Lord's Labor and Employment team in select offices for a complimentary breakfast briefing to learn more about current legal issues facing employers.

Boston // Wednesday, January 29
Click HERE to Register

Houston // Thursday, February 27
Click HERE to Register

Dallas // Thursday, March 5
Click HERE to Register

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For further information on any of the subjects covered in our WORKFORCE WATCH newsletter, please contact any member of our Labor & Employment team.

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