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A New Decade Begins!
Ensure Your Business Is Up to Speed on California's New Employer Requirements

Presented By

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Overview of today's discussion

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- New Updates on use of employment Arbitration Agreements
- "No-Rehire" provisions in Settlement Agreements
- Worker Classification after *Dynamex* and AB 5
- Increases to Minimum Wage and Salaries
- New penalties for Late Paid Wages
- Further Lactation Accommodation Requirements
- Expanded Authority of Labor Commissioner to pursue Wage Claims
- Extending the Statute of Limitations in FEHA claims
- Extension of Paid Family Leave Program
- Protections for Certain Hairstyles historically associated with Race
- Clarification of the Cal. Consumer Privacy Act

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Significant Restrictions on Common Terms

- Mandatory agreements to arbitrate employment disputes are commonplace in the hiring and retention of employees
- Employers favor the perceived privacy and cost effectiveness of arbitration

- Arbitration is generally seen as favoring the employers, despite mixed results in real world cases
- In settlement agreements, employers often want to put restrictions on an employee’s ability to reapply with the same company

AB 51 - Labor Code Section 432.6

- AB 51 prohibits employers from requiring applicants or employees to agree to arbitrate claims involving violations of the California Fair Employment and Housing Act ("FEHA") or the California Labor Code, as a condition of employment, continued employment, or the receipt of any employment-related benefit
- Arbitration Agreements must be voluntary
- AB 51 also prohibits retaliation against an employee or applicant who refuses to sign an arbitration agreement

AB 51- Exceptions to Prohibition

- Starting on January 1, 2020, it will be the ***Employer's burden*** to establish that the employee entered into the Arbitration Agreement voluntarily
- Arbitration Agreements entered into prior to 2020 will not be affected
- However, if the Arbitration Agreement is revised or amended, the revised Agreement would have to be voluntarily

Legal Challenges to AB 51

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Enforceability Hanging in the Balance

- Businesses, lead by the California Chamber of Commerce, filed suit in the U.S. District Court for the Eastern District of California to invalidate AB 51
- They argue the Federal Arbitration Act (FAA) preempts AB 51
- The Federal Court issued a preliminary Injunction on December 30, 2019, restraining the law from taking effect

BREAKING NEWS

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- January 10, 2020
  - Court expressed skepticism that AB 51 only focuses on the waiver of any "right, forum or procedure for a violation" of state law, as argued by California
  - Court also remarked that AB 51 did not force employer to do away with arbitration agreements
  - Court requested additional briefing on the issues of standing and the severability of certain portions of AB 51
- Temporary Injunction remains in place until January 31, 2020 pending a ruling by the Court

Arbitration Provisions, *cont.*

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- Employers can still require employees or applicants to enter into arbitration agreements during the life of the temporary restraining order, which expires January 31, 2020
- Court's request for briefing on severability of AB 51 indicates the Court might invalidate only portions of AB 51
- Employers should be ready to change the language of their Arbitration Agreements pending the outcome of this case

SB 707 - Arbitration Fees and Costs

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- SB 707 creates new consequences in an employment or consumer arbitration for failing to pay arbitration fees within 30 days of the due date
- The consequence depends on the stage of the case
- Failure to pay arbitration *initiation fee*
  1. Employee can withdraw from arbitration and file in Court; **or**
  2. Compel arbitration and require the employer to pay reasonable attorney's fees and costs for arbitration
- Failure to pay fees during *pendency* of arbitration
  1. Employee can withdraw and file in Court;
  2. Arbitrator can institute a collection action;
  3. Employee can seek a court order compelling the payment of fees; **or**
  4. Employee can pay the fees and recover those fees, regardless of the outcome

Ban on "No-Rehire" Provisions

- Employers usually include "No-Rehire" provisions in settlement agreements, prohibiting the employee from applying for a job with the company nationwide
- Enables employers to refuse to hire the employee or fire if mistakenly rehired with no consequences
- Gives employers reassurances they never have to deal with the employee again
  - Some court decisions have called these provisions into question as a violation of Cal. Bus. & Prof. Code section 16600
- No-Rehire provisions are viewed as punishing victims of harassment and a disincentive for employees to report workplace issues

No Rehire, *cont.*

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- Under AB 749, settlement agreements can no longer contain any provision that prohibits, prevents, or otherwise restricts an “aggrieved person” from obtaining future employment with that employer
  - Extends not just to their employer but also their parent company, subsidiary, division, affiliate, or contractor
- “Aggrieved person” is a person who has filed a claim against their employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer’s internal complaint process
- Typical severance offered to a worker can still contain a no-rehire provision, as long as they have not filed a claim and is not a settlement of an employment dispute

Exceptions to Coverage

- AB 749 *<u>does not</u>*
  - preclude an employer from agreeing to end a *current* employment relationship with an "aggrieved person"
    - Employers do not have to keep any bad apples
  - require employers to continue to employ or rehire a person if there is a **non-retaliatory** or legitimate **non-discriminatory reason** for terminating the employment relationship

- Employers are also free to enter into no rehire agreements with employees who engaged in sexual harassment or assault (determination must be made in good faith)

No Rehire, *cont.*

- Employers should be cognizant of this restriction on their settlement agreements and the effect on settlement negotiations
- Former “aggrieved persons” may reapply for a job; internal databases should reflect the history between the company and former employee

Wage Hour

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Worker Classification – Brief recap

- Cal. Supreme Court brought sweeping changes to worker classification in *Dynamex* in 2018.
  - Court expressly rejected the prior “multi-factor” *Borello* test, which focused on control by hiring entity
- *Dynamex* was limited in scope to the Wage Orders issued by the Industrial Welfare Commission
- Open questions remained concerning employers obligations for other rights and benefits of employment like unemployment and disability insurance and reimbursement of workers’ business expenses

AB 5 and Worker Classification

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- First, AB 5 codified the **presumption** that a person providing labor or services for remuneration is an *employee* rather than an *independent contractor*
- Generally adopts the ABC test for the Labor Code (including the Worker's Compensation Act), Unemployment Insurance Code, and for the Wage Orders of the IWC, unless an exemption applies
  - Multiple exemptions exist, may have additional statutory provisions to meet and/or conditions AND
  - The relationship with the worker must satisfy all of the *Borello* requirements

The "ABC" Test

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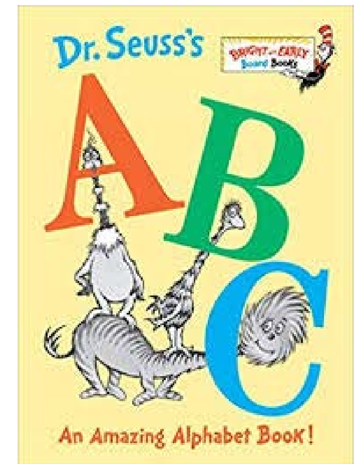
- The hiring entity has the burden to establish that a worker is an independent contractor and not an employee
- To meet this burden, the hiring entity must establish each of the three factors embodied in the ABC test:
  A. the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and
  B. the worker performs work that is 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 by the worker



Exemptions under AB 5

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- Does an exemption apply?
  - Specific occupations such as licensed professionals like physicians and surgeons, lawyers, accountants, investment advisors, direct sales salesperson, and commercial fishermen
  - Certain contracts for professional services such as travel agents, photographers, freelance writers, licensed barbers and cosmetologists;
  - Specified real estate licensees;
  - Bona-fide business-to-business contracting relationships;
  - Particular subcontracting relationships in the construction industry;
  - Defined referral relationships;
  - Certain motor club relationships!

Application of AB 5

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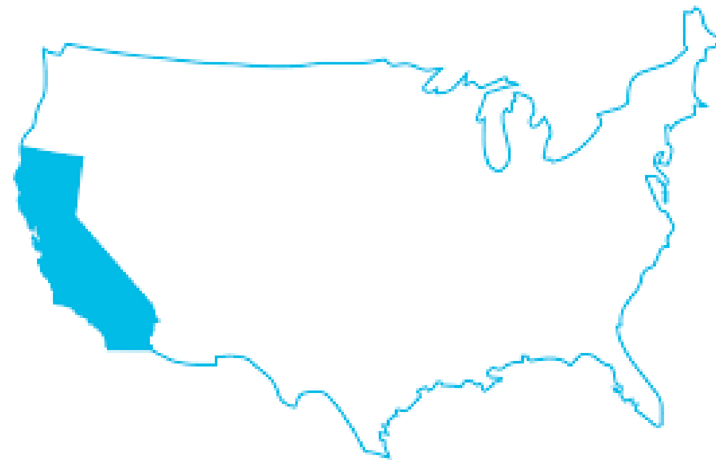
- AB 5 came into effect on January 1, 2020
- The worker's compensation provisions comes into effect July 1, 2020
- To the extent an employer is currently facing a claim for misclassification and application of the exemptions would relieve it from liability, AB 5 applies retroactively
- If you reclassified, keep in mind that AB 5 does not permit an employer to reclassify an individual who was an employee on January 1, 2019, to an independent contractor due to the bill's enactment

Multi-Jurisdictional Issues

- Businesses based in California using independent contractors located out of state
- Businesses based out of California using independent contractors located in California



Potential Exposure

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- Unpaid wages and overtime
  - Possible arguments for exempt status
- Liquidated damages
- Interest
- Attorneys' fees and costs

- Penalties for violation of federal and state labor laws (such as missed meal periods/rest breaks)
- Penalties for failure to pay applicable federal, state and local taxes
- Potential PAGA claims, class actions, and audits

Increases in Minimum Wage and Salaries

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All employers must comply with the statewide minimum wage, although local laws and regulations may provide for a higher minimum wage:

Employer Type	Minimum Wage
Larger employers (26 or more employees)	$13.00/hr
Smaller employers (25 or fewer employees)	$12.00/hr

Exempt employees under a white collar exemption (Bona fide administrative, executive, professional, and computer-related professional employees, as well as outside sales employees) saw their minimum salary increase for 2020:

Employer Type	Minimum Salary
Larger employers (26 or more employees)	$54,080.00
Smaller employers (25 or fewer employees)	$49,920.00

Employees May Recover Civil Penalties for Unpaid Wages

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- AB 673 creates new private right of action under Labor Code § 210 for late payment of wages
  - Previously, only the Labor Commissioner was permitted to seek penalties
- Penalties for late paid wages are:
  - $100 for the first violation and
  - $200 for each subsequent violation
- In addition, the employer must pay **25%** of the late paid wages
- Employee must choose between seeking civil penalties under PAGA or the Labor Code § 210 statutory penalties

Expansion of Labor Commissioner's Authority to Pursue Wage Claims

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- Existing law permits the Labor Commissioner to cite an employer for failure to pay applicable minimum wage
- Under SB 688, the Labor Commissioner may cite an employer if it finds the employer has "paid a wage less than the wage set by contract in excess of minimum wage"
- Expands the reach of the Labor Commissioner to issue citations for wages in excess of the minimum wage

Extending Time to File FEHA Claims

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- Employees must file a charge with the Dept. of Fair Employment ("DFEH") and Housing within a year of termination or end of discriminatory conduct
- Now, an employee has ***three years*** to file a charge with the DFEH
- After receiving right to sue, employee has an additional year to file a lawsuit, effectively extending the statute of limitations to four years

Large Impact on Businesses

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- Imperative that Employers Review and Modify their Data Retention policies to ensure documents related employment related issues are retained
- Retaining relevant employment data for 5 years will ensure relevant records are preserved for unexpected FEHA claims

Extension of Deadlines for Sexual Harassment Training

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- Currently, all employers with 5 or more employees must provide two hours of sexual harassment training to supervisors and one hour to nonsupervisory staff
- Current law mandated the training be completed by January 1, 2020. Instead the training is now required by January 1, 2021 and the training must be provided "thereafter once every 2 years."

Refresher on Sexual Harassment Training…

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- Training may be completed by employees individually or as part of a group presentation, and may even be completed in shorter segments as long as the total hourly requirement is met
- Beginning January 1, 2020, for seasonal and temporary employees, or any employee that is hired to work for less than six months, employers shall provide the required training within 30 calendar days after the date of hire, or within 100 hours worked, whichever occurs first

Expanded Lactation Accommodations

- SB 142 significantly expanded lactation accommodations and protections effective Jan 1, 2020
- Previously, employers only had to "make reasonable efforts" to provide a lactation room other than a bathroom
- Now, employers **must** provide a lactation room with specified accommodations, unless the employer falls within a limited "undue hardship" exemption

Lactation Room Requirements

- The Lactation Room must:
  - Be in close proximity to the employee’s work area,
  - Be free from intrusion while the employee is expressing milk,
  - Be shielded from view,
  - Be safe, clean and free of hazardous materials,
  - Contain a surface to place a breast pump and personal items,
  - Contain a place to sit, *and*
  - Have access to electricity or alternative devices
- The employer must also provide access to a sink with running water and a refrigerator for storing milk in close proximity to the employee’s workplace

Undue Hardship Exemption

- Only applies to employers with <u>50</u> or fewer employees
- The employer must demonstrate implementation would impose an "undue hardship by causing the employer <u>significant difficulty or expense</u> when considered in relation to the size, financial resources, nature, or structure of the employer's business."
- The bounds of this exemption have yet to be tested by employers or reviewed by the Courts

Expansion of Paid Family Leave

- Beginning July 1, 2020, maximum duration of Paid Family Leave (PFL) benefits will expand from 6 to 8 weeks

- PFL applies to people:
  - Caring for a seriously ill child, spouse, parent, grandparent, grandchild, sibling or domestic partner
  - Bonding with a minor child within one year of the birth or placement of the child through foster care or adoption
- SB 83 creates a task force to develop a PFL program that extends benefits to six (6) months by 2022

Protection for Certain Hairstyles

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- CROWN Act (which stands for Creating a Respectful and Open World for Natural Hair) - SB 188
- Amends the definition of race under California's Education and Government Codes
- Race now includes "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."
- Businesses should carefully consider their workplace dress code and grooming policies as SB 188 specifically mentions afros, braids, twists, and locks as important racial hairstyles

The CROWN Act

Creating a Respectful and Open World for Natural Hair.

Clarification of the California Consumer Privacy Act

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- California Consumer Privacy Act of 2018 (“CCPA”), grants consumers rights with regard to their personal information held by businesses

- CCPA is intended to allow consumers to
  - Know what personal information is being collected
  - Access their personal information
  - Stop their personal information from being sold
  - Request a business to delete a consumer’s personal data

Rights and Penalties

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- CCPA gives consumers
  - The **right to know** what categories of personal information is being collected, and
  - The right to demand such personal information **be deleted**

- For Violations of the CCPA
  - A fine up to $7,500 for each intentional violation and $2,500 for each unintentional violation
  - Businesses that are ***the victim*** of a data breach can be ordered to pay statutory damages between $100-$750 per California resident
- Previously, damages to consumers were too speculative to pressure businesses to implement proper security measures for personal data

Crossroads of CCPA and Employment Law

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- AB 25 confirms that the personal information of job applicants, employees, or contractors is covered by the CCPA
- Covers personal information acquired from the applicant or employee, but does not apply to information gathered from third parties
- Businesses will need to ensure the safety and security of applicant's personal information, primarily the digital data

Extending the Time to Comply

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- AB 25 extends the time to comply until Jan. 1, 2021 except for:
  - Ensuring businesses have implemented reasonable security measure to safeguard employees personal information
    - Employees can still sue the employer in the event of a data breach
  - Disclosing the categories of personal information collected from employees or applicants and for which purpose the information is used
- The categories of personal information collected must still be disclosed when the employer received such information from the employee/applicant

What do Businesses Need to Do??

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- Ensure personal information is safeguarded from the wide variety of digital attacks
- Begin disclosing what information is being collected, how it is being collected, and for what business purpose
- Implement a policy and procedure to delete the personal information if requested
- These changes will most likely require changes to the employment application, employment agreement, and employee handbook
- Begin data mapping if needed: connecting the original source of information to any target fields

Questions?

THANK YOU!

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