

# October Chapter Meeting Recap

## What Employers Should Know about California's New Independent Contractor Classification Landscape

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At ASHRAE-Southern California's October 1, 2019, meeting, counsel Eric C. Sohlgren of Payne & Fears LLP gave a presentation on the "Top Ten Mistakes Employers Make: Litigation Prevention Tactics." The common pitfalls highlighted by Sohlgren included (1) improper classification of employees; (2) failure to ensure non-exempt employees are taking meal periods and rest breaks; (3) failure to annually update employee handbooks and HR policies; (4) lack of honest and regular feedback about job performance; (5) lack of documentation about job performance deficiencies; (6) failure to train managers; (7) failure to prevent, promptly investigate and correct allegations of workplace misconduct; (8) failure to obtain release in exchange for severance pay; (9) lack of creativity in resolving employee disputes, and (10) treating employees unfairly.

One topic that generated many questions from the audience was California's new independent contractor classification law, California Assembly Bill 5 ("AB5"), effective January 2020. This article outlines the key features of AB5 and its impact on employers' classification practices.

Businesses with workers not falling under one of the exemptions of AB5 will be at an increased risk of claims of misclassification beginning next year. Employers will want to use the next few weeks to analyze the effect AB5 may have on their businesses, and whether it may be prudent to change their relationships with certain workers in light of the new law.

Some employers may be exempt. Some industries like construction have special requirements. Some may decide that they need to reclassify certain workers as employees. Others may determine that the benefit of continuing to classify workers as independent contractors outweighs the risks of doing so. Whatever your company decides, you'll want to make any decisions with eyes wide open. Does your company have all the required information to mitigate the risks associated with these changes?

## Background

On September 18, 2019, Governor Gavin Newsom signed AB5, controversial legislation which will have a  
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substantial impact on California employers when it goes into effect on January 1, 2020.

AB5 enacts into a statute last year's California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), and the Court's three-part standard (the "ABC test") for determining whether a worker may be classified as an employee or an independent contractor.

## Who will be considered an independent contractor under the new law?

Under the ABC test established in *Dynamex* and now under AB5, workers are presumed to be employees. A worker may be properly considered an independent contractor only if the hiring entity establishes *all three* of the following:

(A) that the worker 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 such work and in fact;

(B) that the worker performs work that is outside the usual course of the hiring entity's business; and

(C) that 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.

## What is changing?

While the *Dynamex* decision applied to workers in all industries, it only governed claims falling under a wage order, as opposed to claims brought solely under the Labor Code or Unemployment Insurance Code. AB5 expands the ABC test to non-wage order claims as well, and makes the test the standard for determining whether workers must be provided with minimum wages, overtime pay, workers' compensation, unemployment and disability insurance, paid sick days, and family leave. The ABC test will govern these items because *employees* are entitled to these things, while independent contractors are not.

## Many industries and positions are exempt

The law contains exemptions for numerous industries and positions due to intense lobbying prior to AB5's ultimate passage. Examples of exemptions include doctors, dentists, psychologists, attorneys, architects,

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engineers, accountants, brokers, investment advisors, direct salespersons, private investigators, commercial fishermen, select professional service providers that meet a series of specific requirements, real estate agents, estheticians, electrologists, barbers, cosmetologists, and many more.

Exempted industries or positions will continue to be subject to the longstanding multi-factor test for determining independent contractor vs. employee status as described in *S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations*, 48 Cal. 3d 341 (1989).

Importantly, however, AB5 does not include exemptions for many "gig economy" businesses, most notably in the ride-sharing space.

This is certain to lead to continued and perhaps escalating disputes pertaining to the classification of workers in these gig economy positions. For example, Uber announced prior to AB5 even being signed by the governor that its drivers "will not automatically be reclassified as employees, even after January of next year," and that the company "will continue to respond to claims of misclassification in arbitration and in court as necessary, just as [the company] does now." Other businesses may very well follow Uber's lead over the coming months.

## What should your company do to prepare?

Businesses with independent contractors should evaluate whether those contractors are in positions that are subject to an exemption under AB5. They should reevaluate their classifications of any workers not falling under an exemption to determine if those classifications are supportable under the ABC test. Businesses may also want to update arbitration provisions in independent contractor agreements to include express class action waivers in order to limit class or representative actions alleging misclassifications.

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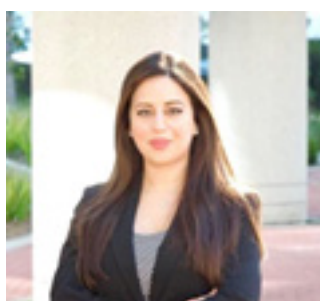
If you would like more information on how to prepare your company for these important changes, please contact us.



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