

ALERT

CalChamber Continues Fight for Worker Opportunities

Urges Legislature to Clarify Dynamex Decision



Legislative intervention is needed to provide clarity to employers and prevent loss

of opportunities for millions of individuals following last year's court decision upending the test for determining who is an independent contractor, the California Chamber of Commerce testified this week.

Speaking at an informational hearing of the Assembly Labor and Employment Committee on February 26, CalChamber Executive Vice President Jennifer Barrera outlined the challenges employers face in the sudden change from the independent contractor test in use for nearly 30 years.

In April 2018, the California Supreme Court ruling in *Dynamex Operations West v. Superior Court* (4 Cal.5th 903) set out a restrictive "ABC" test for determining whether a worker is an independent contractor or an employee.

To be considered an independent contractor, the worker must satisfy all three factors of the ABC Test.

In contrast, the test in use before the *Dynamex* decision weighed multiple factors in their totality to account for the variety of California industries and professions, as well as the diversity of California's workers. That 11-factor test was adopted by the court in a 1989 ruling, *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (48 Cal.3d 341).

Dynamex Test

Under *Dynamex*, the court presumes that a worker is an employee unless an individual satisfies all three factors of the ABC Test:

A. That 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;

B. That the worker performs work that
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CalChamber Urges Education Focus as Better Way to Privacy Law Goals



Educational approaches to help businesses understand how to comply with the state's new privacy law will be far more efficient than costly enforcement actions, according to the

California Chamber of Commerce.

In testimony last week at a legislative informational hearing, CalChamber Policy Advocate Sarah Boot called for setting businesses up for success "because the privacy goals...that we all care so much about will be met when companies are actually able to comply with" the California Consumer Privacy Act (CCPA).

She told members of the Assembly Privacy and Consumer Protection Committee on February 20 that over the last several months she has been on multiple calls in which privacy experts from around the country can't agree or figure out what certain provisions of the CCPA mean.

Boot argued against adding a private right of action to the "incredibly confusing, detailed and complex" CCPA. The Private Attorneys General Act, which enables trial lawyers to enforce government regulations in employment, has led to abuses, she pointed out.

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 CalChamber
CALIFORNIA CHAMBER OF COMMERCE

MAY 22-23, 2019

CAPITOL SUMMIT & SACRAMENTO HOST BREAKFAST

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Labor Law Corner

Requests for Personnel Files, Payroll Records—Required Timing Differs



Erika Pickles
Employment Law
Counsel/HR Adviser

A former employee has asked for a copy of her personnel file and payroll records. Do I have to provide these to her? And if so, by when?

California laws give your current and former employees the right to request access to their personnel files and their payroll records. There are strict time requirements for responding to these requests, so it's important to understand what is required of employers.

Personnel Files

Under California Labor Code Section 1198.5, an employee has the right to inspect and receive a copy of the personnel records the employer maintains relating to the employee's performance or any grievance concerning the employee.

The request must be in writing and employers need to provide employees with a form to use when making such a request.

Employees can request either to inspect their files or receive a copy; if you provide a copy, you can charge the employee for the actual cost of copying the file.

You must either make the personnel file available for inspection or provide the employee with a copy of the file within **30 calendar days** of receiving the written request.

Payroll Records

Employees also have the right, under Labor Code Section 226, to inspect or receive a copy of their payroll records. When responding to this type of request, you must provide either copies of the itemized wage statements received by the employee or a computer-generated record that contains all the information on those wage statements.

The law previously stated that employees had the right to inspect or *copy* their records, but it was amended effective January 1, 2019 to clarify that employees have the right to inspect or *receive* a copy

of their records (meaning employers have to provide the copy and can't require the employee to make the copy).

As with personnel files, you can charge an employee the actual cost of copying if you provide a copy of the records.

Although there are some similarities between the two types of requests, a request for payroll records differs from one for personnel records in two ways:

- first, the request for payroll records can be written or oral;
- second, you have only **21 calendar days** from the date of the request to provide the records, so the window to comply is shorter than for a request for personnel records.

Timing Is Crucial

If you receive a request for personnel or payroll records, make sure you comply within the required time frame—30 days for personnel files and 21 days for payroll records. If you fail to meet those deadlines, you can face a penalty of \$750 for each violation.

Column based on questions asked by callers on the Labor Law Helpline, a service to California Chamber of Commerce preferred and executive members. For expert explanations of labor laws and Cal/OSHA regulations, not legal counsel for specific situations, call (800) 348-2262 or submit your question at www.hrcalifornia.com.

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Labor Law

HR Boot Camp. CalChamber. March 29, San Diego; April 12, Oakland; April 26, Costa Mesa; May 9, Sacramento; June 14, Walnut Creek; August 22, Pasadena; September 12, Sacramento. (800) 331-8877.

Leaves of Absence: Making Sense of It All. CalChamber. March 8, Sacramento; June 21, San Diego; August 16, Oakland. (800) 331-8877.

International Trade

Understanding Brexit. CalChamber and World Affairs, Sacramento. April 24, Sacramento. (916) 444-6670 ext. 232. Aerospace Fair Mexico 2019. Mexican Government. April 24–27, Zumpango,

Mexico. +52 (55) 7098-5299. 93rd Annual World Trade Week: SoCal—The Engine of Global Trade and Economic Growth. Los Angeles Area Chamber. May 2, Los Angeles. (213) 580-7500.

Trade Winds Indo-Pacific Forum and Mission 2019. U.S. Commercial Service. May 6–13, India, Bangladesh, and Sri Lanka. (304) 347-5123.

Annual Export Conference. National Association of District Export Councils. May 21–22, Arlington, Virginia. (407) 255-9824.

SelectUSA Investment Summit. SelectUSA. June 10–12, Washington, D.C. (800) 424-5249.



Canada Day Luncheon

Speakers Agree: NAFTA 2.0 Creates Freer, Fairer Economic Growth

Photos by Sara Proffitt



Honorable Zaib Shaikh, the new Consul General of Canada in Los Angeles.



Consul General of Mexico in Sacramento, Ambassador Liliana Ferrer Silva.



Rana Sarkar, Consul General of Canada based in San Francisco.



The United States-Mexico-Canada Agreement (USMCA) underscores a renewed

understanding among the USMCA parties on the importance of our mutual trading relationships, everyone agreed at a recent international luncheon at the California Chamber of Commerce to celebrate Canada Day in Sacramento.

With the support of the Consulates General of Canada of San Francisco and Los Angeles, and the Consulate General of Mexico in Sacramento, experts convened at the CalChamber on February 20 with more than 100 attendees for a thorough update and discussion on the agreement.

The Honorable Zaib Shaikh, the new Consul General of Canada in Los Angeles, set the tone for the discussion, saying that the USMCA is a narrative of “unity, friendship, partnership, between the three countries that make up not only North America, but are in fact listed as part of the USMCA... We have a moment in history, in time... to really show the world we are together and if you're together, it really counts.”

USMCA Background

The CalChamber actively supported

the creation of the North American Free Trade Agreement (NAFTA) among the United States, Canada and Mexico, comprising 489.5 million people with combined annual trade with the United States being around \$1.139 trillion in 2017. In 2017, goods exports topped \$525.46 billion while goods imports totaled nearly \$614.02 billion.

President Donald J. Trump announced his intent to renegotiate NAFTA in May 2017. The negotiations started shortly thereafter, going through many rounds.

In August 2018, the U.S. and Mexico reached a preliminary agreement, while the U.S. continued separate negotiations with Canada. In October, Canada and the U.S. came to an agreement right before a self-imposed deadline, reassuring the deal would remain trilateral. The pact was rebranded the United States-Mexico-Canada Agreement (USMCA).

The CalChamber joined in the February 26 launching of the USMCA Coalition in support of the agreement. [See story on Page 7.](#)

Stability and Credibility

Ambassador Liliana Ferrer Silva, consul general of Mexico in Sacramento, told attendees that the USMCA provides stability and credibility for North American businesses and workers and will allow them to thrive and prosper.

“We are promoting, creating the best business environment possible for businesses to develop and grow in order to create and grow jobs,” Ferrer said. “Trade is fundamental; we are integrated to the world’s economy and Mexico has been able to grow in thanks to this integration.”

Ferrer said that trade is one of the most important engines of growth and Mexico needs to improve the quality of growth by including additional business sectors, including more products, and this is “precisely what the USMCA will do,” she said.

Mexico continues to be California’s No. 1 export market, purchasing 15.5% of all California exports. California exports to Mexico amounted to \$26.7 billion in 2017, a slight increase from 2016.

Mexico has remained the United States’ second largest export market since 1995, with a total value of \$242 billion in 2017.

“We are committed to a competitive North America and help attract foreign direct investment to be a part of their exporting platform,” Ferrer told attendees about the prospect of ratifying USMCA.

Building Things Together

Consul General Rana Sarkar provided a status update and insights about the approval process of the USMCA from a Canadian perspective.

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CalChamber Continues Fight for Worker Opportunities

From Page 1

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.

The "B" prong of the test is the most problematic because many independent contractors work in the same line of business as the hiring entity. As such, most independent contractor relationships cannot survive under the court's narrow view of the "B" prong.

The court decision in *Dynamex* places the question of employment classification at the intersection of important competing interests—on the one hand, the state's interest in protecting workers, and on the other hand, every individual's personal liberty to contract and be in business for him/herself.

into a traditional employment model that lacks flexibility.

Although proponents of *Dynamex* argue that employers who want to provide flexibility to employees can do so

the court jeopardizes that flexible work arrangement for Californians.

California is estimated to have nearly 2 million residents who work as independent contractors. These numbers

are conservative as the 2018 BLS Economic Release did not include the number of individuals who supplement their income with online platforms.

Many Californians are choosing to work full-time as independent contractors and others are using the opportunity to supplement their income. In fact, 79% of independent contractors prefer it over traditional employment, according to the BLS Economic Release.

The top reasons that motivate individuals to pursue independent work include:

- to be their own boss,
- to choose when they work,
- to choose their own projects,
- to choose where they



CalChamber Executive Vice President Jennifer Barrera explains that legislation clarifying employer obligations is needed to prevent loss of opportunities for millions of individuals following last year's independent contractor court decision.

Outdated Wage Orders

Barrera reminded legislators that the Industrial Welfare Commission (IWC) Wage Orders upon which the court based its decision in *Dynamex* haven't been updated for more than 14 years—since the IWC was defunded in 2004.

Because there is so much crossover between the Wage Orders and the Labor Code, when requirements are out of synch between the two, complying becomes impossible for the employer, Barrera stated.

She added that professionals who are exempt from the overtime provisions of the Wage Orders still are affected by the *Dynamex* decision because other Wage Order provisions still apply to those professionals.

Dynamex jeopardizes freedom of choice for individuals and pushes them

under the current state of the law, California's strict labor laws do not allow for such workplace flexibility.

Retroactivity Unfair

Barrera said legislative intervention also could clarify that the *Dynamex* decision would apply to cases filed after the ruling and not before.

For businesses to be held retroactively responsible for complying with a standard that didn't exist at the time of a claim is "extremely and patently unfair," Barrera stated.

Individual Preferences

As indicated by the U.S. Bureau of Labor Statistics (BLS) Economic Release (June 7, 2018), individuals overwhelmingly prefer their arrangement as independent contractors, and the ABC Test adopted by

work, and

- to earn extra money.

According to a survey commissioned by Upwork and the Freelancers' Union, a majority of freelancers who left full-time, traditional employment made more money within a year, are able to work less than 40 hours per week (on average 36 hours), and the majority believe they have the right amount of work.

Independent Contractors Speak

Many independent contractors from across California testified at the informational hearing about why they want to keep their independence and flexibility.

To see excerpts of that testimony, visit twitter.com/calchamber.

Staff Contact: Jennifer Barrera

Compliance with Privacy Law Depends on Helping Businesses Understand

From Page 1

Granting trial lawyers the same power on the privacy law “would be a class action bonanza,” Boot said.

Business Concerns

A CalChamber-led coalition has been working since the CCPA was enacted last year to fix flaws in the law. Legislation signed last year (SB 1121) corrected a handful of the problematic provisions, but much more needs to be done before the CCPA goes into effect on January 1, 2020.

At the informational hearing, Boot described two concerns related to data security and privacy:

- The CCPA requires businesses to send consumers “specific pieces of information” the business has collected after receiving a consumer request, but does not define “specific pieces of information.”

To alleviate the risk of sending the requested information to a fraudster, the business may need to collect even more information from the consumer making the request to be sure the business is sending sensitive informa-

tion to the right person—especially when the business has no direct relationship with the consumer.

Collecting that additional information runs counter to privacy goals and could

information should be removed, Boot said. As written, the act seems to allow one member of a household—whether an abusive spouse or a roommate—to gain access to all specific pieces of personal information—including credit card information, precise geolocation data, or even shopping records—about another member of the household.

Similarly, one user of a device can request all the specific pieces of information a company has about that device.

Including households and devices in the definition of personal information compromises the privacy of consumers and could also infringe on the choices of other household members, she said. For example, if one household member asks to delete all data associated with a household, another household member subsequently would be unable to gain access to that information.

That result runs counter to the privacy goals of the CCPA.

Boot along with other legal experts described a handful of other concerns the
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CalChamber Policy Advocate Sarah Boot emphasizes at a legislative informational hearing that the goal of the California Consumer Privacy Act should be compliance, not lawsuits.

greatly harm consumers. Therefore, the coalition is seeking a CCPA amendment to limit these risks.

- The CCPA’s references to households and devices in the definition of personal

New Bill to Modify Privacy Law Will Hurt Small Businesses, Kill Jobs



A new proposal to modify the state privacy law that is still being modified will create a litigation nightmare, the California Chamber of Commerce warned this week.

The bill, **SB 561 (Jackson; D-Santa Barbara)**, was introduced on February 22 to expand the reasons a consumer may file a civil lawsuit to enforce the California Consumer Privacy Act (CCPA).

The CCPA was rushed through the legislative process in the summer of 2018 without the benefit of input from numerous crucial stakeholders and as a

result is deeply flawed. A CalChamber-led coalition worked on legislation passed last year to fix some of the problems with the CCPA and is continuing to seek more adjustments to make the law more workable before it goes into effect on January 1, 2020.

In a February 25 press release, the CalChamber said SB 561 proposes to add significant costs to small business employers.

The goal of the CCPA “should be compliance,” the release stated. “Yet the goal of SB 561 . . . appears to be lawsuits and attorney’s fees.

“The bill removes the opportunity for small businesses to seek clarification from the Attorney General on how to ensure they are complying with the law and instead opens up significant new

avenues of litigation that will primarily benefit trial attorneys.”

If a business has an inadvertent misstep because it does not have the benefit of clarifying regulations or direction from the Attorney General’s office, it will have no opportunity to resolve the issue before costly litigation ensues, the CalChamber noted.

“Compliance, not punishment, should be the goal of government to enforce laws and regulations,” the CalChamber stated. “Punishment may be an incentive to increase compliance, but—especially where a law is new and vague—eliminating a right to cure does not promote compliance.”

SB 561 “will not only hurt and possibly bankrupt small businesses in the state; it will kill jobs and innovation.”

Speakers Agree: NAFTA 2.0 Creates Freer, Fairer Economic Growth

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“The point is not just that we have a joint economy, it’s not just that we sell to each other, but we build things together,” Sarkar said.

The United States and Canada enjoy the largest bilateral trade and investment relationship in the world. In 2017, two-way trade in goods between Canada and the United States topped \$582 billion. Exports to Canada were \$282.47 billion, making it the largest export destination for the U.S.

According to the most recent figures, U.S. companies invested approximately \$353 billion into Canada and foreign direct investment from Canada into the U.S. was nearly \$453 billion in 2016.

Canada has remained California’s second largest export market since 2006, with a total value of more than \$16.7 billion in 2017 (9.7% of all California exports), as well as exporting \$9.2 billion in services to Canada. California imports \$28.7 billion from Canada.

The original NAFTA, which came into force in 1994, helped create an economically influential and competitive regional market of 480 million consumers and a combined gross domestic product (GDP) of \$21 trillion.

Nine new chapters have been incorporated into the USMCA—covering modern-day trade challenges, including digital trade, regulatory cooperation, and North American competitiveness.

These represent some much-needed

updates to the original agreement, Sarkar said.

2018 Updates to Agreement

The USMCA deal improves access to Canada’s dairy market for U.S. farmers, giving U.S. exporters an estimated additional 3.59% market share. It also provides for stronger intellectual property provisions and tighter rules of origin for auto production, according to the Trump administration.

The Chapter 19 dispute-settlement mechanism remains untouched, as Canada fought for, although the investor-state dispute settlement will be phased out for Canada and restricted to four areas for Mexico.

Canada also agreed to raise the threshold for applying duties to cross-border purchases, which was a key demand from the United States. The new de minimis level will be C\$150 (\$117 USD) for customs duties, up from C\$20 (\$15 USD).

Steel and aluminum tariffs imposed earlier in 2018 will remain in effect and are being dealt with separately. However, an agreement in the new pact increases by 800,000 the number of passenger vehicles that come across the border from Canada without being subject to a likely 25% duty.

Benefits and Goals

CalChamber support for the USMCA is based on an assessment that it serves the employment, trading and environmen-

tal interests of California, the United States, Mexico and Canada, and is beneficial to the business community and society as a whole.

The objectives of the USMCA are to eliminate barriers to trade, promote conditions of fair competition, increase investment opportunities, provide adequate protection of intellectual property rights, establish effective procedures for implementing and applying the agreements and resolving disputes, and to further trilateral, regional and multilateral cooperation.

CalChamber Position

The CalChamber understands that the original NAFTA was negotiated more than 25 years ago, and, while our economy and businesses have changed considerably over that period, NAFTA has not. We agree with the premise that the United States should seek to support higher-paying jobs in the United States and to grow the U.S. economy by improving U.S. opportunities under the new USMCA.

The provisions of NAFTA with Mexico and Canada have been beneficial for U.S. industries, agricultural enterprises, farmers, ranchers, energy companies and automakers.

Mexico and Canada are California’s largest and second largest export markets. A final approval of the new USMCA will benefit California’s economy.

Staff Contact: Susanne T. Stirling

Compliance with Privacy Law Depends on Helping Businesses Understand

From Page 5

business community has with this law, including that it covers employee data, that it could prevent loyalty and rewards programs, and that it would impede targeted online ads.

Government Services

Boot also pointed out that the CCPA places restrictions on the sale of data to government entities that will have a “profoundly negative impact” on many crucial government services, such as:

- Screening Medi-Cal providers to ensure there is nothing in their history that would prevent them from providing patient care;

- Searching to reunite foster youth with relatives and to assess the suitability of would-be foster parents;
- Child support enforcement activities;
- Fraud prevention in public retirement accounts and other governmental benefits programs;
- Law enforcement response for crimes in progress; and
- Finding abducted children.

If “bad actors” can opt out of the sale of their data to governmental entities for these limited kinds of purposes, the efforts above would be thwarted.

The CCPA’s opt-out provision also undermines legal compliance activities and efforts to prevent identity theft, Boot said.

She commented that the CCPA recognizes part of the problem with an exemption stating that a business need not delete data that is necessary to detect security incidents or to protect against malicious, deceptive, fraudulent, or illegal activity.

The same type of exemption should be applied to the right to opt out of the sale of data for limited purposes, Boot said.

If California can fix the CCPA, Boot concluded, “it really could be a model for the rest of the country. But we have to get it right.”

Staff Contact: Sarah Boot

CalChamber Joins in Launching Coalition Supporting U.S.-Mexico-Canada Pact



USMCA COALITION

The California Chamber of Commerce has joined more than 200 companies

and associations in launching the **USMCA Coalition**, which will advocate congressional approval of the United States-Mexico-Canada Agreement.

The coalition includes a diverse group of businesses, farmers and ranchers, manufacturers, service providers, and technology companies in support of the USMCA.

To join the coalition, visit <https://pages.e2ma.net/pages/1801892/12772>.

Over the coming weeks and months, the USMCA Coalition will make the case for expeditious passage of the agreement to members of Congress, and will work to educate employers and members of Congress about the benefits of the new deal.

The effort will harness the advocacy strength of a broad membership of companies, trade associations, and chambers of commerce, including many that operate outside of Washington, D.C.

More information about the agreement and the coalition is available at www.USMCACoalition.org.

Background

The CalChamber actively supported the creation of the North American Free Trade Agreement (NAFTA) among the United States, Canada and Mexico, comprising 489.5 million people with

combined annual trade with the United States being around \$1.139 trillion in 2017. In 2017, goods exports topped \$525.46 billion while goods imports totaled nearly \$614.02 billion.

President Donald J. Trump announced his intent to renegotiate NAFTA in May 2017. The negotiations started shortly thereafter, going through many rounds.

In August 2018, the U.S. and Mexico reached a preliminary agreement, while the U.S. continued separate negotiations with Canada.

In October, Canada and the U.S. came to an agreement right before a self-imposed deadline, reassuring the deal would remain trilateral. The pact was rebranded the United States-Mexico-Canada Agreement (USMCA).

Benefits and Goals

CalChamber support for the USMCA is based on an assessment that it serves the employment, trading and environmental interests of California, the U.S., Mexico and Canada, and is beneficial to the business community and society as a whole.

The objectives of the USMCA are to eliminate barriers to trade, promote conditions of fair competition, increase investment opportunities, provide adequate protection of intellectual property rights, establish effective procedures for implementing and applying the agreements and resolving disputes, and to further trilateral, regional and multilateral cooperation.

For further information, see the fact sheet at www.USMCAcoalition.org/get-the-facts/.

CalChamber Position

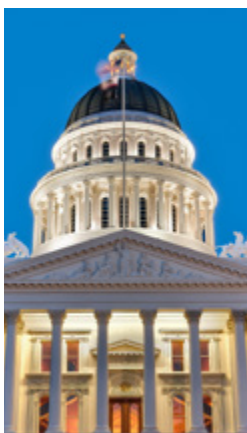
The CalChamber understands that the original NAFTA was negotiated more than 25 years ago, and, while our economy and businesses have changed considerably over that period, NAFTA has not. We agree with the premise that the United States should seek to support higher-paying jobs in the United States and to grow the U.S. economy by improving U.S. opportunities under the new USMCA.

The provisions of NAFTA with Mexico and Canada have been beneficial for U.S. industries, agricultural enterprises, farmers, ranchers, energy companies and automakers.

The CalChamber's longstanding support for NAFTA is based upon an assessment that it serves the employment, trading and environmental interests of California and the United States, as well as Canada and Mexico, and is beneficial to the business community and society as a whole. Since 1993, trade among the three NAFTA countries has nearly quadrupled.

Mexico and Canada are California's largest and second largest export markets. A final approval of the new USMCA will benefit the California economy and jobs.

Staff Contact: Susanne T. Stirling



Capitol Insider

presented by **CalChamber**

The *Capitol Insider* blog presented by the California Chamber of Commerce offers readers a different perspective on issues under consideration in Sacramento. Sign up to receive notifications every time a new blog item is posted at capitolinsider.calchamber.com.

CalChamber Calendar

Water Committee:

March 14, Santa Monica

Board of Directors:

March 14–15, Santa Monica

International Breakfast:

March 15, Santa Monica

Capitol Summit:

May 22, Sacramento

International Forum:

May 22, Sacramento

Host Breakfast:

May 22–23, Sacramento

THURSDAY, MARCH 21, 2019 | 10:00 - 11:30 AM PT

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When hiring any employee, employers are required by federal immigration law to verify that person's identity and eligibility to work in the U.S. by completing the *Form I-9*.

Both a complex and detailed process, the *Form I-9* comes with 15 pages of instructions. This webinar fills you in on avoiding costly mistakes as well as complying with California requirements prior to and following an ICE inspection.

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