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Classifying Employees: New Test Signed Into Law



Last week, Governor Gavin Newsom signed legislation placing in law the test for determining when a worker is an

independent contract as outlined in a California Supreme Court decision last year.

AB 5 (Gonzalez; D-San Diego) codifies the "ABC" test adopted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles.* AB 5 and its exemptions go into effect on January 1, 2020.

Much of the talk surrounding AB 5 has focused on the impact the "ABC" test will have on gig economy jobs, as the new classification test jeopardizes the flexibility and income opportunities the modern employment model provides for thousands of California workers. However, the legislation will affect more than those in the gig industry—it stands to affect nearly every sector of the economy. Although Assemblywoman Lorena Gonzalez (D-San Diego) did allow carve outs for dozens of industries (allowing them to adopt the *Borello* multi-factor test instead), many other key industries were left without an exemption.

See box on Page 4 for AB 5 exempted industries/professions.

In a statement released on September 18, the day AB 5 was signed, the California Chamber of Commerce recognized the exemptions added to AB 5, but pointed out that the ABC test does not reflect the needs of today's workforce.

"The fact that the Legislature recognized in AB 5 — and in related legislation — that so many professions and industries include workers who are not appropriately classified as employees is strong evidence that the *Dynamex* decision should not apply to everyone and there are many industries that still need to be added," the CalChamber said.

"The test set forth in the Dynamex See Classifying Employees: Page 4



Coalition Raises Concerns Over Efforts to Impose Sales Tax on Services

CALIFORNIA TAX & BUDGET RESEARCH PROJECT

A broad coalition that includes

the California Chamber of Commerce, small businesses, and taxpayers this week announced the formation of the California Tax and Budget Research Project (CTBRP).

The project will educate Californians about the harmful impacts that imposing a new sales tax on services will have on the state's economy, budget, consumers and taxpayers.

In the past, state legislators have attempted to pass a sales tax on services—such as those provided by a plumber or a lawyer—without success. Talk of imposing a sales tax on services has been growing again recently.

Although supporters claim it will stabilize the state's fluctuations in tax revenue, a sales tax on services will actually drive up costs of housing, infrastructure and everyday services.

"If the problem is budget volatility, then a sales tax on services is not the solution, no matter how it's structured," said CalChamber President and CEO Allan Zaremberg. "Once you strip away this pretense, you see that a new services tax is just another tax that will simply make services more unaffordable for all Californians."

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Podcast: Ageism in The Workplace: Page 3



Labor Law Corner How Deadline Extension Affects Timing of Harassment Training



David Leporiere HR Adviser

I just read that the Governor signed a new law that changes the timing for the new sexual harassment training. What are the new deadlines for getting my employees trained?

For many years, employers with 50 or more employees were required to provide supervisors with two hours of sexual harassment prevention training every two

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Email: alert@calchamber.com. Home page: www.calchamber.com. years. Last year, SB 1343 was signed into law that required all employers with 5 or more employees to provide the same training to supervisors and one hour of training to employees. This training had to be completed by January 1, 2020, giving employers little time to meet the new mandate.

However, on August 30 of this year, Governor Gavin Newsom signed into law SB 778, which extends this training deadline from January 1, 2020 to January 1, 2021.

Those businesses that were providing training long before SB 1343 was made law must continue to follow their two-year training cycles. So, if you trained your supervisors in 2017, then those supervisors must be retrained before January 1, 2020.

As for employees newly hired or employees newly promoted to a supervisory position, they must be trained within six months of hire or promotion, regardless of whether you fell under the old or newly enacted law.

Employer Training Deadlines

The chart provides a quick breakdown of training deadlines for employers who have trained employees this year or in previous years.

Year you last trained	Next required training year	Explanation
2019	2021	SB 778 clarifies that employers who train their employees in 2019 aren't required to provide refresher training until two years from the time the employee was trained.
2018	2020	SB 778 allows those employers who trained employees in 2018 to maintain their two-year cycle and still comply with the new January 1, 2021, deadline.
2017	2019	Employers who trained supervisors in 2017 under prior law, known as AB 1825, should still train those employees this year in order to maintain their two-year cycle.

CalChamber Resources

The California Chamber of Commerce offers individual, self-paced training in English or Spanish. Available are both a 2-hour online supervisor version and a 1-hour online employee version.

To learn more, visit *https://store.* calchamber.com.

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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HR Symposium. CalChamber. November 8, Huntington Beach. (800) 331-8877. *International Trade*

Foreign Trade Zone Forum: Enhancing Your Company's Global Supply Chain Competitiveness. U.S. Commercial Service. September 30, Portland, Oregon. (503) 326-3002. Discover Greece: Invest in an Exciting Innovation Destination with a Fast-Growing Tech Scene. Hellenic Association of Mobile Applications Companies with

others. September 30, San Francisco. Discover Global Markets: Powering and Building The Middle East and Africa.

U.S. Department of Commerce and See CalChamber-Sponsored: Page 7





<u>The Workplace</u> Ageism at Work: Prevent Liability by Focusing on Abilities, Not Age



In today's modern workforce, it's not uncommon to find employees from a number of generations in a single company. In

Episode 30 of The Workplace podcast, CalChamber Executive Vice President and General Counsel Erika Frank talks with employment law expert Jennifer Shaw about the pitfalls of age-based stereotyping, succession planning, and mandatory retirement.

'Stereotypes on Both Sides'

Two laws protect workers who are 40 years of age or older from discrimination—the California Fair Employment and Housing Act, and the federal Age Discrimination in Employment Act (ADEA).

When the ADEA was passed in 1967, the common retirement age was 60 and many workers had a defined retirement benefit plan that required at least 20 years of service, Shaw explains. Congress sought to protect workers with the ADEA so that a worker could still meet the terms of the benefit plan in time for retirement.

Times have changed, however.

"These days, of course, it's not unusual at all to have a 70-year-old in the workforce doing a great job," Shaw tells Frank. "It's also not unusual to find a 21-year-old being discriminated against because somebody has...the perception that if you're 21 you couldn't possibly be mature, or you couldn't possibly be responsible. So, we've got stereotypes on both sides."

Frank agrees, pointing out that it's important to consider a worker's abilities over that person's age.

"On the one hand you can ask, 'When are you too old?' But the other question could be 'Are they too young?'" Frank says. "As opposed to just looking at the worker in a holistic way and saying, 'Here's what we need for you to perform in the job.""

ABCs of Managing

One of the challenges of having work-

ers from several generations in a workplace, Frank says, is that each generation is marked by its own experiences, values and work ethic.

Shaw recommends that employers focus solely on a worker's skills, qualifications and abilities.

"Are they doing what you need to them to do? If they aren't, then we have to take steps to correct that," she tells Frank.

Employers should not try to be kind and make exceptions for particular workers, Shaw explains, as the exceptions can turn into liabilities. To illustrate her point, she uses the hypothetical example of Mary Beth.

"For example, 'Well we have Mary Beth and she just turned 65. We know she's slowing down. Let's reduce her productivity standard," Shaw says. "[This] feels like a really nice thing to be doing...but of course we just created a slew of issues."

What if Mary Beth's bonuses are based on her productivity and it is now more difficult for her to get a bonus? And what happens, Shaw continues, if a 42-year-old coworker is being held to Mary Beth's previous productivity expectation—isn't the coworker being held to a different standard?

"Even sometimes when we try to do something nice, we actually create potential liability, so we sort of go back to those ABCs of managing and hiring and corrective action..." Shaw explains. "Don't be swayed by how old or how young someone is, or your own bias... about what...an 'older worker' can or should be doing...[or] what a 'younger worker' can or should be doing."

Other Considerations

If an older worker has a medical condition, the employer should treat that older employee like any other employee. Ask for medical documentation, determine whether the employee is eligible under the federal Family and Medical Leave Act (FMLA) or California Family Rights Act (CFRA), or needs accommodation, Shaw advises.

"We don't put on the kid gloves, because that's when you really create a legal issue," she says. "You start doing something...nice for someone, pretty soon you've created an entitlement to an accommodation."

Employers also should make training available for any worker who needs it. Stereotypes might label an older worker as being slower with technology, but even younger workers can struggle with it, Shaw points out.

"You should really be thinking for every position: what training should we be offering, how are we going to gauge performance, how are we going to make sure that we are able to tell if someone is doing the job, and then be consistent in that process," she says.

Succession Planning

Age should not be a factor when succession planning. Shaw recommends having a succession plan whether an employee is 21 or 81.

Again, the work culture has changed and "people just don't stay in jobs the way they used to," Shaw says. Succession plans were put into place to prepare for an employee who was close to retiring, but workers now sometimes leave to experience a change and not just for retirement, she adds.

Mandatory Retirement

Mandatory retirement is legal only in limited government or government-managed agencies where there is a health and safety issue tied to age—such as aviation (pilots) or certain correctional agencies, Shaw explains.

Other than in these select industries, mandatory retirement programs are illegal, she emphasizes.

Sometimes, firms or agencies will have retirement agreements, but the agreements are not *technically* mandatory, as they are negotiated agreements among the employer and employees in the firm, Shaw says.

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Classifying Employees: New Test Signed Into Law

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ruling does not correctly contemplate the realities of the modern economy nor fairly consider the sweeping impracticalities it would bring to the California economy."

The CalChamber also expressed its commitment to aggressively pursue adding more industry exemptions next year.

"Simply put, much work remains to be done on the *Dynamex* issue," the CalChamber stated.

Classifying Independent Contractors

The *Dynamex* decision upended the way businesses in the state distinguished employees from independent contractors. In *Dynamex*, the court abandoned a long-established balancing-of-factors test previously adopted by the court in a 1989 decision, *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (48 Cal.3d 341).

This previous approach weighed multiple factors in their totality to account for the variety of California industries and professions, as well as diversity of California's workers.

In *Dynamex*, the Supreme Court concluded that individuals are presumed to be employees, and a company classifying an individual as an independent contractor bears the burden of justifying that individual's independent contractor classification under the "ABC" test.

'ABC' Test

The ABC test replaces the previously utilized "right to control" or "common law" test, which focused on the hiring entity's ability to control how the work was performed. Under the more restrictive ABC test, an individual is presumed to be an employee, unless the company can prove *all* of the following:

A. That the worker is free from 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. 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.

If the hiring entity fails to show that the individual worker satisfies each of the three criteria, the worker is treated as an employee, not an independent contractor.

Governor's Signing Message

In his AB 5 signing message, Governor Newsom said: "A next step is creating pathways for more workers to form a union, collectively bargain to earn more, and have a stronger voice at work—all while preserving flexibility and innovation."

The Governor said he will "convene

leaders from the Legislature, the labor movement and the business community to support innovation and a more inclusive economy by stepping in where the federal government has fallen short and granting workers excluded from the National Labor Relations Act the right to organize and collectively bargain."

Exempted from 'ABC' Test by AB 5 Industry/Professional Exemptions

AB 5 exempts the following industries and professions from the "ABC" test:

- Insurance agents;
- Securities broker-dealers or investment advisers, who are registered with the SEC FIRA or licensed by California;
- Physicians, surgeons, dentists, podiatrists, or psychologists;
- Licensed lawyers, architects, private investigators, accountants and engineers;
- Veterinarians;
- Direct sales salespersons;
- · Licensed realtors;
- Hair stylists/barbers, estheticians, cosmetologists, electrologists and manicurists, subject to narrow circumstances;
- Commercial fishermen working on an American vessel;
- Marketing, but the marketing work must be original and creative in character;

Broader Exemptions

AB 5 also has several broader exemptions:

• Business to Business Contracts: For two businesses that contract for services that are provided directly to the contracting business, and *not* the customer/client (doesn't include work for which a license is required by the Contractor's State License Board).

• Construction Contractor/ Subcontractor: For this business relationship if certain conditions are met, including the subcontract assumes financial responsibility for all errors or omissions in labor or

- Registered, or exempt from registration, travel agents;
- Graphic designers;
- Grant writers:
- Fine artists;
- Enrolled agents licensed by the U.S. Treasury to practice before the IRS;
- Payment processing agents;
- Repossession agencies;
- Administration of human resources, but the work must be intellectual, varied in character and non-standardized;
- Photographers and photojournalists (35 submissions or less, and not applicable for motion picture industry, live shows, music videos, broadcast news, commercial productions);
- Freelance writers, editors or newspaper cartoonists (35 submissions or less);
- Motor club service providers.

services, evidenced by insurance, indemnity clauses, performance bonds or warranties.

• Construction Trucking Services: Trucking services only in the construction industry if the trucking contractor registers with the Department of Industrial Relations as a public works contractor, even if the work is not public work; utilizes its own employees to perform the work; the trucking contractor does not utilize a broker; and exemption sunsets on January 1, 2022.



Governor Signs CalChamber-Sponsored Bill Helping Small Businesses



A California Chamber of Commerce**sponsored** bill to help protect businesses from predatory lawsuits has *Governor Gavin*

been signed into law by Governor Gavin Newsom.

AB 1607 (Boerner Horvath;

D-Encinitas; Chapter 293) requires that businesses receiving or renewing their licenses get written notice of the Gender Tax Repeal Act, which precludes businesses from charging different prices for services based on gender.

The act requires certain businesses tailors, barbers, hair salons, dry cleaners—to post a notice of pricing for standard services provided.

Businesses that violate the posting requirement are subject to a civil penalty of \$1,000. Any violation of the pricing requirement is subject to a minimum penalty of \$4,000 per violation plus attorney's fees.

"We applaud Assemblymember Boerner Horvath for authoring this important legislation that will protect small businesses from unnecessary lawsuits and allow them to continue to provide services to their customers," said CalChamber Executive Vice President Jennifer Barrera.

Small businesses in particular have been subjected to costly, frivolous litigation for being unaware of the Gender Tax Repeal Act requirement.

For example, an attorney in Riverside County targeted minority-owned businesses and demanded settlements ranging from \$20,000 to \$123,000 for minor price differences. Those differences were legitimate, being based on skill, expertise, and/or effort.

Although the small businesses ultimately prevailed, they spent a significant amount of time and money defending against the meritless claims.

Education and awareness of the Gender Tax Repeal Act is critical for small businesses, which have suffered from abuse of the law's provisions.

Providing notice to businesses of the law in multiple languages at the outset, as required by AB 1607, will give businesses an opportunity to protect themselves from litigation by posting a notice of pricing if required and making sure customers are aware of the price differences for any service.

The requirement to provide businesses with the notice begins January 1, 2021. The state Department of Consumer Affairs is required to develop and make available for download by October 1, 2020 the written notification in English, Spanish, Chinese, Tagalog, Vietnamese and Korean.

Staff Contact: Leah Silverthorn

CalChamber Board Explores Wildfire Challenges for Utilities, Insurers



Pedro Nava (left), chair of the Little Hoover Commission and a former Assembly member, moderates a panel discussion with representatives from the utilities and insurance industries (both heavily regulated) at the CalChamber Board of Directors meeting on September 6. The subject: the issues being raised by the recurrence of deadly wildfires. Kevin Sagara (center), chairman and CEO of San Diego Gas & Electric (SDG&E), describes how the utility has improved infrastructure (such as replacing wood power poles with steel); upgraded technology for monitoring weather, vegetation risk and history of its above-ground power lines (40% of the system); and public notification setup since a 2007 wildfire was deemed to have been caused by SDG&E equipment. The focus of company culture—from lineman to top executives—is "to keep our customers safe," Sagara says. CalChamber Board member Tom Conley (right), senior vice president of State Farm Insurance Companies/president and CEO, State Farm General Insurance Company, explains the practical and regulatory factors at play in determining whether premium pricing is adequate to match the loss risk. A question to consider, he says, is if wildfires are now like Florida hurricanes, are they being appropriately considered in the ratemaking process?



Presidential Politics in Spotlight at CalChamber Board Dinner



Bill Carrick (left), founder of Carrick Consulting, and Michael E. Murphy, senior partner at Revolution Agency, entertain attendees at the CalChamber Board of Directors dinner on September 5 with observations about the presidential campaign and the factors that will affect which one of the many Democratic candidates for president will emerge as the front runner and whether the Democrats or Republicans will win the White House in the 2020 election.

Coalition Raises Concerns Over Efforts to Impose Sales Tax on Services

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Increases Costs for Consumers, Taxpayers

Many economists view taxing services as poor fiscal policy in part because of a process known as "pyramiding," whereby the costs of taxes on services are passed on and services repeatedly taxed again through the production chain. These tax costs can snowball rapidly and add serious costs to end-consumers, particularly in services-intensive sectors.

Research by the California Foundation for Commerce and Education (CFCE), available at www.cataxandbudgetproject. *com/facts*, found that a 5% sales tax on business services would have the following impact:

• The average cost of a new single-family home would increase by more than \$16,500;

• The average construction cost for a new school would increase by more than \$17 million; and

• Costs for public infrastructure like roads and bridges would rise by 3.2%.

"A sales tax on services is effectively a tax on housing, a tax on infrastructure and a tax on everyday goods and services," explains John Kabateck, state director of the National Federation of Independent Business of California.

"California families and small businesses are already grappling with the astronomical costs of housing, with roads in need of repair, and with the high cost of living and doing business here-we do not need another tax to make things worse."

Punishes Small Businesses

CFCE's research also indicates that if a tax on services were imposed, large corporations can avoid the tax by bringing in-house many of the affected services-like legal, accounting or consulting.

In contrast, nearly 90% of impacted small businesses have fewer than 10 employees and couldn't afford to bring these services in house, putting the smaller firms at a cost/price disadvantage with large corporations.

Moreover, the increased costs of business services caused by a services tax will disproportionately hit small businesses, which frequently have lower margins than larger businesses.

California Services Already Taxed

Proponents of a sales tax on services have suggested that services are somehow untaxed in California, and therefore should be taxed to "modernize" the economy.

Yet research by Justin Adams, Ph.D., for CFCE shows that business service

sectors already pay \$22.2 billion a year in taxes to the state, including income and corporation taxes.

The figure is high relative to other sectors/industries, when taking into account California's high "sin taxes" on tobacco, alcohol and cannabis.

Services Affected

A sales tax on services would have an impact on services such as:

- Accounting;
- Advertising;
- Auto repair;
- Banking;
- Construction;
- Delivery;
- Dry cleaning:
- Floral arranging;
- Hair styling;
- Housekeeping;
- Landscape (including lawn) services;
- Legal help;
- Mortgage services;
- · Realtors; and • Rideshare.

More Information

For more information about the California Tax and Budget Research Project, visit www. CATaxandBudgetProject.com.



Governor's Cabinet Secretary to Speak at Public Affairs Conference



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Fashion Island Hotel, Newport Beach

A review of Governor Gavin Newsom's first year in office is on the agenda for the California Chamber of Commerce Public Affairs Conference, set for October 15–16 at the Fashion Island Hotel, Newport Beach.

CalChamber President and CEO Allan Zaremberg will moderate the session, featuring Ana Matosantos, the Governor's Cabinet secretary.

Tuesday, October 15

The opening conference session at 1 p.m. on October 15 will focus on the CalChamber Annual Survey of California Voter Attitudes.

Pollsters Robert Green and Adam Rosenblatt of PSB Research will review the survey results.

Next on the agenda is "California: 2020 Vision Election Preview," moderated by Martin R. Wilson, CalChamber executive vice president, public affairs.

The panelists will be Andrew Acosta, Acosta Consulting; Bob Giroux, Lang Hansen, O'Malley & Miller; and Christy Wilson, Wilson Public Affairs.

Following the election preview, the first of three bipartisan legislative panels

FFAIRS 16, 2019

will examine what happened in the first year of the 2019–2020 session and what remains for the second year of the session.

The legislators set for this panel include: Senator Thomas Umberg, Assemblymember Tasha Boerner-Horrath, Assemblymember Tom Daly, Assemblymember Heath Flora, Assemblymember Vince Fong, Assemblymember Cottie Petrie-Norris, and Assemblymember Rudy Salas.

Wednesday, October 16

The agenda for October 16 will open with a media panel providing "The View from the Fourth Estate." Moderating the panel discussion will be Kevin Yamamura, editor, POLITICO California Pro.

The morning legislative panel will focus on "A Taxing Conversation— Legislative and Ballot Measures."

Legislators scheduled to participate include: Senator Steve Glazer, Senator Scott Wilk, Assemblymember William Brough, and Assemblymember Sharon Quirk-Silva.

CalChamber Executive Vice President Jennifer Barrera will moderate the discussion.

After lunch will be the review of the

Governor's first year and future priorities with Zaremberg and Matosantos.

The afternoon legislative panel will examine the "California Consumer Privacy Act—The Process and the Work in Progress."

The legislators set to speak on this panel will include: Senator Andreas Borgeas, Senator Brian Jones, and Assemblymember Jacqui Irwin.

Register Today

The deadline to register for the conference is Thursday, October 3.

Conference registration includes dinner at Cucina Enoteca on Tuesday evening, the breakfast burrito buffet on Wednesday morning, and the reception on Wednesday evening at the Fashion Island Hotel.

Google and Southern California Edison are major sponsors of the conference.

To register or for more information, visit *www.calchamber.com/publicaffairs*.



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the Houston District Export Council. September 30–October 2, Houston, Texas. (281) 228-5652.

- Exporting Mechanics Webinar Series II: Advanced Letters of Credit. National Customs Brokers & Forwarders Association of America, Inc. and U.S. Department of Commerce. October 8, Webinar. (202) 466-0222.
- Annual Pan African Global Trade and Investment Conference. Africa-USA Chamber of Commerce. October 15–17, Sacramento. (626) 243-3614.
- Trade Expo Indonesia. Indonesian Ministry of Trade. October 16–20, Banten, Indonesia.

- Global Trade in a Changing World. World Trade Center, Northern California. October 24, Sacramento. (916) 447-9827.
- U.S.-U.A.E. Business Council Trade Mission to the U.A.E. U.S.-U.A.E. Business Council. October 21–23, United Arab Emirates.
- Business Conference. GetGlobal. November 5, Long Beach.
- China International Import Expo. China International Import Expo Bureau. November 5–10, Shanghai. +86-21-968888.
- Global Trade Awards Gala. Women Leaders in International Trade – Los Angeles. November 7, Manhattan Beach. (213) 545-6479.

- Hong Kong International Wine and Spirits Fair 2019. Hong Kong Trade Development Council. November 7–9, Hong Kong.
- Exporting Mechanics Webinar Series II: Duty Drawback and Refunds. National Customs Brokers & Forwarders Association of America, Inc. and U.S. Department of Commerce. November 12, Webinar. (202) 466-0222.
- Exporting Mechanics Webinar Series II: ECCN Classification Numbers. National Customs Brokers & Forwarders Association of America, Inc. and U.S. Department of Commerce. December 10, Webinar. (202) 466-0222.



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