

# AB 5 and Beyond – New Rules for Contracting with California Health Care Professionals in 2020

December 3, 2019

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# Presentation Overview

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- Setting the Stage – Employee vs. Independent Contractor
  - State and Federal Requirements
  - *Borello* and Common Law Control Test
  - *Dynamex* Decision
- AB 5
- Other Notable Changes for 2020
  - Arbitration Agreement Requirements
  - Physician Assistant Practice Agreements
  - California Consumer Privacy Act

# State and Federal Applications

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- Employers have wide range of obligations to employees under both state and federal law
  - Wage and hour protections (including overtime, meal periods, breaks, etc.)
  - Non-retaliation/non-discrimination
  - Minimum wage protections
  - Tax and insurance requirements (payroll, unemployment, workers compensation)
  - ERISA coverage



# IRS Requirements

## Separate Control Test for Worker Classification (W-2 vs. 1099)

### 1. Behavioral Control

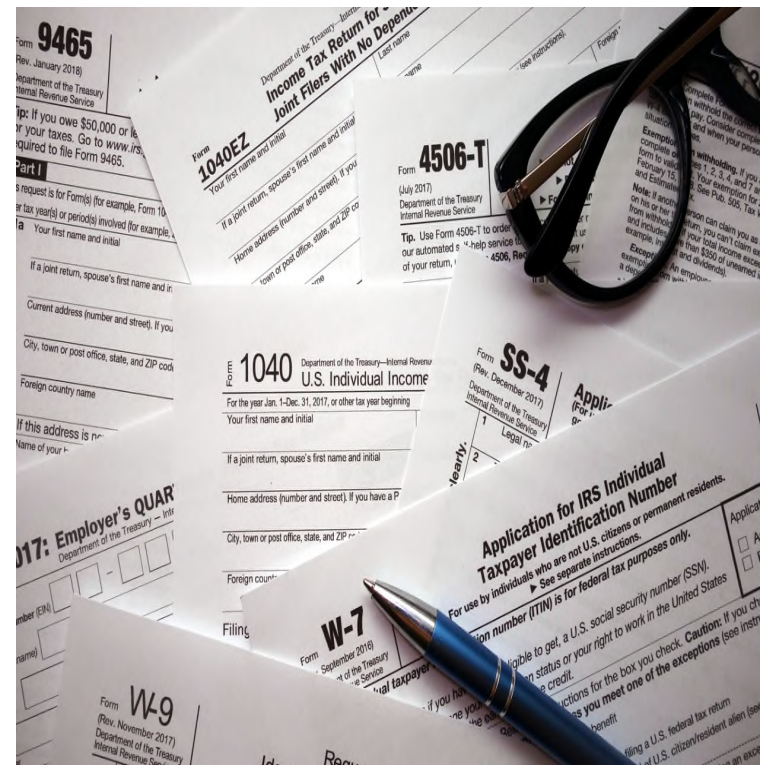
- Business has right to direct and control the work performed (type of instructions given, training, evaluation systems)?

### 2. Financial Control

- Business has right to control financial and business aspects of job?

### 3. Relationship of the Parties

- How do parties perceive their relationship (contracts, benefits, duration of relationship, key activity of business)?



# Borello Control Test in California

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- *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, (1989) 48 Cal.3d 341.
- California Supreme Court case evaluating definition of “employee” for purposes of certain California worker’s compensation protections
- Question whether the hiring entity has the right to control the manner and means of the worker’s services



# Borello Control Test in California

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1. Whether the one performing the services is engaged in a distinct occupation or business from the principal;
2. Whether or not the work is part of the regular business of the principal;
3. The kind of occupation, with reference to whether in the locality the work is usually done under the direction of the principal or by a specialist without supervision;
4. The skill required in the occupation;
5. Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. Whether the principal or the worker invests in the equipment or materials required by his or her task or his or her employment of helpers;
7. The length of time for which the services are to be performed;
8. The degree of permanence of the working relationship;
9. The right of the principal to discharge at will, without cause;
10. Method of payment, whether by the time or by the job; and
11. Whether or not the parties believe they are creating the relationship of employer-employee.

# Dynamex Decision

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- *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018)
- With *Dynamex*, the California Supreme Court introduced a new, three-part test, the ABC test, which presumes that all workers are employees unless the hiring business can demonstrate that the worker satisfies *all* three of the following conditions:
  - (A) The worker is free from the control and direction of the hirer in connection with the performance of the work, both under 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 that involved in the work performed.



# *Dynamex* Decision

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- *Dynamex* decision limited to Wage Order claims issued by the California Industrial Wage Commission
  - Definition of “employee” broader than under the common law
- Wage Orders: “establish protections for workers or impose obligations on hiring entities relating to minimum wages, maximum hours and specified basic working conditions (such as meal and rest breaks).”
- Did not change the standard for determining whether a worker should be classified as an independent contractor or employee for purposes of enforcing other federal or state labor protections (e.g. workers compensation).



# AB 5 Overview

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- Governor Newsom signed into law on September 18, 2019
- Codifies and expands upon the *Dynamex* decision
  - Under AB 5, the ABC test will be used to determine whether a worker providing labor and services for remuneration in California is an “employee” for purposes of not only the Wage Orders, but also the Labor and Unemployment Insurance Codes
  - Generally effective January 1, 2020 though application of ABC test to wage orders in effect since *Dynamex* decision came down. Updates to workers’ comp (Labor Code § 3351) effective July 1, 2020.



# AB 5 Exemptions

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- Specific occupations
- Professional services contracts
- Business-to-business contracting relationships



## AB 5 Exemptions – Specific Occupations

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- Specific occupations are exempted, and *Borello* applies
- Exempted occupations include:
  - “A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian licensed by the State of California . . . performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation”
  - The exemption does not apply to the employment settings currently or potentially governed by collective bargaining agreements for these licensees – here *Dynamex* applies
- Allied health professionals are not exempted occupations
  - The ABC test applies, unless they qualify for another exemption
- This is not a free pass for exempted occupations

## AB 5 Exemptions – Professional Services

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- Contracts for “professional services” that meet specific requirements indicative of an independent contract are exempted, and *Borello* applies
- “Professional services” includes marketing, human resources administration, creative services, and others
- “Professional services” do not include the services of health care professionals

# AB 5 Exemptions – Business-to-Business Relationships

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- “Bona fide business to business relationships” meeting specific requirements are exempted
- *Borello* would apply (and would likely be satisfied)
- A health care professional hired to provide services to patients of the hiring business probably wouldn't qualify for the exception

# AB 5 Exemptions – Business-to-Business Relationships

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All the following criteria must be satisfied for the exception:

- The service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- **The service provider is providing services directly to the contracting business rather than to customers of the contracting business.**
- The contract with the service provider is in writing.
- The service provider has any required business license or business tax registration.
- The service provider maintains a business location that is separate from the business or work location of the contracting business.
- The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.
- The service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.
- The service provider advertises and holds itself out to the public as available to provide the same or similar services.
- The service provider provides its own tools, vehicles, and equipment to perform the services.
- The service provider can negotiate its own rates.
- Consistent with the nature of the work, the service provider can set its own hours and location of work.

# Changes on Horizon?

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- Numerous professional groups and trade associations very motivated to press for additional changes to AB 5 text in 2020
- Recognition that additional clarification may be necessary – particularly around joint employment and application to health care professionals (non-physicians)

# Example: Physician

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- maintains her own office practice, provides *locum tenens* services for local medical practices
- is required by the contracting group to comply with general professional standards, but is not subject to supervision or direction
- is compensated on a per-service or per-procedure basis (not hourly)
- pays for liability insurance and the other costs of maintaining her practice
- does not receive employee benefits from the contracting practices





## Example: Physical Therapist

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- maintains her own office practice, provides regular part-time services to local hospital
- is required by the hospital to comply with general professional standards, but is not subject to supervision or direction
- is compensated on an hourly basis
- pays for liability insurance and the other costs of maintaining her practice
- does not receive employee benefits

# Example: Electrician

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- is on call to the local hospital
- maintains his own business out of separate rented space
- holds a business license
- advertises and provides services to the public
- has his own transportation, tools and equipment
- sets his rate, by the hour or the job
- schedules his work at the hospital around his other jobs



## Example: Registered Nurse

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- works for a temporary staffing agency that treats her as an employee
- is assigned temporarily to a hospital, which pays the staffing agency a daily rate



# What Now? How Should Employers Respond

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- Application is very fact specific – will depend greatly on specific circumstances
- Much of the requirements already in effect (not January 1, 2020)
- May also depend on prospects for change to text in the near future

# Potential Exposure

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- IRS Audit
- EDD Regulatory Audit
- Penalties for labor code violations (meal and rest period, paystubs, overtime, etc.) or failure to withhold and remit appropriate tax deductions
- Suits by ICs Alleging Misclassification
- PAGA Penalties



# Other Notable Changes for 2020

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- Arbitration Clauses in Employment Agreements
- Physician Assistant Practice Agreements
- California Consumer Privacy Act



# Arbitration Clauses in Employment Agreements

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- The courts have upheld carefully drafted arbitration provisions in employment contracts
  - Must be mutual, provide discovery, not impose costs that the employee would not have to pay in court, and otherwise be fair
- AB 51 adds a new § 432.6 to the Labor Code
  - Prohibits employers from requiring employees or applicants to waive rights to a civil action or state agency proceeding for a violation of the Labor Code or the Fair Employment and Housing Act, and from retaliating against them for refusing to waive these rights
  - Applies to contracts entered into, modified or extended after December 31, 2019
  - Does not apply to post-dispute settlement agreements or negotiated severance agreements
  - Does not apply to arbitration agreements covered by the Federal Arbitration Act

# Physician Assistant Practice Agreements

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- SB 697 – Amends Physician Assistant Practice Act
- Streamlines PA practice and allows for more independence (removes chart review requirement)
- Requires agreement to establish policies and procedures to identify a supervising physician for a PA rendering services in a general acute care hospital (removes requirement for Delegated Services Agreements)



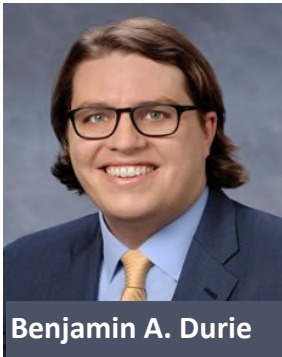
# CA Consumer Privacy Act of 2018

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- AB 25 (signed by Governor Newsom 10/11/19)
  - Provides that the CA Consumer Privacy Act does not apply to the personal information collected by a business subject to the CCPA “in the course of the natural person acting as a job applicant to, an employee of, director of, officer of, medical staff member of, or contractor of that business.”
  - However, businesses subject to the CCPA will still need to inform employees, contractors, and applicants, at or before the point of collection, of the categories of personal information to be collected and the purposes for which such information will be used.
  - Further, this information remains subject to the private right of action established under the CCPA for certain security incidents.
  - The exemption is currently scheduled to sunset on January 1, 2021.
  - (Note that CCPA generally applies to for-profit businesses that (i) have an annual gross revenue in excess of \$25 million, (ii) buy or sell the personal info of 50,000+ consumers, or (iii) derive 50% or more of annual revenue from selling consumer’s personal information)

# Contact Page

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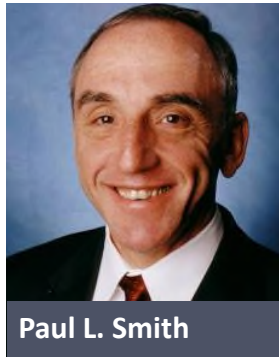


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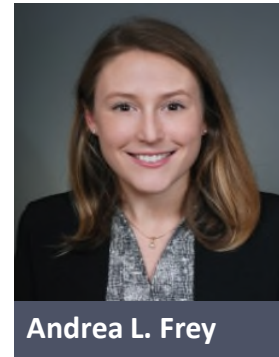


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Thank You.

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