NOSSAMAN LLP

NORTH AMERICAN MEAT INSITUTE

SELECTED DEVELOPMENTS IN CALIFORNIA LABOR AND EMPLOYMENT LAW

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CONTENTS

NEW CALIFORNIA EMPLOYMENT LEGISLATION RELEVANT TO NAMI MEMBERS EFFECTIVE JANUARY 1, 2019

Lactation Accommodation AB 1976: This bill amends California Labor Code section 1031. It makes changes to existing lactation accommodation law. California law required employers to make reasonable efforts to provide a location other than a toilet stall to be used for lactation. The new law specifies that the location should be something other than a bathroom. The new law also states that the lactation area should be a permanent location but a temporary location is permissible if (1) the employer is unable to provide a permanent location due to operational, financial, or space limitations; (2) the temporary location is private and free from intrusion while being used for lactation purposes; and (3) the temporary location is not used for other purposes while being used for lactation.

Salary History Information AB 2282: This bill amends sections 432.3 and 1197.5 of the California Labor Code. Present California law prohibits an employer from relying on the salary history information of an applicant for employment as a factor in determining (a) whether to offer the applicant employment or (b) what salary to offer the applicant, with limited exceptions. California law also generally forbids an employer from seeking salary history information from an applicant for employment. Nonetheless, an employer may rely on salary history in determining whether to offer employment or what salary to offer **if the applicant voluntarily discloses their salary history information**. Moreover, California currently requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment.

This bill, among other things, adds new provisions to existing law. In providing a pay scale to an applicant for a position, the bill defines "pay scale" as "a salary or hourly wage range." The bill defines "applicant" or "applicant for employment" as "an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position." The bill defines "reasonable request" as "a request made after an applicant has completed an initial interview with the employer." Additionally, under bill, employers are not prohibited from asking an applicant about his or her **salary expectation** for the position being applied for. Employers can make compensation decisions based on

a current employee's existing salary as long as any wage differential resulting from the compensation decision is justified by one or more specified factors, including a seniority system, a merit system, or education, training and experience.

Privileged Communications Re Sexual Harassment AB 2770: This bill amends section 47 of the California Civil Code relating to privileged communication and alleged defamation. According to the Legislative Counsel's Digest:

> This bill would include among those privileged communications complaints of sexual harassment by an employee, without malice, to an employer based on credible evidence and communications between the employer and interested persons regarding a complaint of sexual harassment and would authorize an employer to answer [a prospective employer's question], without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment

Disclosure Of Sexual Harassment AB 3109: This bill adds California Civil Code section 1670.11. It renders void and unenforceable any provision in a contract or settlement agreement that prevents a party to the contract from testifying about criminal conduct or sexual harassment in an administrative, legislative, or judicial proceeding. The Legislative Counsel's Digest summarizes the provision:

> The California Constitution provides that the people have the right to petition government for redress of grievances and to assemble freely to consult for the common good. The California Constitution provides that every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right. Existing law generally regulates formation and enforcement of contracts, including what constitutes an unlawful contract. Under existing law, a contract is unlawful if it is contrary to an express provision of law, contrary to the policy of express law, though not expressly prohibited, or otherwise contrary to good morals. A contract is also void to the extent that it restrains a person from engaging in a lawful profession, trade, or business of any kind.

> This bill would make a provision in a contract or settlement agreement void and unenforceable if it waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment.

Sexual Harassment SB 224: This bill amends California Civil Code section 51.9. It expands the types of relationships that can be subject to a claim for sexual harassment to include lobbyists, elected officials, directors, producers, and investors. The statute applies to work relationships where one person holds himself out as being able to help someone establish a business or professional relationship directly or with a third party. The Legislative Counsel's Digests states:

> Existing law establishes liability for sexual harassment when the plaintiff proves specified elements, including, among other things, that there is a business, service, or professional relationship between the plaintiff and defendant and there is an inability by the plaintiff to easily terminate the relationship. Existing law states that a relationship may exist between a plaintiff and certain persons, including an attorney, holder of a master's degree in social work, real estate agent, and real estate appraiser.
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> This bill would include within the elements in a cause of action for sexual harassment when the plaintiff proves, among other things, that the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a 3rd party. The bill would eliminate the element that the plaintiff prove there is an inability by the plaintiff to easily terminate the relationship. The bill would include an investor, elected official, lobbyist, director, and producer among those listed persons who may be liable to a plaintiff for sexual harassment.

Settlement Of Sexual Harassment Claims SB 820: This law adds Code section 1001 and precludes non-disclosure or confidentiality provisions in settlement agreements involving sexual assault, sexual harassment, workplace harassment, sex discrimination failure to prevent workplace harassment, sexual harassment, retaliation for reporting harassment or discrimination based on sex or sex discrimination. The new law does not prohibit a provision that prevents the parties to the

agreement from disclosing the amount of the settlement. Additionally, at the claimant' request, the settlement agreement may include a provision that limits the disclosure of the claimant's identity or of facts that would lead to the discovery of the claimant's identity.

Gender Composition Of Boards Of Directors SB 826: This law adds California Corporations Code sections 301.3 and 2115.5. As the Legislative Counsel's Digest summarizes:

> This bill, no later than the close of the 2019 calendar year, would require a domestic general corporation or foreign corporation that is a publicly held corporation, as defined, whose principal executive offices, according to the corporation's SEC 10-K form, are located in California to have a minimum of one female, as defined, on its board of directors, as specified. No later than the close of the 2021 calendar year, the bill would increase that required minimum number to 2 female directors if the corporation has 5 directors or to 3 female directors if the corporation has 6 or more directors. The bill would require, on or before specified dates, the Secretary of State to publish various reports on its Internet Web site documenting, among other things, the number of corporations in compliance with these provisions. The bill would also authorize the Secretary of State to impose fines for violations of the bill, as specified, and would provide that moneys from these fines are to be available, upon appropriation, to offset the cost of administering the bill.

Paid Family Leave/Active Duty Military SB 1123: California has a paid family leave program that provides partial wage replacement to employees who take leaves of absence for specified purposes. According to the Legislative Counsel's Digest:

> This bill would, on and after January 1, 2021, expand the scope of the family temporary disability insurance program to include time off to participate in a qualifying exigency related to the covered active duty, as defined, or call to covered active duty of the individual's spouse, domestic partner, child, or parent in the armed forces of the United States, as specified.

Copy Of Payroll Records SB 1252: This bill amends section 226 of the California Labor Code. California required that employees have a right

to inspect or copy their payroll records and that they must be allowed to do so within 21 days of such a request. This amendment makes clear that if an employee requests a copy of the records, the employer must provide the copies (as opposed to requiring employees to copy the records themselves).

FEHA Amendments SB 1300: SB 1300 amends provisions of California's Fair Employment and Housing Act, including sections 12923, 12940, 12950.2, 12964.5 and 12965. It adds a provision making it an unlawful practice for an employer to require an employee to release an FEHA claim in exchange for a bonus, raise, or continued employment. The bill also makes employers liable for any kind of unlawful harassment by non-employees (not just for sexual harassment) where the employer knew or should have known of the harassment and failed to take appropriate remedial action. Lastly, the bill has provisions expressing the legislative intent that harassment cases are rarely appropriate for resolution on summary judgment, and a declaration that a single act of harassment may suffice to support a finding of a hostile work environment. This is intended to make it more difficult for employers to prevail on claims of harassment.

Sexual Harassment Training SB 1343: This bill amends sections 12950 and 12950.1 of the California Government Code. California law required employers with 50 or more employees to provide supervisors with sexual harassment training. This amendment now includes within the training requirement employers with 5 or more employees and requires that employers provide at least 2 hours of training to supervisory employees and at least one hour of training to non-supervisory employees by January 1, 2020 and once every two years thereafter. It also requires the DFEH to develop and post training materials for employers to use for these purposes.

Port Drayage Workers SB 1402: This bill adds section 2810.4 to the California Labor Code. It provides that customers who use the services of a port drayage motor carrier are jointly and severally liable with the motor carrier for nonpayment of wages, expenses, damages, and penalties. This is an effort to use the market power of customers of motor carriers to influence motor carriers from exploiting truckers. The Legislative Counsel's Digest states in relevant part:

(p) The California Legislature established, with the enactment of Assembly Bill 1897 in 2014, that business entities that are provided workers from subcontractors can be jointly liable for the nonpayment of wages and failure to provide unemployment insurance by the subcontractor.

(q) Holding customers of trucking companies jointly liable for future labor law violations by port drayage motor carriers who they engage, where the customer has received advance notice of their record of unsatisfied judgments for labor law violations, will exert pressure across the supply chain to protect drayage drivers from further exploitation.

(r) Customers have the market power to exert meaningful change in the port drayage industry that has eluded California drivers for more than a decade.

Criminal History Inquiries SB 1412: This bill amends California Labor Code section 432.7. The section restricts employers' ability to conduct criminal history inquiries and to use criminal history information in employment decisions. The section provides an exception for employers who are required by federal or state law to inquire into an applicant's or employee's criminal history. The amendment intends to clarify and tighten this exception to apply only where an employer is required by law to inquire into a "particular conviction" or where an employer cannot by law hire someone with a "particular conviction." The amended section defines "particular conviction" to mean "a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses." (Cal. Labor Code, § 432.7(m)(2).)

VETOED BILLS FROM 2018

Records Retention AB 1867: The proposed bill would have required employers with 50 or more employees to retain records of any complaint of sexual harassment for at least 5 years following the last day of employment of the employing making a harassment claim or the last day of employment of the purported harasser, whichever is later.

FEHA Statute Of Limitations AB 1870: The proposed bill would have enlarged the statute of limitations for an employee to file an administrative complaint of discrimination/harassment/retaliation under FEHA from one year to three years.

Janitorial Workers – Harassment Training AB 2079: This bill would have imposed more stringent and burdensome requirements for sexual violence and harassment training for janitorial services employers.

Janitorial Workers – Presumption Of Employee Versus Independent Contractor Status AB 2496: The proposed bill would have created a *rebuttable* presumption that janitorial workers are employees rather than independent contractors.

Joint Liability For Harassment AB 3081: The proposed bill would have amended California's Fair Employment and Housing Act and require a client employer to share with a labor contractor all civil liability for harassment for all workers supplied by that labor contractor. The proposed bill would also (a) prohibit an employer from discharging or in any manner discriminating or retaliating against an employee because of the employee's status as a victim of sexual harassment, as defined by FEHA, and (b) establish a rebuttable presumption of unlawful retaliation based on the employee's status as a victim of domestic violence, sexual assault, sexual harassment, or stalking if an employer takes specific actions within 30 days following the date that the victim provides notice to the employer or the employer has actual knowledge of the status.

Lactation Accommodation SB 937: The proposed bill would have amended sections 1030 and 1031 and require an employer to provide a lactation room or location (that is not a bathroom) that includes prescribed features such as (a) access to a sink and refrigerator in close proximity to the employee's workspace, (b) a space that is shielded from view and free from intrusion while the employee is lactating and a place to sit. It also

would have required that a lactation room be: (1) safe, clean, and free of toxic or hazardous materials; (2) contain a surface to place a breast pump and personal items; (3) contain a place to sit; and (4) have access to electricity or alternative devices needed to operate an electric or battery-powered breast pump. An employer with fewer than 50 employees could establish an exemption from any requirement of this section if the employer could show that the requirement would impose an undue hardship when considered in in relation to the size, nature, or structure of the employer's business. The proposed bill would have provided that the failure to provide adequate break time or a suitable space will be deemed a failure to provide a rest break under Labor Code section 226.7.

A SAMPLING OF CALIFORNIA EMPLOYMENT RELATED BILLS INTRODUCED (*BUT NOT YET PASSED*) IN 2019-2020 LEGISLATIVE SESSION.

Joint Liability For Harassment With Labor Contractor AB 170: This bill would add section 12940.2 to Government Code as part of FEHA. It would require a client employer to share with a labor contractor all civil legal responsibility and civil liability for harassment for all workers supplied by that labor contractor.

Employee Remedy AB 403: This bill would amend section 98.7 of the California Labor Code. The Legislative Counsel's Digest states:

> (1) Existing law authorizes a person who believes they have been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner to file a complaint with the Division of Labor Standards Enforcement within 6 months after the occurrence of the violation.
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> This bill would extend the period to file a complaint to within 3 years after the occurrence of the violation.
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> (2) Existing law prohibits an employer, as defined, or any person acting on behalf of the employer, as defined, from, among other things, preventing an employee from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of a law, regardless of whether disclosing the information is part of the employee's job duties.
>
> This bill would authorize a court to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of these provisions.

PAGA Attorney's Fees Limitation AB 443: Would limit the amount of attorney's fees on a PAGA suit involving violation of section 226 of the Labor Code regarding itemized wage statements. On a judgment or settlement of $50,000 or more, fees would be limited to 25% of the amount.

Protection Of Victims Of Sexual Harassment AB 628: This bill would amend section 230 of the Labor Code. (1) Existing law prohibits an employer from discharging, or discriminating or retaliating against, an employee who is a victim of domestic violence, sexual assault, or stalking and who takes time off from work to obtain, or attempt to obtain, any relief to help ensure the health, safety, or welfare of the victim or his or her child. (2) Existing law also prohibits an employer from discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking because of the employee's status as a victim, if the employer has notice or knowledge of that status. (3) Existing law additionally prohibits an employer with 25 or more employees from discharging, or discriminating or retaliating against an employee who is a victim, in this regard, who takes time off to obtain specified services or counseling. (4) Lastly, existing law makes it a misdemeanor for an employer to refuse to rehire, promote, or restore an employee who has been determined to be so eligible by a grievance procedure or legal hearing.

This bill would extend these protections to victims of sexual harassment, as defined. The bill would also extend these employment protections to family members, as defined, of the victims for taking time off from work to provide assistance to the victims when seeking relief or obtaining relevant services and counseling. The bill additionally would extend confidentiality protections provided to victims in this context, which existing law applies only to people employed by employers with 25 or more employees, to employers generally.

Unfair Immigration Practices AB 589: This bill would add sections 1019.3 and 1019.5 to the Labor Code. As stated in the Legislative Counsel's Digest:

> Under existing law, it is unlawful for an employer or any other person or entity to engage in, or to direct another person or entity to engage in, unfair immigration-related practices against any person for the purpose of, or with the intent of, retaliating against any person for exercising any right protected under the Labor Code or by any local ordinance applicable to employees, as specified. This bill would make it unlawful for an employer to knowingly destroy, conceal, remove, confiscate, or possess any actual or purported passport or other immigration document, or any other actual or purported government identification document of another person in the course of committing, or with

the intent to commit, trafficking, peonage, slavery, involuntary servitude, or a coercive labor practice. The bill would impose specified civil and criminal penalties for a violation. The bill would also authorize the Labor Commissioner to issue a citation for a violation, as prescribed. By imposing criminal penalties, the bill would impose a state-mandated local program. The bill would require an employer to post a prescribed workplace notice with information including the right to maintain custody and control of immigration documents and that the withholding of immigration documents by an employer is a crime.

The bill would require an employer to provide to an employee a document entitled the "Worker's Bill of Rights," to be developed and made available to employers by the Department of Industrial Relations on or before July 1, 2020, either before verifying an employee's employment authorization pursuant to federal law governing the employment of unauthorized aliens for an employee hired on or after July 1, 2020, or, if hired before July 1, 2020, when the department makes the document available. The bill would require an employer to provide the document in a language understood by the employee and to require such an employee to sign and date the document in acknowledgment that the employee has read and understood the employee's rights. The bill would require the employer to keep the signed document in its records for at least 3 years and to give the employee a copy of the signed document.

Remedy For Failure To Pay Wages AB 673: This bill would amend section 210 of the Labor Code and would permit an employee (in addition to the Labor Commissioner) to recover penalties for an employer's failure to pay wages.

Itemized Wage Statement AB 789: This bill would amend section 226 of the Labor Code relating to an employer's obligation to provide itemized wage statements. Subject to certain exceptions, the bill would require, for an action to recover for any violation of the itemized wage statement requirement, that an employee or representative give prescribed notice of the alleged violation to the employer. The bill would authorize an employer to cure the alleged violation within 65 calendar days of the postmark date of

the notice. The bill would allow an action to commence only if the alleged violation is not cured within that period.

With respect to the Private Attorneys Generals Act (PAGA), this bill would authorize an employer to cure any violation brought under the act regarding itemized wage statements by using the cure procedure described above and would extend the curing period to 65 days.

No Discharge Because Employee In Alcohol Or Drug Rehabilitation Program AB 882: This bill would add section 1029 to the Labor Code. Existing law requires an private, non-governmental, employer who regularly employs 25 or more employees to reasonably accommodate any employee who voluntarily participates in an alcohol or drug rehabilitation program, provided the employer does not suffer undue hardship. This bill would prohibit an employer, *regardless of the number of employees*, from discharging an employee for testing positive for a drug that is being used as a medical-assisted treatment, under the care of a physician or licensed treatment program, as specified.

Written Injury Prevention Program AB 1569: This bill would amend section 6401.7 of the Labor Code and require an employer to submit annually a copy of its written injury prevention program to the division of Occupational Safety and Health.

Family Care And Medical Leave SB 135: This bill reflects an extensive revision of California's family care and medical leave statute. The bill would expand the statute to employers with 5 or more employees. The requesting employee would need to have 180 days of service rather than 1,250 hours. The bill would expand family care and medical leave to include leaves for reason of the birth or placement of a child, leave to care for a grandparent, grandchild, sibling, domestic partner, or designated person who has serious health condition and leave because of qualifying exigency related to covered active duty of spouse, domestic partner, child or parent in Armed Forces. The bill also would expand California's paid family leave program.

Lactation Accommodation SB 142: This bill is similar to SB 937 from 2018 which the governor vetoed, discussed above. Additionally, this bill would set building standards for the installation of lactation space for employees in nonresidential buildings newly constructed or remodeled

for workplace occupancy. The bill would also require an employer to adopt a lactation policy.

ARBITRATION AND CLASS ACTION WAIVERS

Class action waivers in arbitration provisions are enforceable under the Federal Arbitration Act ("FAA").

Authority: (*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-52; *see also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 2330239 (2013) [following *Concepcion* - parties' agreement waiving class-wide arbitration was enforceable]; *Coneff v. AT&T Corp.* 673 F.3d 1155, 1161 (9th Cir. 2012) [FAA preempted Washington law invalidating class action waiver as substantively unconscionable].)

PAGA CLAIMS

California Private Attorney General Claims ("PAGA") cannot be waived.

Authority: In *Iskanian v. CLA Transportation Los Angeles, LLC*, 59 Cal.4th 348, 382-87 (2014), regarding California's Private Attorney General Act ("PAGA"), the California Supreme Court held, among other things that an agreement banning PAGA claims in any forum (court or arbitration) violates California public policy (the "*Iskanian* Rule"). The Court also held that the FAA does not preempt this rule based upon an agreement between an employee and an employer because the claim is in effect a governmental claim. A PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute **between an employer and the state**, "which alleges directly or through its agents - either the [Labor and Workforce Development] Agency or aggrieved employees - that the employer has violated the Labor Code." (*See Sakkab v. Luxottica Retail N. America*, 803 F.3d 425, 431 (9th Cir. 2015) [the *Iskanian* rule is valid; waiver of right to bring a representative PAGA action is unenforceable; FAA does not preempt the *Iskanian* rule.].)

California state court cases hold that PAGA claims cannot be forced into arbitration by a pre-dispute agreement between employer and employee.

Authority: In *Correia v. NB Baker Electric, Inc.*, 32 Cal.App.5th 602, 624-25 (2019), the California Court of Appeal held that a PAGA claim – as a representative claim – cannot not be forced into arbitration based upon a pre-dispute agreement. This is because the claim is essentially a "state" claim and without the State of California agreeing to arbitration, a court may not enforce an employee/employer agreement as to arbitrating such claims: "In sum, we agree with the California Courts of Appeal that have held *Iskanian's* view of a PAGA representative action necessarily means that this claim cannot be compelled to arbitration based on an employee's pre-dispute arbitration agreement absent some evidence that the state consented to the waiver of the right to bring the PAGA claim in court. There was no such evidence produced in this case." (*See also*, *Lawson v. ZB, N.A.*, 19 Cal.App.5th 705, 725 (2017); *Hernandez v. Ross Stores, Inc.*, 7 Cal.App.5th 171, 178 (2016); *Tanguilig v. Bloomingdale's, Inc.*, 5 Cal.App.5th 665, 670, 678-79 (2016); *Williams v. Superior Court*, 237 Cal.App.4th 642, 649 (2015).)

Federal courts, however, have held that PAGA claims as representative claims may be arbitrated under pre-dispute agreement between employer and employee.

Authority: *See, e.g.*, *Valdez v. Terminix International Co.*, 681 Fed. Appx. 592, 594 (9th Cir. 2017); *Wulf v. Valero Refining Co. – California*, 641 Fed.Appx. 758, 760 (9th Cir. 2016); *McCormack v. Marriott Ownership Resorts, Inc.*, No. 3:17-cv-01663-BEN-WVG, 2018 U.S. Dist. LEXIS 151331; *Cabrera v. CVS Rx Services, Inc.*, No C 17-05803 WHA, 2018 U.S. Dist. LEXIS 43681 (N.D. Cal. March 16, 2018); *but see Whitworth v. SolarCity Corp.*, 336 F.Supp.3d 1119, 1126 (N.D. Cal. 2018 [PAGA claims not subject to arbitration]; *see also Sakkab v. Luxottica Retail N. America*, 803 F.3d at 441 [remanding to determine if parties agreed to arbitrate PAGA claims].

CALIFORNIA - INDEPENDENT CONTRACTOR OR EMPLOYEE?

Dynamex Operations W. v. Superior Court

The California Supreme Court generated an earthquake in the business community when it changed the definition of "independent contractor" on April 30, 2018 in *Dynamex Operations W. v. Superior Court*, 4 Cal.5th 903, 955-56 (2018). Until *Dynamex*, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989) was the benchmark for determination of whether a worker was an employee or independent contractor.

Borello applied a common law "control-of-work-details" test, with multiple relevant factors applied to determine how much control a hiring party had over the worker. The more discretion in performing the work placed in the hands of the worker, the more likely the worker would be deemed an independent contractor.

The Supreme Court in *Dynamex* observed that in determining whether a worker was an independent contractor, one needed to look at any applicable statutory provisions. *Dynamex* involved wage orders. In the context of wage orders, the court ruled that a so-called ABC test should apply:

Part A Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?

Part B Does the worker perform work that is outside the usual course of the hiring entity's business?

Part C Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Simply put, use of the ABC test makes it more difficult for employers to classify workers as independent contractors and places the burden demonstrating independent contractor status upon the employer (worker is presumed to be an employee under the ABC test).

Subsequent Cases

Cases subsequent to *Dynamex* have applied the case in a somewhat limited fashion. In *Garcia v. Border Transportation Group, LLC*, 28 Cal.App.5th 558 (2018), the plaintiff cab driver brought claims arising under wage order and claim arising under other statutory provisions (not wage orders). The Court of Appeal held that *Dynamex* applies only to claims brought under wage orders. Thus, *Dynamex* governed the plaintiff's wage order claims (e.g., unpaid wages, failure to pay minimum wage, failure to provide meal and rest periods, failure to furnish itemized wage statements, and UCL claims based on the foregoing) while *Borello* governed his other claims (overtime, wrongful termination, waiting time penalties, and UCL claims resting on the foregoing).

Duffey v. Tender Heart Home Care Agency, LLC, 31 Cal.App.5th 2321: The court looked to language of California's applicable Domestic Worker Bill of Rights statute to determine how to assess whether domestic worker was an independent contractor. The statute provided two alternative definitions: (1) the hiring entities control over the wages, hours, or working conditions of the worker or (2) when a common law employment relationship has been formed (*Borello* test).

California Trucking Ass'n v. Su, 903 F.3d 953, 959, fn.4 (9th Cir. 2018): "*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor practices."

Karl v. Zimmer Biomet Holdings, Inc., No. C 18-04176 WHA, 2018 U.S. Dist. LEXIS 189997, at *7 (N.D. Cal. Nov. 6, 2018): "The ABC test applies only to claims arising under Industrial Welfare Commission Wage Orders."

Pending Legislation Relevant To *Dynamex*

AB 5 (Gonzalez): This bill would add section 2750.3 to the California Labor in an effort to codify *Dynamex*. The bill includes limited exceptions for certain employers as to whom the *Borello* test will apply. The exceptions include doctors, insurance agents, financial advisors and "direct sellers" who offer products to consumers under the aegis of such companies as Mary Kay or Herbalife.

AB 71 (Melendez): This bill represents a Republican counter-response to *Dynamex* and essentially proposes to revert to the previous multi-factor *Borello* test for determining employee or independent contractor status. AB 71 likely faces an uphill battle in Sacramento, but will be another opportunity for interested stakeholders to engage on this issue.

CALIFORNIA CONSUMER PRIVACY ACT OF 2018

In 2018, the California Legislature enacted the California Consumer Privacy Act of 2018, Civil Code, § 1798.10 et seq., effective January 1, 2020. The statute seeks to protect the dissemination by sale and disclosure of information related to California residents (defined as "consumers" in the statute) and provides certain rights to consumers to control the use, sale and disclosure of that information. At the same time, the statute imposes obligations upon "businesses" to disclose to consumers on request information regarding collection, use and sale of personal information.

The statute applies to a business that collects personal information from California residents and

* is operated for profit;

* does business in California;

* satisfies one or more of the following thresholds:

> Has annual gross revenues in excess of $25,000,000; **or**
>
> "Alone or in combination, annually buys, receives for the *business'* [sic] *commercial purposes*, *sells*, or shares for *commercial purposes*, alone or in combination, the *personal information* of 50,000 or more *consumers*, households, or *devices*"; **or**
>
> "Derives 50 percent or more of its annual revenues from selling consumers' personal information."

Information subject to the statute includes, among other things,

* identifiers such as a real name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver's license number, passport number;

* commercial information, including records of personal property, products or *services* purchased, obtained, or considered, or other purchasing or consuming histories or tendencies;

* biometric information;

* Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a *consumer's* interaction with an Internet Web site, application or advertisement;

* geolocation data;

professional or employment-related information;

* education information

* inferences drawn from the foregoing information to create a profile about a *consumer* reflecting the *consumer's* preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

The Act does not apply to information that has been made publicly available through government records.

There is an open question as to whether this act applies to information an employer obtains from employees. This may be clarified upon the Attorney General issuing regulations implementing the act.

COMPARE General Data Protection Regulation of the European Union. Applies to personal information received from individuals in EU member countries