

Torrance Professionals & Supervisors Association

November 2019 News

California Enacts Landmark Legislation on Employers Misclassifying Employees as Independent Contractors

On September 18, 2019, Governor Gavin Newsom signed into law Assembly Bill 5 (“AB 5”), which Assemblywoman Lorena Gonzalez introduced into the California Legislature in the wake of last year’s California Supreme Court ruling in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County* (2018) 4 Cal.5th 903. It will go into effect on New Year’s Day, January 1, 2020.

The bill was one of the most closely tracked pieces of legislation this year. It got lots of media attention and drew several demonstrations (both for and against the bill), especially in Sacramento. The bill’s supporters saw it as necessary to address what’s become known as the “gig economy,” and most of the rhetoric surrounding the bill was focused on technology companies such as Uber, Lyft, GrubHub, and DoorDash. But the reality is that AB 5 will have a much broader effect on the California economy. It is not limited to just tech startups. Here’s a summary of the Bill’s history, what it says, what’s at stake, and what it may mean for the future of public sector employment.

Prior Legal Rulings: *Dynamex* – itself a landmark ruling – had modified decades of legal precedent. Prior to *Dynamex*, state courts had used the *Borello* test to determine whether a worker was an employee or an independent contractor. *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341. Under *Borello*, courts applied a “multi-factor” test, also known as the “economic realities” test, to determine if a worker

was misclassified. Courts relied most heavily on the employer’s control or right to control the worker, both as to the work done and the manner and means in which it is performed.

Dynamex changed all that, at least for wages and benefits claims arising under the Wage Orders issued by the Industrial Welfare Commission. *Dynamex* presumed that most workers are employees, not contractors. It set forth a new employee-friendly test (the “ABC” test) that requires an employer who claims someone is an independent contractor to prove that the worker (A) is free from control and direction of the work, both under the contract and in fact, (B) performs work that is outside the usual course of the employer’s business, AND (C) is customarily engaged in an independently established trade, occupation, or business. The Court said the new test will provide greater clarity and consistency and less opportunity for manipulation.

AB 5: Ms. Gonzalez introduced AB 5 “to codify the decision in the *Dynamex* case and clarify its application.” AB 5 states:

The bill would provide that for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity’s business, and the person is customarily engaged in an independently established trade, occupation, or business.

The bill exempts specified occupations – such as licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry. It says courts shall apply the *Borello* test for any of the exempt occupations and for any situation where a court can’t apply the ABC test.

What’s at Stake: The public debate around AB 5 isn’t just about more precise language, better legal tests or modernizing prior court rulings. There is something very real at stake, including how society should define “work” in the 21st Century.

Advocates for AB 5 say that without it, employers will improperly classify employees as contractors to save money at the expense of workers. This includes payroll taxes, the minimum wage or overtime, meal periods and rest breaks, reimbursements for business

expenses incurred in performing the work, paid sick leave, paid family leave, medical insurance, retirement contributions, unemployment insurance, workers compensation insurance, and disability insurance. They also argue that employers misclassify workers as contractors to circumvent other legal protections for employees, like the National Labor Relations Act (the right to join a union in the private sector), California's Fair Employment and Housing Act (FEHA) (California's landmark anti-discrimination and retaliation law, discussed in last month's newsletter), and the California Family Rights Act (CFRA) (the right to take job-protected medical leave or family leave).

On the other hand, companies argue that the use of contractors is necessary for today's modern economy, especially when considering their own business model or structure. Uber and Lyft, for example, who rely on classifying drivers as independent contractors as a core part of their business model, have vowed to challenge the law. They want to fund a ballot initiative in 2020 to ask voters to approve an exception for ride-sharing drivers.

All this comes amid a backlash against tech companies, with critics arguing that the era of cheap rides in cities, propped up by massive venture capital-backed subsidies, has been built on an untenable business model and is too good to last. Some see AB 5 as the tipping point that could lead to the end of the once-celebrated Silicon Valley Gig Economy, or at least its latest incarnation. Many labor advocates say that it will merely end the exploitation of workers by the big technology companies, who have reaped enormous profits and staggering business valuations by skirting the rules – rules that everyone else must follow. The tech companies counter that if they go under, so too will the livelihoods of those who earn a living off, and rely on, their technology as part of their daily life.

Various state agencies have an interest, too. The Employment Development Department (EDD) wants to ensure they are collecting all employment-related taxes. The Division of Labor Standards Enforcement (DLSE) wants to ensure that the wage and hour laws, and workers' compensation insurance laws are applied fairly and are not circumvented. The Franchise Tax Board wants to ensure they are collecting the necessary income taxes, including quarterly estimated payments for contractors.

As AB 5 wound its way through the legislature and to the Governor's desk, the tension between the interests of technology companies on the one hand, and labor unions and employee rights advocates on the other, came to a head. Labor Day weekend, Governor Newsom penned an op-ed in the Sacramento Bee – amid demonstrations from both sides – vowing his support for AB 5. He suggested that misclassifying workers was contributing

to wealth inequality. He signed the bill a few weeks later. The media quickly declared a stunning loss for the tech industry and a remarkable victory for organized labor. The media views AB 5 as opening the door for other states, like New York, to do the same.

Impact in the Public Sector: Although the publicity mostly focused on the “Gig economy” – e.g. Uber drivers – it is a warning to public agencies across California about the continued risks of using contract labor. Agencies shouldn’t expect to reap cost-savings by using contractors to fill positions that permanent employees once performed. If a court later finds that someone who an agency classified as a contractor is really an employee, the agency may owe pension contributions, back-taxes, and wage penalties.

During the 2008-2009 recession, agencies began to regularly use contract labor to perform work typically done by permanent public employees. Sometimes the worker was a “consultant” who worked directly for the agency. Sometimes the agency hired a staffing firm that supplied the labor. In either case, the person doing the work was a contractor, either for the agency, or for the staffing firm.

This practice is longstanding. Fifteen years ago, the California Supreme Court issued a landmark ruling in *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491. Known as the *Cargill* case, the sole question of law was whether, under the Public Employees’ Retirement Law (PERL), MWD was required to enroll in CalPERS all workers who would be considered MWD’s employees under California common law (at the time, the *Borello* test), or whether MWD could exclude from enrollment workers such as Dwayne Cargill, who was paid through private labor suppliers. The Court said that PERL incorporates common law principles into its definition of a contracting agency employee and that PERL requires contracting public agencies to enroll in CalPERS all common law employees except those excluded under a specific statutory or contractual provision. The Court acknowledged an exclusion for temporary workers (generally employed for no more than 6 months) but found no exclusion for long-term, full-time workers hired through private labor suppliers. The *Cargill* case led to workers in many agencies being enrolled in the pension system, some even retroactively.

The stakes are high for California public agencies in the wake of AB 5. The “common law” definition of an employee is now the *Dynamex* ABC test codified in AB 5. This means that most contract labor are considered “employees,” either of the agency or of the staffing firm. In addition to the costs that private sector companies incur for misclassifying, public agencies must contend with the *Cargill* case and potentially retroactive enrollment into

the pension system. In short, the damages for misclassifying workers as contractors can be steep, and the likelihood that an agency will prevail under the new standard is, in most cases, very low.

Agencies may still use outside consultants, but these workers will likely be employees of the staffing firm. In the past, many firms treated these workers as contractors, not employees, in order to keep costs low and win bids for government work. These firms will now have to compensate their staff as employees and provide all the legal protections required under state and federal law.

This will cause their costs to rise, and they will likely pass along those costs to the agency in the form of higher fees. This added cost may cause an agency to reduce its use of outside firms and bring more government work back in-house. In the end, AB 5 may help reduce the practice of public agencies selling bargaining unit work to the lowest bidder. That is a big win for public employee organizations!

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

- 1.7% - CPI for All Urban Consumers (CPI-U) Nationally
- 2.6% - CPI-U for the West Region
- 3.0% - CPI-U for the Los Angeles Area
- 3.1% - CPI-U for the Riverside Area
- 1.7% - CPI-U for San Diego Area
- 2.7% - CPI-U for San Francisco Bay Area (from August)

These numbers are important! Although they're only a rough measure of inflation, elected officials and agency management do often look to these figures as a benchmark for determining an appropriate "Cost of Living" raise.

When is Travel Time Compensable?

The Portal-to-Portal Act of 1947 amended the federal Fair Labor Standards Act (FLSA), and one of those revisions specifically made normal everyday commuting to and from work non-compensable time. In other words, you are not “on the clock.” But there are certain instances when home-to-work travel is considered time worked under the FLSA. For example, if you have gone home after work and are called out to deal with an emergency in the field, all the time spent traveling to and from that location *in the field* is considered time worked. But if you report to your regular worksite first (for example, to pick up a work truck), the home-to-work travel is considered non-compensable commute time. You are only paid travel time for the drive from the regular worksite to the location in the field and then back to the regular worksite. Similarly, during the normal workday, time spent traveling to and from your job’s main location to another location is compensable.

The FLSA doesn’t specify a rate of pay but does require that all compensable time be paid, including compensable travel time. This must be at least the minimum wage and may even be your normal pay rate. Keep in mind that most public agencies have negotiated “Call Out” policies which can be more generous than what the FLSA requires. For example, a common provision is for the agency to pay a minimum of 2-3 hours of overtime pay if you are physically called out after work hours. Some, but not all, call-out policies will count or pay travel time.

On the other hand, when you are called at home about a work problem or must perform work on a computer from home, this is not considered a “call out” unless you have a policy specifically saying otherwise. If you are an hourly employee, the agency must compensate you for all the time worked, and typically this is at the overtime rate. There is usually no minimum pay for the disruption caused to your non-work time. Call-out policies are negotiable. If your place of work has no call-out policy, the Fair Labor Standards Act still applies. The law is complicated, so call your professional staff for help.

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: I’m a PEPRA employee and I just found out that my pension contribution went up by over 1% on this latest paycheck. When I asked HR, they

said that it’s required by law. I thought this was something they had to negotiate over. I didn’t know that this was something that fluctuated. Is that

true? I live paycheck to paycheck. I know it seems tiny, but this is a big deal to me. It seems that if the pension system controls this, then my Agency should increase my pay by an equal amount whenever they decide to increase my contribution rate. I also think they should have provided advance notice so that I could've planned better. What can I do about it?

Answer: If you are a PEPRA employee, your contribution is set by law at 50% of the "normal cost" rate. This rate is expressed as a percentage of pay and can fluctuate. For example, if the normal cost rate is 12%, your contribution is 6%.

The normal cost rate is the amount required to fund your retirement benefits, as determined by the pension fund. It does not include other pension payments that the agency must make (e.g., on any "unfunded liability"). The pension fund provides the agency with an Annual Valuation Report that sets forth the normal cost rate. The Report also sets forth the employer rate for Classic Members (the employee rate is set at a fixed percentage based on your retirement formula). Finally, the Report sets forth any unfunded liability and a schedule of payments that the Agency must make to bring that balance to zero.

This year, the normal cost rate did go up in many agencies. You should still be paying 50% of the normal cost rate, but you are contributing a higher percentage

of your pay. For example, if the normal cost rate went up to 14%, your new contribution is 7%. If your contribution went up by 1%, this means the normal cost rate should have gone up by 2%. Your employee organization can ask the Agency to provide the latest valuation report to verify the numbers.

There isn't much you can do about the formula (50% of normal cost) because that's mandated by law. You also can't do much about the normal cost rate, because that's set by the pension fund. But if your current MOU is expired or about to expire, you can negotiate with the Agency to provide a compensation increase to help offset the reduction in your take-home pay.

Question: Management told me that my step increase was issued in error and that I must repay some of the funds. They said I had to come in for a meeting to further discuss repayment. Can I have representation at this meeting? What can you do to help?

Answer: Overpayments do happen. The best thing you can do is contact your union or professional staff right away. They can help you determine whether there was an overpayment, and if so, how to pay it back. Most agencies will allow you to bring a union representative to this meeting because, technically, the agency must get consent from your

Association to approach you individually about repayment terms.

Here are some basic things to consider. First, the agency may have procedures in your MOU (or rules and regulations) that address overpayments. It's best to start there. Next, know that the agency can't just deduct the overpayment from your paycheck without your consent. (California Labor Code §221). If they do, you can file a wage claim with the California Labor Commissioner's office. Third, you have the right to ask for proof that this really *was* a mistake. If you are entitled to the money, you shouldn't have to repay anything. If there's a legitimate dispute about this, you have more leverage in negotiating the amount to repay. And, lastly, you can always try to negotiate the repayment amount and any terms of repayment. Ultimately, if it was an error, you will have to repay the whole amount. But this can be done over time to mitigate any impact on you.

Question: My supervisor wrote me up for not reporting my sick leave absence properly. I had called out sick one morning and called my supervisor's desk phone and left a message saying I would be out sick. The Agency did deduct my sick time for that day, and I was paid correctly for the absence, but now I have a write-up in my file. Are they allowed to do this? I don't think it's fair that I must chase down my supervisor on his personal cell phone if I am going to be

out sick. This seems like a new thing. I don't think others are required to do this. Please advise.

Answer: A write up is considered minor discipline. You can dispute this through a written rebuttal that explains your side of the story. Some MOUs provide for an appeal, but usually a rebuttal is enough to ensure your side of the story is documented. If you believe you are being treated differently than other employees in your department, please call your professional staff for assistance. They can help you determine if you have a grievance for disparate treatment.

Keep in mind that each department can have different procedures that pertain only to that department. It's important to know what the call-in procedure is for your department. Absent a written procedure, a supervisor does have the right to direct you to follow a specific protocol (call cellphone, email, text, etc.) if this is consistent with a current standing practice. If so, the supervisor can write you up if you don't follow it. However, if they never told you what the rule for callouts *was*, make sure to put that in your rebuttal. If management is putting in place a new protocol, or changing the existing practice, your Association can demand to meet and confer over the procedure.

Question: Our lead worker recently retired. HR opened the lead position for

recruitment. A few of us are qualified for it because we work immediately below the lead. They've opened this to both internal and external recruitment. But the day that they've selected for interviews happens to fall during a vacation that I scheduled months ago. Do I have a right to ask them to reschedule the interview date, or to wait to interview me until I get back? It seems like I'm being unfairly penalized for a promotional opportunity and I don't think I should have to choose between my vacation and the interview. But I don't want to object and run the risk of being identified as a problematic employee. What should I do?

Answer: You can't force them to, but you can ask! It's often not a problem to request that your interview date be rescheduled because most interviews are done in-house, so the employer has flexibility. However, it is harder to reschedule it if a panel or outside interviewer(s) is involved. Since you're aware of the conflict, ask as soon as possible if they can move your interview date. You do run the risk of the employer saying no because it would be unfair to the other employees interviewing, they're juggling schedules for the outside interviewer(s), or because they need the position filled immediately and don't want to delay. It's unfair but not illegal for the interviews to move forward without you. Know that most good employers will try to work with you.

Question: Management has changed a job description for the Collections workers to include a Class A driver license. They had only required a Class B license, previously. They met and conferred with the association and we agreed to it. The one employee who was impacted agreed to get his Class A. Now that the new job description has come out, he is questioning the fact that he only has 18 months to get the license. Is it legal for them to put a time limit for him to get his license, because he was hired under a different standard, even though he agreed to the change?

Answer: It's best practice for the employee organization to discuss any changes with the impacted employees. It sounds like that happened here. Since the Association agreed to the change, the new Class A requirement stands, and the new job description is valid. But, usually as part of the meet and confer process, the parties negotiate over and agree to reasonable timelines to obtain new licensure. Is the 18-month timeline something that was negotiated? If it was, then the employee must work towards meeting that timeline. If not, contact professional staff, who can raise the timeline issue with the Agency and request an extension, if needed. In most cases, 18-months is a reasonable time period to get the license.

Asbestos in the Workplace

Asbestos was widely used in many industries for many years. Most people have been exposed to some degree during their lifetime. But most people don't become ill from this. People who do have asbestos related illnesses have usually been exposed on a regular basis, often on-the-job. Until the late 1960s, asbestos was used in most public buildings. Public employees may have been exposed when those buildings were later renovated or torn down.

Did

You

Know?

Asbestosis and mesothelioma are crippling, and ultimately terminal, lung diseases, caused by the asbestos fibers repeatedly irritating the lungs. If

you think you have been exposed, tell your doctor about your exposure history and any symptoms you experience. Symptoms may not become apparent for many years and may include: shortness of breath, wheezing or hoarseness; a persistent cough that gets worse over time; blood in the fluid coughed up from the lungs; pain or tightening in the chest; difficulty swallowing; swelling of the neck or face; loss of appetite; weight loss; fatigue or anemia.

The agency must notify you if they think you were exposed to significant doses of asbestos on the job. At your request, they must send you to a doctor for tests and assist you in filing a workers' compensation claim. If you are concerned about prior or current asbestos exposure at work, call your professional staff or the Occupational Safety & Health Administration directly. More information is available on the OSHA website at <https://www.osha.gov/SLTC/asbestos/> and <https://www.osha.gov/contactus/bystate>.