Independent contractors, *Dynamex* and AB-5

New employment law seeks to codify the ruling in *Dynamex,* other new laws address lactation and ethnic hairstyles

By Karine Bohbot and Elizabeth Riles

Writing this article is a challenging exercise considering our focus of late has been and will for the foreseeable future continue to be COVID-19 and the world-changing effect this pandemic has had on all of us. Our own professional lives have changed dramatically, with the focus being on keeping the doors closed (i.e., sheltering in place) while keeping our businesses alive.

As the world begins to "cope" with the future impact to the political, social, environmental and economic landscape, we employment law practitioners should ensure that we remain on top of the ever-changing laws impacting our practice area.

Indeed, absent the pandemic, 2020 was already set to be a year with significant changes in the employment law arena, thanks to the hard work of many organizations, like CAOC and CELA. So, let's review some of our favorites.

Independent contractors vs. employees under AB-5

As of January 1, 2020, the legislature codified the ABC test that was articulated by the California Supreme Court in the *Dynamex* decision (*Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903). This test clarified how to determine whether a person is an independent contractor versus an employee.

First, we must all remember that the burden is on the *employer* to prove that the individual meets the test under *Dynamex* and the ABC test. That an individual signed an independent contractor agreement does not negate this burden on the employer. In determining whether the individual is in fact an IC, the employer must establish *each* of the following:

A. **Control.** The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under contract and in fact.

B. **Usual course of business.** The person performs work that is outside the usual course of the hiring entity's business.

C. **Established trade or business.** The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

What makes AB-5 different from *Dynamex* is the number of exemptions for particular industries. The legislature granted specific exemptions to a laundry list of industries, including: (1) licensed insurance agents; (2) doctors and veterinarians; (3) lawyers, architects, engineers, private investigators, and accountants; (4) registered securities broker-dealers or investment advisers; (5) direct-sales salespersons (provided that the salesperson's compensation is based on actual sales rather than wholesale purchases or referrals); (6) commercial fishermen working on an American vessel (but only until January 1, 2023); (7) workers performing work under contract for "professional services;" (8) realtors; (9) licensed repossession agencies (but only if the repossession agency is free from the control and direction of the hiring person or entity in connection with the performance of the work, both under the contract for the performance of the work and in fact); (10) subcontractors in the construction industry (subject to certain requirements);
(11) tutors (provided they teach their own curriculum and are not public school tutors); (12) construction truck drivers (until January 1, 2022, subject to certain requirements); (13) tow truck drivers affiliated with the American Automobile Association; and (14) newspaper distributors and deliverers (though only until January 1, 2021).

AB 5 also exempts those providing "professional services" defined as (1) marketing services (provided that the contracted work is original and creative in character); (2) human resources administrators (provided that the contracted work is predominately intellectual and varied in character); (3), travel agents; (4) graphic designers; (5) grant writers; (6) fine artists; (7) enrolled tax agents licensed by the U.S. Department of Treasury or who practice before the Internal Revenue Service; (8) payment processing agents (provided they are retained though an independent sales organization); (9) certain photographers (who do not license content submissions to a putative employer more than 35 times a year); (10) freelance writers, editors, newspaper cartoonists (provided that the individual contributes no more than 35 submissions a year to the hiring entity); and (11) licensed estheticians, electrologists, manicurists (until January 1, 2022), barbers, or licensed cosmetologists, subject to a number of additional requirements.

It is important to note that beyond being included as a qualifying industry, the professional services exemption requires that the contractor; (a) maintains a business location that is separate from the hiring entity (including the individual's residence); (b) maintains a business license if the work is performed more than six months after the effective date of the bill; (c) has the ability to set his or her own hours and set or negotiate his or her own rates; (d) customarily engages in the same type of work performed under contract with another entity; and (e) customarily and regularly exercises discretion or independent judgment in the performance of the services.

Additionally, to satisfy the "business service providers" exemption, a contracting

business bears the burden of establishing that *each* of its "business service providers" satisfy each of 12 factors:

1. **Control.** The business service provider must be "free from the control and direction" of the contracting business entity, both under the contract and in fact.
2. **Services must be to the business, not customers.** The business service provider must provide services directly to the contracting business rather than to customers of the contracting business.
3. **In writing.** The contract with the business service provider must be in writing.
4. **Properly licensed.** The business service provider must have required business licenses and business tax registrations.
5. **Separate location.** The business service provider must maintain a business location that is separate from the location of the contracting business.
6. **Independent, established business.** The business service provider must customarily engage in an independently established business of the same nature as that involved in the work performed.
7. **Other clients.** The business service provider must actually contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.
8. **Actively advertises.** The business service provider must advertise and hold itself out to the public as available to provide the same or similar services.
9. **Provides own equipment.** The business service provider must provide its own tools, vehicles, and equipment to perform the services.
10. **Negotiate rates.** The business service provider must be able to negotiate its own rates.
11. **Set own hours and location.** Consistent with the nature of the work, the business service provider must be able to set its own hours and location of work.
12. **Not applicable to construction.** The business service provider must not perform the type of work for which a license from the Contractor's State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

Though this is a long list of industries that are exempted from AB-5, it is clear from the requirements for establishing these exemptions that exempting someone from the employment relationship will be a high hurdle.

Finally, two thoughts going forward. First, it is expected that more exemptions will be added to this rule. There were a number of industries seeking to be added to the list of exemptions before this legislative session was halted by the pandemic. Hopefully, the exemptions will not consume the rule. Second, the distinction between employees and independent contractors will be incredibly important going forward as many workers will be fighting to get all of the benefits available to employees both new and old to help protect themselves and their families from the impact of the COVID-19 pandemic. Many of these benefits are only available to employees, but there are many workers who remain misclassified and should be able to take advantage of these benefits.

New employee lactation accommodation rights under SB 142

SB 142, which amended Sections 1030, 1031, and 1033 of and added Section 1034 to the Labor Code came into effect on January 1, 2020.

Under SB 142, employers are required to allow employees to use their break time to express milk. Particularly, employers must now provide a private lactation room other than a bathroom that is in close proximity to the employee's work area. The space has to have all of these features:

1. It must be shielded from view and free from intrusion while the employee is expressing milk.
2. It must have a surface to place a breast pump.
3. It must contain a place to sit.
4. It must be clean and safe.
5. It must have access to electricity.
6. The employee must have access to a sink with running water and a refrigerator in close proximity to the employee's workspace.

An employer can use a multi-purpose room for lactation, but lactation has to take precedence over other uses when it is being used for lactation purposes. The lactation room can be shared among multiple employers or tenants. A temporary space can be designated as a lactation room due to operational, financial or space limitations.

If an employer has fewer than 50 employees, they may be exempt, if it can show that a requirement would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. Even so, the employer must still use reasonable efforts to provide a lactation space that is not a toilet stall and that is in close proximity to the employee's work space.

Employers or contractors must provide lactation space within two business days of a written request from a subcontractor. Failure to provide reasonable break time or adequate space are violations of these provisions and can subject employers to civil penalties of $100 for each day that an employee is denied reasonable breaks or adequate space. Additionally, employers cannot discriminate, discharge, or retaliate against an employee for exercising their rights to these benefits.

Finally, employers are required to develop and implement policies that explain to employees their rights under these sections, including but not limited to: A statement about an employee's right to request lactation accommodation; the process by which the employee makes the request; the employer's obligation to respond to the request; a statement about an employee's right to file a complaint with the Labor Commissioner for any violation. These policies should be described in an employee handbook or set of policies that are made available and distributed to current employees, to new employees and when employees request parental leave.

Though many of us are working from home as we shelter in place, it is possible and even likely that there are a number of essential workers who are continuing to go to work every day. For these workers, having space to express milk that is private,

clean and safe, having access to running water and electricity, is even more important now than ever.

The Crown Act – it's all about hairstyle under SB 188

In July of 2019, California became the first state in the country to enact the aptly named CROWN (Creating a Respectful and Open World for Natural Hair) Act. This legislation recognizes the historical trend to associate black hair in its natural state as "unkempt" or "unprofessional." This conscious or unconscious bias creates a big disadvantage for Black people, forced into the no-win choice of either taking steps that are often damaging to their hair to make it conform to "white" standards or to wear it naturally and be deemed unprofessional, losing out on potential career opportunities. Thanks to this legislation Black people no longer have to make that choice.

This legislation also makes clear that religious dress and grooming practices are also protected, that such prohibitions are a form of religious discrimination. Again, this will stem both the conscious and unconscious bias against many who practice religions that have particular grooming practices or dress practices, many of whom have faced discrimination and loss of career opportunities as a result.

SB 188 amends Government Code Section 12926 of the Government Code to include the following clarifications and additions to the discrimination statute:

> (q) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. "Religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of an individual observing a religious creed. "Religious grooming practice" shall be construed broadly to include all forms of head, facial, and body hair that are part of an individual observing a religious creed.
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> (x) "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists.

Extension of FEHA statute of limitations under AB-9

Last, but certainly not least is AB-9, also known as the Stop Harassment and Reporting Extension (SHARE) Act. The SHARE Act extends the one-year deadline to file an administrative complaint with the Department of Fair Employment and Housing to *three years*. The one-year deadline was one of the shortest statutes of limitations, particularly to redress fundamental civil rights like discrimination and retaliation in the workplace.

Many victims of discrimination or harassment in the workplace take time to recover from their experiences, particularly when a person has experienced sexual assault or other physical forms of harassment based on race or gender or the like in the workplace. People who have experienced discrimination, harassment or retaliation often suffer from depression and anxiety that make it difficult to recover, to seek further employment and especially to concentrate on redressing their rights under the law. The extension of the statute of limitations gives people a reasonable amount of time to do just that.

AB 9 extends the statute of limitations for all forms of employment discrimination, harassment, and retaliation prohibited by FEHA. It became effective January 1, 2020 but does not revive old claims. Therefore, if the administrative one-year deadline passed before January 1, 2020, the claim is expired. If the administrative deadline was still "alive" as of January 1, 2020, the deadline is now three years.

So, as we can see, and should remember, 2020 has marked some great moves forward in California in the area of employment law and protections for employees. As employment practitioners, let's stay on top of the new challenges we are facing and continue to champion the rights of employees, including those misclassified! Be safe and stay sane!

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