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USING INDEPENDENT CONTRACTOR DRIVERS POST-AB 5

ARRON LAWYERS, APC

UL MARRON, ESQ.

Paul Marron is the Founder & Principal of Marron Lawyers. Mr. Marron has grown the Firm from a solo practice to a litigation and outside general counsel firm dedicated to excellence and winning for clients. Mr. Marron has tried 35 cases to jury verdict and 30+ to judges, administrative tribunals and arbitrators. For plaintiffs, he has secured multiple judgments after trial of over $1M. For defendants, he has secured complete defense verdicts in trials where plaintiffs sought as much as 8-figure judgments. Mr. Marron's career includes numerous wins in bet-the-company cases. A judge described Mr. Marron as "among the finest itigators I've had in court," while clients describe him as a "legal sharpshooter." Recently, Mr. Marron secured a finding of "independent contractor" status and a $1.1M+ judgment against the California Employment Development Department (EDD) in a 4.5 month trial in which EDD sought to re-classify 1500 independent contractors as employees and dismantle his client's business model.

Contact: pmarron@marronlaw.com
www.marronlaw.com
(562) 432-7422

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OVERVIEW:

- California Assembly Bill 5.
- The Protect App-Based Drivers Act.
- The impact of the retroactive decision *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 232 Cal.Rptr.3d 1, 416 P.3d 1 on independent contractors in California.
- The new National Labor Relations Board [NRLB] regulations and its impact on California.
- California Assembly Bill 51.

California Assembly Bill 5

California Assembly Bill 5 (AB 5)

Worker status: employees or independent contractors

The current Governor of California, Gavin Newsom, signed into law Assembly Bill 5, effective January 1, 2020—sweeping legislation that requires most "gig economy" workers to be treated as employees.

AB 5 codifies the California Supreme Court's 2018 ruling in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 (Dynamex). Dynamex creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission. The law requires a three-factor "ABC test" to decide a worker's status as an independent contractor.

Under ABC test, the hiring entity has the burden to prove that a worker is an independent contractor by establishing that (A) the worker is free from the control of the employer; (B) performs work that is not central to the employer; and (C) has an independent business of the same nature.

Under AB 5, an entity must classify workers as employees if it exerts control over how the workers perform their duties, or if their work is part of a company's regular business. In addition, under AB 5, such workers classified as employees must also be afforded workers' compensation in the event of an industrial injury, unemployment and disability insurance, paid sick days and family leave.

Impact of AB 5 in the industry that relies on independent contractors in CA

- Burden on employers to classify a worker's status.
- Difficult to legally classify workers as independent contractors.
- Requirement to assess and restructure operating business models.
- Workers may not prefer to work on a status-quo basis.
- Workers may be forced to make changes or seek other employment opportunities.
- Forced reduction of workforce.
- Increased lawsuits to change work status/reclassification.
- AB 5 curtails the freedom of Californians to earn income when, where, and how they want as independent contractors.
- Restricts accessing work on app-based rideshare and delivery network platforms forcing the drivers to rigid employment schedules against their preference.
- Eliminates hundreds of thousands of work opportunities, including part-time flexible employment, multiple jobs etc.

- Increases challenges and burdens on companies when contractors are required to incorporate and adopt another status such as an employee of their own corporation.
- Extends the reach of AB 5 to numerous additional CA employment laws beyond CA wage laws (e.g., workers' compensation, paid sick leave, unemployment and other protections under the California Labor Code).
- Impacts companies' ability to retain, attract, sustain, and preserve manpower.
- Threatens on-demand services, forced classification as employees, forcing shifts, limiting earnings, eliminating the opportunity to earn.
- Increases formation of new corporations and limited liability companies as AB 5 exempts businesses providing services to other businesses under certain conditions.

AB 5 Exemptions to Specified Occupations

AB 5 exempts specified occupations from the application of ABC test. These exemptio
include, but are not limited to:

- licensed insurance agents
- certain licensed health care professionals;
- registered securities broker-dealers or investment advisers;
- real estate licensees;
- commercial fishermen;
- workers providing licensed barber or cosmetology services
- licensed professionals (Lawyers, architects, engineers); others performing work unc a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry;

- Direct sales salespersons;
- Freelance writers, photographers;
- Tutors

The long list of exemptions suggests the legislature is aware that many industries benefit from utilizing independent contractors.

Note: The *Borello* test (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341) will still apply to companies that are exempt from AB5.

Current Status

AB 5 is currently under a Temporary Restraining Order with respect to motor carriers operating in California under an order issued by the Eastern District of California. A hearing was held on January 13, 2020 and the court took the matter under submission and continued the TRO pending its ruling on the preliminary injunction.

The TRO is based on the Court's preliminary determination that the Federal Aviation Administration Authorization Act (FAAAA) preempts this California law because it affects "rates, routes, and services" because the B prong of the ABC test mandates the use of employees v. the independent contractor owner/operators contemplated by federal regulations.

The purpose of the TRO is to maintain the status quo pending ruling on the preliminary injunction.

Implications of TRO

- TROs are temporary, but full injunction likely to issue.
- The TRO applies to motor carriers, but the FAAAA applies to brokers and freight forwarders as well.

PROTECT APP-BASED DRIVERS AND SERVICES ACT

otect App-Based Drivers & Services Act - Basics

ne Protect App-Based Drivers & Services Act is a state-wide ballot measure aimed for
vember 2020 California ballot to protect the rights of numerous Californians to choose
xible work on rideshare and delivery platforms.

ne ballot measure would enact labor and wage policies specific to app-based drivers an
mpanies, including a net earnings floor based on 120 percent of the state's or
unicipality's minimum wage, preserving the driver's opportunity to earn more with no
os.

npose strong consumer and public safety protections.

).30 per mile for expenses such as gas and vehicle wear and tear.

health care stipend and occupational accident insurance for on-the-job injuries.

Pros and Cons of the Protect App-Based Drivers Act

Pros

The ballot measure would:

- Protect worker flexibility and independence
- Require new wage and benefit guarantees. Healthcare benefits are consistent with employees' benefits under the Affordable Care Act. Drivers can earn a health care stipend after completing 15 work hours per week or more. Drivers receive multiple stipends if working with more than one company. After 25 work hours, a driver can earn a stipend equivalent to 82% of the cost for a Covered California Bronze Plan.
- Implement new customer and public safety protections.
- Protect access to affordable and convenient rideshare and delivery services.
- Tips will be on top of all wages, expense reimbursements and any company-specific inducements.

Cons

The ballot measure is:

- narrowly crafted to protect the right of Californians to work as independent contractor drivers with on-demand rideshare and delivery companies, and to provide those on-demand drivers new benefits and protections.

- focused on specific types of work (independent contractors on on-demand rideshare and delivery network platforms).

[**Notes**: The ballot measure would permit delivery drivers to work as independent contractors and maintain control over their own hours and when, where, how long they work, and the ability to work with multiple companies.

To avail the protection under this ballot measure, the delivery companies must conform to the elements in the ballot measure by permitting the delivery drivers flexibility of independent contracting coupled with new economic guarantees and protections, including control over their own hours and when, where, how long they work, and the ability to work for multiple companies.

Thus, companies that assign fixed routes to contractors must allow the delivery drivers to maintain control over their routes, contrary to assigning the fixed routes.]

The impact of the retroactive *Dynamex* decision

In *Gonzales v. San Gabriel Transit, Inc*., et al., (2019) 40 Cal.App.5th 1131, the court concluded that the "ABC test adopted in *Dynamex* is retroactively applicable to pending litigation" asserting wage order violations and Labor Code violations based on wage orders.

Thus, until a decision is rendered by the California Supreme Court on the retroactive application of *Dynamex*, the *Gonzales* decision should be the binding authority.

[**Notes**: Prior California law focused on the level of control exercised by the hiring entity and utilized a multifactor test to determine whether the worker had sufficient independence to qualify for independent contractor status. *S.G. Borello & Sons, Inc v. Department of Industrial Relations*, 48 Cal.3rd341 (1989).]

Vazquez v. Jan-Pro Franchising
2019 WL 1945001, 9th Circuit, May 2, 2019

Three-tiered franchising model common in janitorial industry.

Franchisor/Regional Master Franchisees/Unit Franchisees.

Originally determined *Dynamex* ABC Test applies retroactively.

Follows General Rule: Statutes are given prospective affect and judge made rules are given retroactive affect. Holding is clarification rather than departure from existing law.

The decision was subsequently vacated in July and the 9th Circuit has sought guidance from the California Supreme Court.

New National Labor Relations Board [NRLB] Regulations

The National Labor Relations regulations relate to the legal framework for private-sector employees dealing with bargaining units in their workplace.

Misclassifying workers, alone, is not an unfair labor practice: Employers do not violate the National Labor Relations Act (NLRA) by misclassifying employees as independent contractors. See, *Velox Express, Inc.*, 368 NLRB No. 61 (Aug. 29, 2019), finding that misclassifying employees as independent contractors does not, by itself, "inherently coerce" employees in violation of the NLRA, and therefore is not a standalone violation of the Act.

Employer's mandatory arbitration agreements with class and collective action waivers, do not violate NLRB: In *Epic Systems Corp. v. Lewis, 584 U.S. __, 138 S.Ct. 1612 (2018)*, the Court held that employment agreements waiving workers' rights to class and collective actions, and requiring individualized arbitration to resolve employment disputes, does not violate the NLRA.

Per the recent decision, *Cordua Restaurants*, 368 NLRB No. 43 (Aug. 14, 2019), an arbitration agreement that prohibits employees from opting into a collective action does not restrict any rights under the NLRA. Opting into a collective action is merely a procedural step for participating as a plaintiff in a collective action, not a substantive Section 7 right in itself.

The NLRB's proposed regulation establishes the standard for determining joint-employer status. Under the regulation, an employer should possess and exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine.

[**Notes:** Employers should review their arbitration policies and practices in light of *Cordúa*. Section 7 of the NLRA gives employees the right to self-organize, engage in union actives, and engage or refrain from protected concerted activities.]

The NRLB restores longstanding arbitral deferral standards

The NRLB restored its long-standing arbitral deferral standards in *United Parcel Service, Inc.*, 369 NLRB 1 (2019), by overruling the standard set forth in *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB (2014), with the former less stringent *Spielberg Mfg*. Co., 112 NLRB 1080 (1955), and *Olin Corp*., 268 NLRB 573 (1984) aka the *Spielberg/Olin* Standard.

Under the standard, the NRLB will defer to the arbitrator's decision where:

- the arbitral proceedings were fair and regular,
- all parties have agreed to be bound,
- the contractual issue was factually parallel to the unfair labor practice issue,

- the arbitrator considered the unfair labor practice issue, and
- the arbitrator's decision is not clearly repugnant to the Act.
- The key distinction is that the arbitrator must not expressly consider the unfair labor practice, if the contractual issue and unfair labor practice are factually parallel.
- Under the standard, the NRLB tends to safeguard the exercise of Section 7 rights, by ensuring that arbitral awards are not clearly repugnant to the Act and promoting the strong federal policy favouring arbitration as the parties' agreed-upon mechanism for resolving employment disputes.
- The Board would apply the *Spielberg/Olin* standard retroactively to all other pending cases, at whatever stage.

***United Parcel Service, Inc.*, 369 NLRB 1 (2019)**

- In *United Parcel Service, Inc.*, the NRLB dismissed the complaint on unfair labor practice by applying the *Spielberg/Olin* standard to the facts of the case.
- A package driver was discharged for allegedly violating the employer's delivery procedures. The driver filed two grievances under the parties' collective bargaining agreement, alleging discharge in violation of 8(a)(3) of the NLRA, which the grievance panel denied. Driver filed unfair labor practice charges on the same issues.
- The NLRB reversed the Administrative Law Judge's application of *Babcock* standard.

- Per the NLRB, deferral to collectively-bargained grievance-arbitration procedures is meant to balance the Board's exclusive Section 10(a) authority to prevent unfair labor practices with the NLRA's purpose to "reduce industrial strife by 'encouraging practices fundamental to the friendly adjustment of industrial disputes' and 'encouraging the practice and procedure of collective bargaining.'"
- The Board preferred: – when feasible – to let "parties resolve employment disputes through negotiated mechanisms of their own choosing without resort to the Board's processes."

[**Notes**: Under the *Babcock* standard, the NRLB would not defer to arbitral decisions unless "(1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award."]

NRLB Reverts to Pre-2014 Test for Determining if Individual Is an Independent Contractor

- The NRLB adopted its long-standing independent contractor standard in *SuperShuttle DFW, Inc.*
- NLRA does not cover independent contractors. [Under Section 2(3) of the NLRA, independent contractors are specifically excluded from the protections afforded to employees.]
- In evaluating independent contractor/employee status, the Board traditionally applied the common-law agency test, consisting of 10 factors:
- (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
- (b) Whether or not the one employed is engaged in a distinct occupation or business.
- (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

- The skill required in the occupation
- Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work.
- The length of time for which the person is employed.
- The method of payment, whether by the time or by the job.
- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating the relation of master and servant.
- Whether the principal is or is not in business.

NRLB returned to its prior independent contractor standard on January 25, 2019; the NRLB brought clarity in the role entrepreneurial opportunity plays while determining independent contractor status. Entrepreneurial opportunity is used to evaluate the overall significance of the 10 agency factors. Thus, generally, the factors that support a worker's entrepreneurial opportunity indicate independent contractor status and the factors that support employer control indicate employee status.

[Notes: *SuperShuttle DFW, Inc.*, overrules *FedEx Home Delivery*, 361 NLRB 610 (2014), decision that modified the applicable test for determining independent-contractor status by severely limiting the significance of a worker's entrepreneurial opportunity for economic gain.]

***SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (Jan. 25, 2019).**

- The NRLB held shuttle drivers at Dallas-Fort Worth Airport were properly categorized as independent contractors.
- The Amalgamated Transit Workers Union petitioned the NLRB to represent a unit of SuperShuttle drivers. SuperShuttle moved to dismiss the petition on the ground that the shuttle drivers were independent contractors, not covered employees.
- The Board found shuttle drivers have unfettered control over their daily work schedules, and could decide their passengers, routes, and workdays/hours on a given day.
- The Board concluded these facts provide shuttle drivers significant entrepreneurial opportunity to strongly support factors of independent contractor status. In deciding so, the Board mainly focused on the company's "control over the manner and means by which the drivers conduct business" and "the relationship between the company's compensation and the amounts of fares collected."

California Assembly Bill 51 (AB 51)

AB 51: California's New Anti-Arbitration Statute

- On October 10, 2019, Governor Gavin Newsom signed California Assembly Bill (AB) 51. The Bill prohibits employers from arbitrating employees' claims arising under the California Fair Employment and Housing Act (FEHA) and related employment statutes.

- The Act, codified in Government Code Section 12953 and California Labor Code Section 432.6, took effect January 1, 2020.

- Under AB 51, an employer cannot refuse hiring an applicant who refuses to arbitrate. Thus, arbitration may not be a mandate for employment. If it is, the employer may suffer claims of retaliation or discrimination under the Act.

- AB 51, however, does not preclude an employer from arbitrating post-dispute settlement or claim under negotiated severance agreement.

- Under AB 51, an employer cannot require an employee to opt out of an existing workplace arbitration program. Any such agreement or action is deemed a condition of employment. Thus, even arbitration agreements with opt-out provisions are unlawful.
- Agreements to arbitrate disputes entered into voluntarily are still permitted, as are arbitration provisions included within negotiated severance and settlement agreements.
- **[Notes:** In sum, AB 51 prohibits mandatory arbitration agreements for any discrimination claims covered under FEHA (not just sexual harassment) and for any claims under the Labor Code (including wage and hour and other protections)].

Application of AB 51

- Claims under FEHA [Section 12953 of the Government Code makes it "an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code."]
- Claims under the California Labor Code are codified in Section 432.6. [Section 432.6 will also make it unlawful for an employer to threaten, retaliate or discriminate against, or terminate any job applicant or employee because they refuse to consent to the waiver of any FEHA or Labor Code-based rights.]
- AB 51 applies to both applicants and employees
- AB 51 applies to employment agreements entered on or after January 1, 2020. In other words, the current agreements remain enforceable under existing law.

AB 51 IMACT AND EXCEPTIONS

Impact of AB 51

- Violation of Section 432.6 of the Labor Code by an employer is considered as an unlawful employment practice.
- Violation of the new sections under AB 51 may be punishable as a crime.
- This law will go into effect on January 1, 2020.

AB 51 exemptions

- Non-statutory employment claims
- Claims under other statutory provisions
- Financial Industry Regulatory Authority arbitration agreements [The Act does not apply to arbitration involving "a person registered with a self-regulatory organization such as the Financial Industry Regulatory Authority] as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c)."
- AB 51 is not intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (FAA). [The Act expressly states that it does not "invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)"]

[Notes: The question whether AB 51 can survive attacks based on FAA pre-emption still remains. The FAA applies to any transaction where the parties are involved in interstate commerce and favors the enforcement of private arbitration agreements.]

Penalties for violation of AB 51

- An employer that violates this new law could be subject to criminal sanctions, including "imprisonment in a county jail, not exceeding six months, or . . . a fine not exceeding one thousand dollars ($1,000), or both" under Section 23 of the Labor Code.
- In addition to injunctive relief and any other available remedies, a court may also award a prevailing party enforcing their rights under 432.6 reasonable attorney's fees.

ENFORCEMENT OF AB 5 AND AB 51 ARE TEMPORARILY RESTRAINED

Enforcement of AB 51 Temporarily Restrained

- The Eastern District of California temporarily restrained California authorities from enforcing Assembly Bill (AB) 51.
- The U.S. and California Chambers of Commerce and other pro-commerce and trade organizations filed suit to enjoin enforcement of AB 51 on December 9, 2019.
- In *Chamber of Commerce of U.S. v. Xavier Becerra*, et al., Case No. 19-cv-02456-KJM-DB, Docket No. 24, E.D. Cal., Dec. 30, 2019, the court found that serious questions exist regarding whether AB 51 is preempted by the FAA and that plaintiffs' have no other adequate legal remedy.
- The hearing date is set on January 10, 2020. If the court grants preliminary injunction, the enforcement of AB 51 would be put on hold pending the litigation.

Enforcement of AB 5 Against Motor Carriers Temporarily Restrained

- The Southern District of California temporarily restrained California from enforcing AB 5 against any motor carrier operating in California.
- The California Trucking Association (CTA) filed suit to stop enforcement of AB 5, alleging it was preempted by the Federal Aviation and Administration Authorization Act of 1994 (FAAAA), in November.
- In *California Trucking Association v. Xavier Becerra, et al.*, Case No. 18-cv-02458-BEN-BLM, Docket No. 77, S.D. Cal., Dec. 31, 2019, the court found that the plaintiffs met their burden for purposes of emergency relief.
- If the court grant preliminary injunction the enforcement of AB 5 would-be put-on hold as to carriers subject to the FAA pending the litigation.

Questions ?

ww.marronlawyers.com
Attorney Misclassification Team.
tionwide experience and wins on misclassification
ses handled in CA, AZ, CO, TX, OR, MO, MI, FL, AL, TN, MN,
, and HI

Primary Contacts:

Paul Marron, pmarron@marronlawyers

Paul Arenas, parenas@marronlaw.com

Steve Rice, srice@marronlaw.com

(562) 432-7422