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Supporting Employers Since 1937

Labor Law Update


*Presented by
California Employers Association*



2020 IN FOCUS

CEA Introduction

- Providing support for employers since 1937
- Onsite, over the phone, email, website
- Compliance, trainings, recruiting
- We are subject matter experts, certified trainers, labor relations specialists, and human resource professionals



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Stuff Our Lawyers Make Us Say



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4

California's Vision



- New Governor, New Focus
- 2,625 bills introduced
- 1,042 to Gov. desk
- Signed 870
- Vetoed 172 (16.5%)
- Newsom passed bills that Brown vetoed



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Put It in Perspective



Today we will cover:

- Most impactful 2020 employment laws
 - View our fact sheet on our website under Additional Resources
- 2019 cases
- Upcoming trends




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AB 5: "Gig Economy Bill"

- Adopts *Dynamex* case and ABC Test as law
- General rule: "A person providing labor or services for [pay] **shall be considered an employee** rather than an independent contractor unless the hiring entity demonstrates that **all** of the following conditions are satisfied"
- Applies to all Labor Code, Wage Order and UI claims



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ABC Test

ABC Test presumes all workers are employees *unless the worker:*

- is free from control and direction of the hirer,
- performs work that is **outside the usual course** of the hiring entity's business, AND
- is customarily engaged in a trade, occupation, or business of the same nature as the work performed.

Penalties: \$5,000 to \$15,000 for each violation
\$10,000 to \$25,000 per violation for a pattern and practice



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So Many Exceptions

Attorneys	Engineers
Architects	Private investigators
Accountants	Security brokers and advisors
Commercial fisherman	Certain marketing personnel
Certain human resources personnel	Travel agents
Graphic designers	Licensed real estate agents
Artists	Certain photographers
Certain freelance writers and grant writers	Certain cosmetologists, barbers, etc.
Certain direct sales salespersons	Physicians, surgeons, dentists, podiatrists, psychologists, and veterinarians

Business to Business: Employers who contract with other **businesses** for services or goods.

Construction: Contractors and individuals working for a licensed business. Has a separate location and meets other criteria (including written contract).

Clear as Mud

"In all of these carve-outs you are picking winners and losers, so, can you walk me through the process of why you are doing it that way and how you process, who wins, and who loses. Who gets favoritism and who loses out?"
-Senator Mike Morell

- Who got an exception?
- Exceptions are difficult
- Exception doesn't guarantee independent contractor status

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Vision for IC's Future?

- Will see challenges: fairness, confusing
- Gig economy seeks to put issue on ballot
- Uber, Lyft, truckers, journalists, photographers have filed lawsuits challenging AB 5 (so far)
- Future amendments

"We probably won't fix it for everybody this time...we will run out of time and I never worked harder on a bill, spent more hours on a bill. And, yet, we are not gonna get to every situation we dreamed of. And, I anticipate we'll be working on this for a few years to get to those situations."
Assemblymember Lorena Grotzaler, Author of AB 5, closing statement at July 10, 2019, hearing

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Employer Takeaways — ICs


- ✓ Determine if your ICs can exist under new law
- ✓ If not, convert contractors over to employees to avoid misclassification claims
- Misclassification problems: owed meal/rest, overtime, wage statement violations, expenses, penalties...

Consult legal counsel!

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Big News! Harassment Prevention Training Update



- 2019: SB1343 — All employers with **5 or more employees** must provide harassment prevention training
 - 1 hour for non-managerial employees
 - 2 hours for managers
- Training completed by 1/1/20

Updates (August 2019)...

- SB 778 extends training deadline to **1/1/2021** for employers with 5+ employees
- SB 530 extends deadline to 1/1/2021 for seasonal and temporary worker compliance

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Training Deadlines

Trained In:	Train Next:	Reason:
2019	2021	Employers that provided harassment prevention training anytime in 2019 aren't required to provide refresher training for two years
2018	2020	Employers that provided harassment prevention training in 2018 in order to maintain their two-year cycle and still comply with the SB 530 January 1, 2021, deadline
50 or more employees:	Ongoing	Ongoing obligation to train new supervisory employees within six months of hire or promotion and every two years thereafter

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Employer Takeaways

Must use a qualified trainer

- ✓ Employment law attorneys
- ✓ HR professionals with at least two years of practical experience in harassment complaint handling, investigations
- ✓ Law school, college, or university instructors

Must be interactive

- ✓ Live, or interactive webinar (no recordings)
- ✓ Interactive online training
- ✓ Opportunity to ask questions
- ✓ Covers all content required by law
- ✓ **CEA provides online, live webinar, and onsite training!**

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**“CROWN” Act
Senate Bill 188**



“Creating a Respectful and Open Workplace for Natural Hair”


- Expands FEHA definition of race
- Protects hairstyles “historically associated with race,” including hair texture and protective hairstyles
- Employers can’t ban natural hairstyles: “braids, locks, twists”
- Impacts any gender

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Hairstyle Discrimination Cases

- **Study by Dove** — black women are 80% more likely to change their natural hair to conform to social norms or expectations at work.
 - “People with kinky & curly hair — sometimes subject to unequal treatment and/or viewed as inferior.”
- **12/23/19 DFEH settlement under CROWN ACT:**
 - When employee wore hair naturally curly or in braids, the CEO told her she looked unprofessional and unacceptable. “What did you do to your hair?” When she straightened it, “Oh, that look’s better.”

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Employer Takeaways:

- ✓ Review your dress code policies
- ✓ Make sure policies are gender neutral
- ✓ Ensure your managers are aware of the law
- ✓ Okay to require hairnets or other policies for safety reasons — consult with HR or counsel
- ✓ Best dress code policy?
 - **Non-discriminatory and easy for employees to understand**

“The CROWN Act is about inclusion, pride, and choice. This law protects the right of Black Californians to choose to wear their hair in its natural form, without pressure to conform to Eurocentric norms.” Sen. Holly J. Mitchell

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Stop Harassment and Reporting Extension (SHARE) Act — AB 9

More Time to Sue!

Prior law

- **One year** to file with DFEH for harassment, discrimination, retaliation

New law

- **Three years** to file with DFEH



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Delayed Deadline Example

2020: Employee is harassed in 2020

2023: Employee files complaint with DFEH

2024: DFEH reviews case and could issue right-to-sue in 2024

2025: Employee has one year from right-to-sue to file lawsuit

Five years after the alleged violation the lawsuit is brought. A couple more years until the trial.

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Employer Takeaways

- ✓ Promptly investigate all complaints
- ✓ Real-time documentation of complaints and investigations
- ✓ Retain documentation
- ✓ Ensure multiple options for employees to report harassment
- ✓ Train supervisors and managers to follow and implement policies consistently
- ✓ Consider an employee action hotline/ confidential reporting

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Lactation Accommodation Update (SB 142)

Pre-2020


- Reasonable break time and a location, other than a bathroom, for employees to express breast milk in private
- Make reasonable efforts to comply
- Undue hardship exception no matter what size employer
- \$100 for each violation



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New Location Requirements



- Shielded from view
- Free from intrusion
- Safe, clean, free of hazardous material
- Surface to place breast pump and personal items
- Place to sit
- Access to electricity
- Access to a sink with running water and a refrigerator in close proximity to employee's work space (or cooling device, e.g., provided cooler)
- Multi-purpose room okay; lactation takes precedence

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What Else is New?


- Only employers with less than 50 employees may apply to LC for undue hardship exemption
- Multi-tenant buildings may use shared space
- Denial of reasonable break time or adequate space is the same as failure to provide a meal/rest period: premium pay, plus the \$100, plus PAGA
- **Mandatory written policy and process to request accommodation**

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Employer Takeaways

- ✓ Update your employee handbook to include a lactation accommodation policy (see CEA website)
- ✓ Provide policy to new hires and whenever parental leave is requested
- ✓ Create form(s) for requesting lactation accommodation and written employer response (see CEA website)
- ✓ Review your facility and talk to legal counsel if you think you can't comply





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Organ Donation (AB 1223)


- **Pre-2020:** 30 **paid** business days for organ donation leave in a 12-month period
- AB 1223 adds an additional 30 **unpaid** business days in a 12-month period
- Employers with 15+ employees






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Flexible Spending Accounts (AB 1554)

- Employer required to notify an employee who participates in a FSA of any deadline to withdraw funds before the end of the plan year
- Must provide notice two ways — electronic delivery can be one of the two forms
- No model form — talk to your plan administrator



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California Consumer Privacy Act (CCPA)

Only applies if:

- Annual gross revenue is over \$25 million; OR
- Annually receives, sells, or shares personal information about 50,000+ individuals or devices; OR
- Derives 50%+ of annual revenue from selling personal information of consumers

- Gives individuals the right to know what personal information a business has collected on them — **includes employees.**
- Requires reasonable security measures to safeguard personal information of consumers, including employees and applicants, beginning **January 1, 2021.**

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CCPA Notice

- **January 1, 2020:** Disclose to employees and applicants what categories of personal information the company collects on them and the purposes for which the information will be used
- Example: Your {name, address, SSN, email, payroll info} are collected to {comply with state and federal record requirements, to administer payroll, to manage performance}

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Reporting "Serious Injury or Illness" (AB 1805)



- **Pre-2020:** employers had to report a work-related "serious injury or illness" that resulted in 24-hour patient hospitalization
- **New** law eliminates the 24-hour minimum hospitalization requirement
- **Now any and all** injuries or illnesses that result in hospitalizations must be reported
- Also expands definition of "serious exposure" for reporting requirements

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Impacts of 2020 Minimum Wage Increase

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2020 State Minimum Wage

January 1st	Small Employer 25 or fewer	Large Employer 26 or more
→ 2020	\$12.00	\$13.00
2021	\$13.00	\$14.00
2022	\$14.00	\$15.00
2023	\$15.00	\$15.00

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Salaried Exemption Increases

Small Employers: 25 or fewer employees
Large Employers: 26 or more employees

Exempt Salary


January 1, 2020	\$49,920/\$54,080
January 1, 2021	\$54,080/\$58,240
January 1, 2022	\$58,240/\$62,400
January 1, 2023	\$62,400/\$62,400

*Duty and Salary Test (2 x State min wage x 2080 hours)
both must be met!*

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Employer Takeaways



- ✓ Check your county and city minimum wage laws — 30+!!
- ✓ Make \$ increases where and when necessary
- ✓ Ensure your exempt employees meet both the salary and duty tests
- ✓ **Prepare for 2020 and beyond:** Will your salaried employees still meet the test?
- ✓ See Minimum Wage and Minimum Salary Form on CEA's website

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CalSavers (SB 1234)

- 2016 law going into effect in 2020
- Mandatory automatic retirement savings program for private-sector workers
- Applies to employers with more than 5 employees who don't offer retirement plans
- Automatically enrolls employees based on employer-provided payroll list
- Employees can opt-out or, stay enrolled and customize their investments
- CalSavers provides info to employees
- Employer not involved in investment management or distribution
- Failure to register may result in penalties

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CalSavers: Employer's Role

- ✓ Register: Calsavers.com
- ✓ Create payroll list — add new employees within 30 days of hire
- ✓ Calculate employee deduction. (Shown on employer's CalSavers account page)
- ✓ Submit employee contributions
- ✓ Can add payroll provider as a delegate


Optimal for VOLUNTARY Enrollment	
New 2021	
Number of employees	Must register by
Over 100	June 30, 2020
Over 50	June 30, 2021
5 or more	June 30, 2022

✓ **Fact sheet – CEA website**

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2020 Poster Updates


- FEHA posting to include information on the new time limit for bringing claims (3 years) and CROWN Act
- Transgender Rights Posting (for new 3 year time limit)
- Family Care and Medical Leave and Pregnancy Disability Leave postings
- Includes mandatory updates from 2019
 - Cal/OSHA's posting has a mandatory update (8/19)
 - California's state minimum wage increase



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37

Mileage Reimbursement




IRS standard mileage rates for the use of a car (also vans, pickups, or panel trucks) will be:

- 57.5 cents per mile driven for business use, **down ½ cent** from 2019

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38




Important Cases from 2019


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39

Reimbursement
Townley v. BJs Restaurant

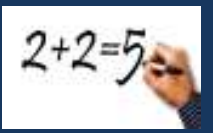


- Required to wear black, slip-resistant closed-toe shoe for safety and style
- BJs argued: don't have to pay for non-specialty shoe that is slip-resistant but otherwise like a regular shoe
- **Court: Cost of shoe is not a "necessary expenditure"**
- Not part of a uniform unique to BJs
- Shoes of this type are "usual and generally usable in the occupation" (e.g., white shirts, black belts)




40

Who Pays for Payroll Errors?



- Employee can't sue his employer's payroll service provider for wage/hour violations, only the employer.
- **Tip:** Don't assume "the payroll provider must have gotten it right" when it comes to employee paychecks.
- Look at your payroll provider agreements and ask counsel about indemnity questions.


Gooneward v. ADP, Cal Supreme Court




41

Email and Union Organizing

- National Labor Relations Board (NLRB) decided employers may bar employees from using company email for union organizing purposes.
- Change from prior decision that gave employees access to work computers for non-business uses if allowed for other non-business purposes.
- If restricting personal use of computer systems, employers should carefully review their policies.



Caesars Entertainment (2019) overruling Purple Communications (2014)




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Confidentiality During Investigations

- NLRB decided employers **may require** employees to maintain confidentiality during a workplace investigation into misconduct.
- Overrules a 2015 decision in which the Board found that strict confidentiality rules could inhibit employees' rights to discuss working conditions.
- Gives employers ability to limit discussions among employees during an investigation to protect the integrity of the process.
- Ensure investigations are conducted by an objective, trained investigator versed in witness and complainant communication

Apogee Retail LLC d/b/a Unique Thrift Store (2019), overruling Banner Estrella Medical Center (2015)



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What Are Some Changes/Trends That May Occur in the Future?

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Expansion of Leave Laws

- Confirmed
 - Expansion of PFL wage replacement benefits (7/1/2020)
- Potential Changes
 - Gov. Newsom may propose up to 6 months paid parental leave by 2021/2022
 - More private companies offering paid parental leave
 - More Paid Sick Leave may be in CA's future



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Wage & Hour Laws That May Be Expanded



- Expansion of when employee is considered working for pay (pre- and post-shift, call-in, reporting time (*Tilly's*), travel time)
- Reimbursement claims
- Predictive scheduling
- Rounding rules – paying for exact time worked in the future

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Employee Relation Trends



- Pay disparity claims
- Unconscious bias training
- Bystander training
- Proposed regulations on religious and age protections and hiring inquiries
- Politics at work
- Recruiting and retention — continues to be a tight labor market
- Crackdown on arbitration agreements continues — consult counsel!

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Discrimination & Harassment in the News...




- Winery Gets Crushed for \$11M in Harassment Case
- Ex-Baldwin Park Police Chief Wins \$7M in Gender Discrimination Lawsuit
- McDonald's CEO Fired for Consensual Relationship
- Walmart Inks \$14M Deal to End Pregnancy Bias Class Action
- Ex-LA Times Columnist Wins \$15.4M in Age, Disability Suit
- JPMorgan to Pay \$5M to End Dad's Leave-Bias Suit
- The #1 Way Employers Get in Trouble? Retaliation (*CEA blog*)

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Employer Takeaways

- ✓ Maintain and distribute effective policies
- ✓ Create effective complaint procedures that encourage employees to feel comfortable reporting misconduct
- ✓ Take all reports of harassment and discrimination seriously
- ✓ Investigate allegations quickly and follow up
- ✓ Train all employees
- ✓ Take a pulse — know what's happening in your work environment!


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- 1/29: Labor Law Update Encore
- 2/6: Harassment Prevention Training
- 2/12: What's Different in California?
- 2/19: Creating a Culture of Professionalism
- 3/5: Harassment Prevention Training
- 3/11: Employee Handbooks
- 3/25: Crucial Conversations
- 4/2: Harassment Prevention Training
- 4/15: Alternative Workweeks
- 4/29: Pets, Politics & Pot
- 5/7: Harassment Prevention Training
- 5/20: How to Handle Workplace Investigations
- 5/27: Drugs & Alcohol in the Workplace
- 6/4: Harassment Prevention Training
- 6/10: Leave Laws
- 6/24: Communication in the Digital Age




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For more information email
CEAinfo@employers.org
or call 800.399.5331