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California's New Arbitration and Independent Contractor Laws Stayed, Conditionally and Temporarily For Now

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As expected, two new California laws relating to arbitration and independent contractor status that were set to take effect on January 1, 2020 were promptly challenged in court as unconstitutional. District courts have already issued temporary restraining orders blocking the laws from taking full-effect immediately. We expect these forays into court will merely be the first step in protracted legal proceedings that could very well end up at the Supreme Court. This post summarizes each law, the legal challenges made, and the current status of the law.

AB 51 – The Anti-Arbitration Law

AB 51, as summarized in a previous blog post, would make it unlawful for employers to impose arbitration agreements on employees as a condition of employment, even if employees are permitted to opt out.

AB 51 was challenged by various national and state trade associations on the basis that the law is unconstitutional and preempted by the Federal Arbitration Act (FAA), the federal law that governs the use of arbitration agreements in employment and generally favors and promotes arbitration. The court granted a temporary restraining order (TRO) on December 30, 2019, preventing the law from becoming effective on January 1, 2020. The next hearing is on January 10, 2020, during which the court will hear oral arguments as to whether it should grant a preliminary injunction to continue the stay of the law pending the outcome of the lawsuit.

This challenge to AB 51 is not a surprise – it was expected as soon as the law passed. Similar attempts to restrict arbitration in California have been thwarted by the FAA, which is exactly what we see happening again now. When the court granted the TRO on December 30, it conveyed its concern that the law is preempted by the FAA and that allowing the law to take effect, even briefly, would cause disruption to the formation of employer-employee contracts.

For now, it remains lawful for employers to require employees to sign arbitration agreements. This could change on January 10, 2020. Employers need to stay current on the status of this lawsuit until its final determination.

AB 5 – Determining Whether a Worker is an Employee or Independent

Contractor

AB 5 makes it harder for businesses to classify workers as independent contractors by codifying and expanding the so-called “ABC Test” established by *Dynamex Operations West v. Superior Court of Law Angeles*, a case decided by the California Supreme Court in April 2018. (See our prior posts here and here).

Under the AB 5 “ABC” test, businesses can classify their workers as contractors only if they can satisfy three conditions:

- the worker is free from the company’s control;
- the worker performs work that is outside the company’s main business, and
- the worker normally performs work in an independent business or trade that is in the same vein as the work she or he is performing for the company.

If these conditions cannot be proven, the worker would be classified as an employee, not an independent contractor, and thus entitled to the benefits of California wage and hour laws, such as minimum wage, paid sick days, overtime, workers’ compensation, and unemployment insurance.

The motivation behind AB 5 was purportedly to provide protections to workers who were being taken advantage of by employers wanting to eliminate the cost of classifying a worker as an employee. Workers and employers are far from charmed, and instead downright frustrated with the negative and restrictive impact the law will have on both alike.

These frustrations spurred challenges to the law by *three* different categories of occupations: freelance journalists, truck drivers, and most recently, gig-economy companies Uber and Postmates.

- The freelance journalists and photographers are challenging AB-5 on constitutional grounds (First and Fourteenth Amendment), as the law only allows 35 submissions per year for the same publication without becoming an employee.
- The trucking industry is challenging the law on the basis that it runs afoul of federal law which prohibits states from enforcing any law related to the price, route, or service of a motor carrier.
- Uber and Postmates characterize AB-5 as “irrational and unconstitutional” under the Constitution’s equal protection clause as well as “vague and incoherent.” They allege that AB 5 will force some employers to “fundamentally restructure their business models” and could “force them to stop doing business in California.” As proof that AB 5 violates the equal protection clause, their complaint argues that “the vast majority of the statute is a list of exemptions that carve out of the statutory scope dozens of occupations, including direct salespeople, travel agents, grant writers, construction truck drivers, commercial fisherman, and many more. There is no rhyme or reason to these nonsensical exemptions, and some are so ill-defined or entirely undefined that it is impossible to discern what they include or exclude.”
- Separately, a group of drivers for Lyft, Uber, and DoorDash submitted a California ballot initiative for the November 2020 election that seeks to enable drivers and couriers to continue

to be independent contractors while guaranteeing benefits like a minimum wage, expenses, healthcare, and insurances.

On December 31, 2019, a district court in San Diego issued a TRO blocking AB 5 as it applies to the California trucking industry. The TRO will remain in effect until January 13, when a hearing will be held on the plaintiff's motion for a preliminary injunction. This is good news for truck drivers, but means nothing for all other industries.

On January 3, 2020, a district court in Los Angeles denied a TRO blocking AB 5 as it applies to the freelance journalists on the basis that the request for the TRO was made on an emergency basis just one day before the law was set to take effect; the request should have been made earlier. Had the request for a TRO been made earlier, the court would have had more time to "carefully review" the request for a TRO and hear oral argument. The hearing on the journalists' request for a temporary injunction to stay the law is set for March 9, 2020.

The Uber/Postmates plaintiffs hope that the trucking TRO is the first domino to fall in a series of similar TROs, but this remains to be seen. The denial of the journalists' request for a TRO is based upon procedural grounds more than legal grounds. The outcome of the hearing on the journalists' request for a preliminary injunction on March 9 will be telling.

Employers using independent contractors need to quickly take steps to comply with AB 5, as it is now effective until deemed otherwise. The steps an employer needs to take should be developed with counsel, and prioritized so that litigation does not ensue. Employers need to stay current on the status of the legal challenges to the law until final determination.

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