

RECENT DEVELOPMENTS IN EMPLOYMENT AND LABOR LAW

Christine Sargent, Matthew A. Bowles, Bruce J. Sarchet, Jake Proudfoot, and Zack Duffly

I.	The Expanding Scope of Arbitration Agreement Enforceability.....	252
II.	Federal Enforcement of Medical Marijuana Accommodation Laws: Another U.S. District Court Upholds State Accommodation Protections for Medical Marijuana Users	256
III.	It's Not as Easy as A-B-C: AB 5 and Its Potential Impact on Employment Litigation in California	259
	A. Dynamex v. Superior Court.....	260
	B. Assembly Bill 5	260
	C. The ABC Test.....	261
	D. Exceptions	261
	E. Retroactive Versus Prospective Liability.....	262
	F. Injunctive Relief.....	263
	G. Predictions: Impact on Litigation	263
IV.	The Overtime Rule That Went into Overtime.....	264
V.	<i>Yovino v. Rizo</i> : The Supreme Court Punts on Pay History as a “Factor Other Than Sex” Under the Equal Pay Act.....	267

Christine Sargent is an associate at Littler Mendelson P.C. in Portland, Oregon; Matthew A. Bowles is an associate at GrayRobinson, P.A. in Tampa, Florida; Bruce J. Sarchet is a shareholder at Littler Mendelson P.C. in Sacramento, California; Jake Proudfoot is an associate at GrayRobinson, P.A. in Tampa, Florida; and Zack Duffly is an associate at Littler Mendelson P.C. in Portland, Oregon.

Many developments in labor and employment law happened this year, including yet another significant U.S. Supreme Court decision regarding arbitration agreements and continued momentum nationwide for enforcement of such agreements when the parties knowingly entered into same. Increasingly relevant throughout the United States, actions regarding state medical marijuana and accommodation laws are being litigated in federal courts with somewhat surprising results. Although medical marijuana remains illegal under federal law, some federal courts are enforcing state laws requiring employers to accommodate employees who consume medical marijuana. In California, recent and drastic changes as to how independent contractors are classified will impact regional and nationwide employers, as well as employees and employers within the state. In a significant development from the U.S. Department of Labor, it issued its final overtime rule which will impact many employers and employees throughout the United States. Lastly, the U.S. Supreme Court took on the catchall exception of the Equal Pay Act in *Yovino v. Rizo* only to decline to reach a decision on the merits due to the death of the Ninth Circuit's *en banc* decision author and remand the case accordingly. While this chapter of the survey focuses only on a small portion of the developments in labor and employment law over the past year, practitioners should remain apprised of such changes to applicable law in their particular geographic region, as well as new federal developments, as this area of law continues to evolve.

I. THE EXPANDING SCOPE OF ARBITRATION AGREEMENT ENFORCEABILITY

Over the past decade, courts around the country, up to and including the U.S. Supreme Court, have been exceptionally busy upholding new laws and clarifying policies relating to the enforceability of arbitration agreements. This past year was no exception. While many of the cases ruled upon in the last year would be considered a “win” for businesses, companies, and employers whose contracts with consumers and employees contain arbitration agreements, courts have made significant efforts to convey what is needed to enforce such agreements, namely, clear and conspicuous language and consent on behalf of both parties. A survey of recent case law follows.

In *Lamps Plus, Inc. v. Varela*, one of the most significant cases regarding arbitration agreements this past year, the U.S. Supreme Court effectively pronounced the end of class arbitration proceedings, signaling that individualized arbitrations are preferred absent express authorization for class-wide arbitration.¹ Although a literal reading of the *Lamps Plus* decision may

1. 139 S. Ct. 1407, 1418–19 (2019).

reasonably lead to the conclusion that only class arbitrations were affected by the ruling, the overwhelming trend over the past two years indicates both the U.S. Supreme Court's and various state and federal district courts' clear intention to enforce arbitration agreements that have been unquestionably consensually entered into by the parties.²

In *Lamps Plus*, a Lamps Plus employee filed a putative class action lawsuit against the company for alleged statutory and common law violations following a data breach.³ The company moved to compel individual arbitration based on the employee's arbitration agreement.⁴ The District of California granted the motion, but allowed the employee to proceed with a class action in arbitration.⁵ The company appealed to the Ninth Circuit.⁶ Based on a California contract-law principle stating that any ambiguity in a contract may be construed against the drafter, the Ninth Circuit affirmed the class action arbitration decision because the agreement did not contain an explicit waiver prohibiting arbitration of class or collective claims.⁷ The U.S. Supreme Court reversed the Ninth Circuit's decision, holding that an ambiguous agreement cannot provide the necessary "contractual basis" for compelling class arbitration.⁸ In so holding, Chief Justice Roberts, who authored the opinion, noted that "[c]lass arbitration is not only markedly different from the traditional individualized arbitration contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration."⁹ The Court emphasized that silence or ambiguity is not enough, and that the FAA "requires more . . ."¹⁰ Thus, the holdings of the District Court and Ninth Circuit were flatly inconsistent with the "foundational FAA principle that arbitration is a matter of consent."¹¹

The importance of an arbitration agreement being clear and conspicuous, without any ambiguity, cannot be understated. Courts have demonstrated an unwillingness to enforce arbitration agreements where employees or consumers have not been given adequate notice that they have entered into an agreement containing an arbitration provision. For example, in *Kernaban v. Home Warranty Administrator of Florida, Inc.*, the New Jersey Supreme Court refused to compel arbitration because the provision was flawed in that it was mislabeled in the contract and written in size

2. See *id.* at 1415 ("The first principle that underscores all of our arbitration decisions is that arbitration is strictly a matter of consent.") (quotation omitted).

3. See *id.* at 1413.

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. *Id.* at 1415.

9. *Id.* (quotation and citation omitted).

10. *Id.*

11. *Id.* at 1418 (quotation omitted).

6.5 font.¹² There, the plaintiff was a consumer who entered into an agreement for repair of certain home appliances in exchange for \$1,050.00.¹³ After becoming dissatisfied with the defendant's services, the plaintiff canceled the contract and filed suit for alleged violations of consumer protection statutes.¹⁴ The arbitration agreement contained in the parties' services contract was effectively tucked inside a mediation provision, as consumers were bound to "mediate in good faith" in the event of a dispute, but were in turn also bound to arbitrate any remaining dispute that was not resolved in mediation.¹⁵

Emphasizing the importance of both parties actually agreeing to arbitrate, the New Jersey Supreme Court analyzed the intent of the parties in the context of the contract.¹⁶ It determined that the meaning of the arbitration provision was "not apparent from the manner in which it relayed information to the consumer who signed the contract."¹⁷ Notably, the Court further explained that "[a]lthough we are not expecting a specific recitation of words to effect a meeting of the minds to create an agreement to arbitrate, the construct and wording of the instant provision are too confusing and misleading to meet simple plain wording standards demanded by the public policy of this state for consumer contracts."¹⁸

In January 2019, the Second Circuit issued a ruling similar to *Kernaban* when it held in *Starke v. SquareTrade, Inc.* that an arbitration agreement between a consumer and electronics protection plan service was unenforceable because the contract did not contain a "clear and conspicuous notice that the transaction would subject [the plaintiff] to binding arbitration."¹⁹ In *Starke*, the plaintiff and the defendant disagreed as to whether the electronics protection plan purchased by the plaintiff covered his CD player.²⁰ The defendant moved to compel arbitration, but the District Court refused to grant the motion and the Second Circuit affirmed that decision.²¹ The Second Circuit focused its analysis on the fact that the webpage where the defendant had sold its protection plan did not adequately direct consumers' attention to the "Terms & Conditions" page, where the arbitration clause was located, and that there were so many distractions and extraneous information on the webpage that the arbitration clause could not have

12. 199 A.3d 766, 781 (N.J. 2019).

13. *See id.* at 771.

14. *See id.*

15. *Id.* at 771–72.

16. *See id.* at 774.

17. *Id.* at 778.

18. *Id.*

19. 913 F.3d 279, 296 (2d Cir. 2019).

20. *See id.* at 286.

21. *See id.* at 287, 297.

been deemed to be assented to by the plaintiff.²² Ultimately, the Second Circuit concluded that because the plaintiff had not expressed any assent to arbitrate, the arbitration agreement could not be enforced.²³

In contrast to *Starke* and *Kernaban*, the Ninth Circuit recently reached the opposite conclusion after analyzing an arbitration agreement contained in a former employee's retirement savings and investment plan.²⁴ In *Dorman*, plaintiff filed a putative class action alleging that the defendant violated ERISA and breached its fiduciary duties with respect to investment funds in the company's contribution 401(k) retirement plan.²⁵ The plan contained an arbitration clause providing that "[a]ny claim, dispute or breach arising out of or in any way related to the plan shall be settled by binding arbitration . . ."²⁶ The Northern District of California concluded that the plaintiff was not bound to this provision.²⁷ Defendant appealed.²⁸

On appeal, the Ninth Circuit issued two separate opinions. First, the Ninth Circuit concluded more generally that ERISA claims are arbitrable, overruling long-standing case law on the basis that intervening U.S. Supreme Court precedent upholding and expanding the enforceability and permissible scope of arbitration agreement applications was controlling and irreconcilable with older jurisprudence.²⁹ Subsequently, the Ninth Circuit concluded in the companion matter that plaintiff's plan's arbitration provision was valid and enforceable because (1) plaintiff was a participant of the plan at the time the arbitration provision went into effect, and (2) the agreement to arbitrate belonged to the plan, not the plaintiff.³⁰ Moreover, the Court relied on the premise that a plan participant agrees to be bound by a provision in the plan document when he participates in the plan while the provision is in effect.³¹

The Ninth Circuit also reasoned that although Section 502(a)(2) of ERISA "claims seek relief on behalf of a plan . . . such claims are inherently individualized when brought in the context of a defined contribution like

22. *See id.* at 292–93.

23. *See id.* at 297.

24. *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019).

25. *See id.* at 1109.

26. *Id.*

27. *See id.* at 1110–11.

28. *See id.* at 1111.

29. *See id.* at 1111–13 (overruling *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984)); *see also* *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013) (citing the FAA and holding that "[t]his text reflects the overarching principle that arbitration is a matter of contract, . . . [a]nd consistent with that text, courts must rigorously enforce arbitration agreements according to their terms, . . . including terms that specify with whom the parties choose to arbitrate their disputes . . . and the rules under which that arbitration will be conducted . . .") (citations, quotations, and brackets omitted).

30. *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019).

31. *See id.* at 512–13; *see also* *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723–24 (9th Cir. 2000).

that at issue.”³² Notably, the Ninth Circuit also observed that “[o]nce it is established that a dispute falls within the scope of an arbitration agreement, a court must order arbitration unless the agreement is unenforceable upon such grounds as exist at law or in equity for the revocation of any contract.”³³ Such grounds include generally applicable contract defenses, such as fraud, duress, or unconscionability.³⁴ Accordingly, the agreement was enforceable.³⁵

While the courts in 2019 have indicated a push toward enforcing arbitration agreements, they do not disregard the perceived disadvantages of arbitration agreements when it comes to employees and consumers. Courts have made clear that businesses and employers must ensure that both parties have knowingly and voluntarily entered into the arbitration agreement for it to be enforceable. Companies and employers should recognize that other parties still have room to argue against an arbitration agreement’s enforceability and, therefore, should take steps to give their agreements the best chance of withstanding such a challenge.

II. FEDERAL ENFORCEMENT OF MEDICAL MARIJUANA ACCOMMODATION LAWS: ANOTHER U.S. DISTRICT COURT UPHOLDS STATE ACCOMMODATION PROTECTIONS FOR MEDICAL MARIJUANA USERS

Medical marijuana is now legal in thirty-three states and recreational marijuana is legal in eleven states and the District of Columbia. While it appears inevitable that medical marijuana will soon be legal in every state, the legalization of medical marijuana through the autonomy of the states and not through federal legislation has created an unsettling lack of consistency amongst state medical marijuana laws and state regulatory frameworks. Within this lack of consistency, there is no exception for employment-related matters arising from the use of medical marijuana. Accordingly, whether state medical marijuana and/or accommodation statutes require that an employer accommodate off-site medical marijuana use and/or prohibit discrimination based upon such use varies from state to state.

In states where medical marijuana and/or accommodation laws are silent as to whether an employer has a duty to accommodate off-site medical marijuana use, and even in states where such laws expressly do not create a cause of action, some state courts have used preemption by the federal Controlled Substances Act (CSA) to find that such state statutes were not intended to require that an employer accommodate an activity which is

32. *Id.* at 514.

33. *Id.* at 513.

34. *See id.*

35. *See id.* at 514.

illegal under federal law. For instance, in *Emerald Steel v. Bureau of Labor*, one of the first decisions of its kind, the Oregon Supreme Court examined the CSA and the federal Americans with Disabilities Act (ADA) as part of the court's analysis of whether an employer had a duty to accommodate medical marijuana use under Oregon's Medical Marijuana Act and/or Oregon's state counterpart to the ADA.³⁶ Not surprisingly, the court found that the illegality of medical marijuana under the CSA and the ADA's express lack of protection for illicit drug users preempted state law legalizing medical marijuana and, therefore, Oregon employers did not have a duty to accommodate or engage in the interactive process with an employee who consumed medical marijuana within or outside of the workplace, regardless of whether the use was legal at the state level.³⁷

Based on utilization of the CSA preemption argument by the Oregon Supreme Court in *Emerald Steel*, as well as the use of such argument by jurists in other state court decisions finding no duty to accommodate medical marijuana use, some employment defense practitioners believed that federal courts examining medical marijuana-related employment claims would, as a matter of course, find any state law requiring an employer to accommodate medical marijuana use preempted by the CSA's Schedule I designation of marijuana. The District of Connecticut, however, surprised many litigators when it became one of the first United States District Courts to take on the issue in *Noffsinger v. SSC Niantic Operating Co. LLC*.³⁸ In *Noffsinger*, the court found that the CSA did not conflict with Connecticut's Palliative Use of Marijuana Act (PUMA) which prohibits employers from discriminating against persons authorized to use medical marijuana.³⁹ Specifically, the court held that the CSA does not create a positive conflict with PUMA because, unlike PUMA, the CSA "does not make it illegal to employ a marijuana user . . . [n]or does it purport to regulate employment practices in any manner."⁴⁰ Further, the *Noffsinger* decision proved that some federal courts were willing and ready to uphold autonomous state legislation regarding medical marijuana and disregard the fact that marijuana remained illegal under the CSA.⁴¹

Some management defense practitioners believed that *Noffsinger* was a one-off decision and that CSA preemption would prevail in preventing other federal courts from upholding state medical marijuana and accommodation laws. A recent decision in the U.S. District Court for the District of Arizona has indicated that *Noffsinger* may not be an anomaly and that

36. 230 P.3d 518, 519–36 (Or. 2010).

37. *See id.* at 536.

38. 273 F. Supp. 3d 326 (D. Conn. 2017).

39. *See id.* at 330–43.

40. *Id.* at 334.

41. *See id.* at 330–43.

some federal courts are willing to uphold the autonomy of state legalized medical marijuana and accommodation laws.

Specifically, in *Whitmire v. Wal-Mart Stores Inc.*, Wal-Mart terminated the plaintiff after she failed a post-accident drug test by testing positive for marijuana metabolites.⁴² The plaintiff brought several state law claims against Wal-Mart for its adverse employment action, including a claim for discrimination under the Arizona Medical Marijuana Act (AMMA).⁴³ The AMMA expressly prohibits an employer from discriminating against an employee who possesses a medical marijuana registry card issued by the Arizona Department of Health Services and who tests positive for marijuana metabolites unless the employee consumed medical marijuana on-site or was impaired by same while at the workplace.⁴⁴ In its motion for summary judgment, Wal-Mart argued that the AMMA created neither an express nor implied private cause of action.⁴⁵ In support of its argument, Wal-Mart cited several cases where state medical marijuana statutes were found not to create a cause of action against an employer, including several state supreme court decisions from Washington, California, and Montana.⁴⁶ Unmoved by Wal-Mart's argument, the District Court found Wal-Mart's cited authority dissimilar to the case before it and, therefore, unpersuasive.⁴⁷ To the contrary, the District Court considered *Noffsinger* "highly persuasive" and, along with a recent state trial court decision from Delaware, relied on *Noffsinger* in finding that the AMMA did indeed create a private cause of action against an employer thereby denying that portion of the defendant's motion for summary judgment.⁴⁸ Notably, the District Court did not discuss the CSA, much less CSA preemption, in its analysis of that claim.

Ironically, the District Court did reference the CSA in discussing the unrelated issue of whether the plaintiff was considered disabled under the Arizona Civil Rights Act (ACRA).⁴⁹ In fact, the decision expressly cites the CSA and states: "Rather, marijuana is still classified as a Schedule I controlled substance under the Controlled Substances Act, meaning it has a high potential for abuse, and has no currently accepted medical use in treatment in the United States."⁵⁰ In analyzing the plaintiff's AMMA claim by relying on *Noffsinger* without a discussion of CSA preemption and then referencing the CSA while analyzing Plaintiff's ACRA claim,

42. 359 F. Supp. 3d 761, 770–71 (D. Ariz. 2019).

43. See *id.* at 771.

44. ARIZ. REV. STAT. ANN. § 36-2813(B) (2019).

45. See *Whitmire*, 359 F. Supp. 3d at 775.

46. See *id.* at 778.

47. See *id.* at 778–79.

48. See *id.* at 781.

49. See *id.* at 795.

50. *Id.* (internal citation omitted).

the District Court avoided a discussion of whether the CSA preempts the AMMA while, in the same decision, partially relying on a CSA provision which expressly states that Schedule I substances have no medical use in the United States. Regardless, *Whitmire* provides yet another example of a District Court willing to apply a state law that protects an employee's ongoing violation of federal law.

In light of decisions in *Noffsinger* and *Whitmire*, it appears as though federal trial courts will apply state medical marijuana and/or accommodation laws as they believe a state court would and without regard to medical marijuana's status under the CSA and other federal laws. While some may consider such decisions as judicial activism, there have been several recent attempts to remove state legalized marijuana from the CSA and even President Trump has indicated support for such a bill.⁵¹ Practitioners who represent employers should not only remain apprised of the constant evolution of state medical marijuana and accommodation laws, but also vigilant as to how federal courts may interpret such laws based upon a particular state's statutory language and relevant case law.

III. IT'S NOT AS EASY AS A-B-C: AB 5 AND ITS POTENTIAL IMPACT ON EMPLOYMENT LITIGATION IN CALIFORNIA

California's Assembly Bill (AB) 5, signed into law on September 18, 2019, imposes the "ABC" test on California businesses and workers, dramatically altering the legal standards applied in evaluating whether a worker in California is an employee or an independent contractor.⁵² On January 1, 2020, approximately two million independent contractors in California may be considered employees under this change in state law. The state's workplace laws and regulations, along with local city laws and rules, will then apply to these newly classified workers and give rise to potential back-pay claims for misclassification. Employers will face very difficult choices in this brave new world, many of which are not appealing.

The question of whether a worker is an employee or a contractor is of substantial importance not just to the novel business models of our modern, digital economy, but also to more traditional businesses and their workers: warehouses, dance studios, interpreter services, real estate appraisers, freelance copywriters, and so forth. Further, the question obviously impacts those currently classified as contractors as well—individuals who value the freedom and entrepreneurial spirit that contracting brings, as well as more

51. Donald Trump, *President Trump Delivers a Statement upon Departure*, YouTube, at 11:18 to 11:30 (posted June 8, 2018), <https://www.youtube.com/watch?v=zvw75UJyZhA&feature=youtu.be>.

52. A.B. 5, 2019 Leg. (Cal. 2019) (enacted Sept. 18, 2019).

mundane aspects of the status, such as the ability to claim business expenses on their tax returns.

Below is a summary of the evolution of the ABC test in California, an overview of the major provisions of AB 5, a critique of the new law, and a discussion on the potential impact on litigation in California.

A. *Dynamex v. Superior Court*

AB 5 is the legislature's reaction to the California Supreme Court's April 30, 2018 opinion in *Dynamex v. Superior Court*.⁵³ At that time, California courts and state agencies had long applied the common-law test adopted by the Supreme Court in 1989 in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*⁵⁴ to determine whether an individual could be classified as an independent contractor, rather than an employee. Throughout the intervening twenty-nine (29) years, California's courts, state agencies, and businesses relied on the "*Borello* test" as the applicable standard to determine whether a worker was a contractor or an employee. *Dynamex* abruptly imposed an *entirely new* standard, the "ABC test," for purposes of the California wage orders. The California wage orders are a series of seventeen (17) sets of regulations published by the California Industrial Welfare Commission. Each wage order governs wages, hours, and working conditions in a specific industry or occupation, ranging from the Manufacturing Industry (Wage Order 1-2001) to "Miscellaneous Employees" (Wage Order 17-2001).

Dynamex did not, however, completely eliminate all use of the *Borello* test. The California Supreme Court expressly limited *Dynamex* to application of the wage orders. That limitation left the *Borello* test in place for all other purposes, including the Labor Code, the Unemployment Insurance Code, and Workers' Compensation.

Despite its stated intention to bring more certainty and clarity to worker classification, *Dynamex* failed to address the critical issue of retroactive versus prospective application of the new test. Indeed, the court declined to clarify this issue.

Reaction from the business community was swift—the court seemed to be doing the job of legislating—creating new law. The legislature, in turn, responded.

B. *Assembly Bill 5*

Assembly member Lorena Gonzalez (D-San Diego) first introduced AB 5 on December 3, 2018. Legislators subsequently amended AB 5 six times. The final text of the bill is lengthy and complex. Conceptually, it is composed of four basic parts: (1) adopting the ABC test; (2) specifying exceptions

53. 416 P.3d 1 (Cal. 2018).

54. 769 P.2d 399 (Cal. 1989).

that invoke the *Borello* test; (3) delineating retroactive versus prospective liability; and (4) authorizing the Attorney General and other specified public officials to prosecute actions for injunctive relief to prevent continued misclassification.⁵⁵

C. *The ABC Test*

AB 5 adopts the ABC test, using the exact language of *Dynamex*. Specifically, any person providing labor or services for remuneration shall be considered an employee, rather than an independent contractor, unless the “hiring entity” demonstrates that all of the following conditions are satisfied:

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

(B) The person performs work that is outside the usual course of the hiring entity’s business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.⁵⁶

As in *Dynamex*, AB 5 imposes this test for purposes of the California wage orders. The bill also applies the ABC test to the California Labor Code and Unemployment Insurance Code. The *Borello* test, however, will remain the applicable standard for occupations and relationships that fall within AB 5’s various exceptions.

D. *Exceptions*

The bulk of AB 5 attempts to define “exceptions” for particular occupations and relationships. These exceptions fall into seven categories. If an exception applies, the bill then specifies what standard, other than the ABC test, will govern. For the vast majority of the exceptions, the bill provides “the determination of employee or independent contractor status . . . shall be governed by *Borello*.”⁵⁷ Therefore, it is not enough that a particular situation falls within one of AB 5’s exceptions. The situation must still satisfy the applicable test, which will usually be the *Borello* test.

The seven categories of exceptions generally include:

- Specific occupations, such as insurance agents, physicians, dentists, lawyers, architects, engineers, private investigators, accountants, and more;

55. See A.B. 5, 2019.

56. See *id.*

57. *Id.*

-
-
- Contracts for professional services, such as marketing, administrator of human resources, travel agent services, graphic design, and others;
 - Real estate licensees and repossession agencies;
 - So called “business-to-business” contracting relationships between a contracting business and a business service provider. The title of this exception, however, is somewhat misleading—this exception is subject to twelve (12) criteria and may ultimately prove to be unworkable in many situations;
 - Relationships between a contractor and an individual performing work pursuant to a subcontract in the construction industry;
 - Relationships between a referral agency and a service provider that uses the referral agency to connect with clients, for services such as graphic design, photography, tutoring, event planning, and others; and
 - “Motor club” services.⁵⁸

Many of the above exceptions and criteria present considerable practical difficulties of execution. For example, the business-to-business and referral agency exceptions contain an inherent conflict. These exceptions: (1) expressly provide that the service provider may be formed as a sole proprietorship without sacrificing the exception; (2) refer to a sole proprietorship as a business entity; and (3) expressly exclude “an individual worker, as opposed to a business entity” from the scope of the exception.⁵⁹ It is entirely unclear whether an individual operating as a sole proprietor would be considered a sole proprietorship or an individual worker.

E. Retroactive Versus Prospective Liability

AB 5 parses retroactive and prospective liability into four parts:

1. *Dynamex* and the ABC test apply retroactively “with regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders.”
2. All exceptions apply retroactively to the maximum extent permitted by law, to the extent they would relieve an employer from liability.
3. On and after January 1, 2020, *Dynamex* and the ABC test will apply for purposes of the Unemployment Insurance Code and all other provisions of the Labor Code.
4. On July 1, 2020, *Dynamex* and the ABC test will apply for purposes of workers’ compensation.⁶⁰

58. *See id.*

59. *Id.*

60. *Id.*

F. *Injunctive Relief*

In a last-minute amendment to AB 5, legislators added an entirely new subdivision authorizing the Attorney General and specified public officials to prosecute civil actions for injunctive relief “to prevent the continued misclassification of employees.”⁶¹ The future use of this provision will be telling—the government will have the ability to enter the fray in a way that is largely without precedent. Although this provision mirrors California’s controversial Unfair Competition Law (UCL),⁶² actions for injunctive relief under the UCL have been relatively rare. That said, on September 13, 2019, the same day on which AB 5 was passed by the Legislature, the City Attorney in San Diego filed just such an action against a business, alleging misclassification of its workers as independent contractors constituted unfair competition.⁶³

G. *Predictions: Impact on Litigation*

The ABC test will be added to a growing list of employment law issues and concerns confronting California employers today. Every employer in California today knows that a “part of doing business” is the threat of employment litigation. In the last few years, there has been a tremendous growth in the number of employment lawsuits filed in California. Of particular note are class action lawsuits alleging wage and hour violations, along with Private Attorney General Act lawsuits, seeking penalties on a per-paycheck basis for labor code violations.

Over the last five years, we also have seen exponential growth in the number of state laws that impose obligations on employers. In addition to the ever-growing list of state employment laws, cities often regulate the workplace. Municipalities continue to implement new minimum wage ordinances, paid sick leave ordinances, “predictable scheduling” ordinances, and so on.

Many in the business community have asserted that adoption of the ABC test in California will lead to more employment litigation and open up the possibility of hundreds of thousands of new plaintiffs with wage and hour claims potentially stretching back for years. Misclassification lawsuits typically involve claims for minimum wage, overtime meal and rest breaks, leave of absence, wage statement violations, waiting time penalties, failure to reimburse for business expenses, and so on. There is a separate section in the Labor Code, section 226.8(b), which provides a penalty of between \$15,000 and \$25,000 per misclassified worker. Many have said that the

61. *Id.*

62. CAL. BUS. & PROF. CODE § 17204.

63. See California v. Mapbear Inc., No. 37-2019-00048731-CU-MC-CTL (Super. Ct. San Diego Cty. 2019).

floodgates of employment litigation in California are already opened. The ABC test will likely lead to more litigation, making a difficult situation even more challenging for California businesses.

IV. THE OVERTIME RULE THAT WENT INTO OVERTIME

On September 24, 2019, the U.S. Department of Labor announced updates to a final rule that will make approximately 1.3 million workers eligible for overtime.⁶⁴ While workers generally earn time-and-a-half pay for hours worked in excess of forty in a week,⁶⁵ section 13(a)(1) of the Fair Labor Standards Act provides certain exemptions from the overtime requirement for executive, administrative, or professional employees when they meet several requirements.⁶⁶ The requirement undergoing the most significant change is the salary threshold—executive, administrative, or professional employees encompassed by the rule will only remain exempt employees if they receive a weekly salary of \$684.00 or more.⁶⁷ This is a fifty percent (50%) increase over the current weekly salary threshold of \$455.00 that was originally put into place in 2004.⁶⁸ The final rule goes into effect on January 1, 2020, and is a relatively quiet ending to a story that actually began nearly six years ago.

On March 23, 2014, President Barack Obama issued a memorandum for the Secretary of Labor titled “Updating and Modernizing Overtime Regulations.”⁶⁹ President Obama noted in the Memorandum that the Fair Labor Standards Act regulations regarding exemptions from the Act’s overtime requirement “have not kept up with our modern economy” and directed the Secretary of Labor to propose revisions to “modernize and streamline the existing overtime regulations.”⁷⁰ Pursuant to this Presidential directive, the Department of Labor developed an updated version of the current regulation, receiving more than 270,000 comments in the process.⁷¹ The final rule, published on May 23, 2016, would have more than doubled the minimum salary level for exempt executive, administrative,

64. Press Release, Dep’t of Labor Wage and Hour Div., U.S. Dep’t of Labor Issues Final Overtime Rule (Sept. 24, 2019) (No. 19-1715-NAT), <https://www.dol.gov/newsroom/releases/whd/whd20190924>.

65. See 29 C.F.R. § 207 (2019).

66. *Id.* § 541.0.

67. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230, 51,238 (Sept. 27, 2019) (to be codified at 29 C.F.R. § 541).

68. *Id.* at 51,231.

69. Presidential Memorandum, Updating and Modernizing Overtime Regulations (Mar. 13, 2014), 79 Fed. Reg. 18,737 (Apr. 3, 2014).

70. *Id.*

71. Defining and Delimiting the Exemptions for Executive, Administrative, Professional Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,397 (May 23, 2016).

and professional employees from \$455.00 weekly to \$913.00, and would have gone into effect on December 1, 2016.⁷² The new salary threshold was based upon the 40th percentile of earnings of full-time salaried workers in the lowest wage region in the United States.⁷³ The May 23, 2016, final rule also provided for automatic adjustments to the minimum salary level every three years.⁷⁴

The May 23, 2016, final rule was challenged before it came into effect and a federal court in the Eastern District of Texas held that in enacting the final rule, the Department “exceed[ed] its delegated authority and ignore[d] Congress’s intent,” and the rule was therefore unlawful.⁷⁵ The court noted that Congress’s intent in enacting the exemption to the overtime regulations focused on the duties of the executive, administrative, and professional employees covered by the rule, and the court devoted much analysis to defining those positions and duties.⁷⁶ The court then held that the final rule was unlawful because of the way in which it supplanted the duties test and made executive, administrative, and professional employees eligible for overtime if they made less than \$913.00 per week, “irrespective of their job duties and responsibilities.”⁷⁷ The Department appealed the ruling, but asked that the appeal be suspended while the Department of Labor worked on a replacement.⁷⁸

In replacing the rule, the Department paid particular attention to maintaining distinctions between “the white collar employees whom Congress intended to be protected by the FLSA’s minimum wage and overtime provisions and bona fide executive, administrative, and professional employees whom Congress intended to exempt from those statutory requirements.”⁷⁹ The Department received more than 116,000 comments.⁸⁰ In supporting the new salary threshold of \$684.00 weekly, the Department referenced the way in which the original \$455.00 threshold was calculated using the “20th percentile of full-time salaried workers in the South and in the retail industry nationally,” and noted that repeating this calculation now resulted in a proposed standard salary level of \$679 per week. Notably, instead of

72. *Id.* at 32,393.

73. This region was the United States South. *Id.*

74. *Id.* at 32,430.

75. *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 530 (E.D. Tex. 2016).

76. *Id.* at 529.

77. *Id.* at 530.

78. Press Release, Dep’t of Labor Wage and Hour Div., Dep’t of Labor Provides Update on Overtime (Oct. 30, 2017) (No. 17-1456-NAT), <https://www.dol.gov/newsroom/releases/osec/osec20171030>.

79. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51,230, 51,231 (Sept. 27, 2019) (to be codified at 29 C.F.R. § 541).

80. *Id.*

allowing for automatic updates every three years, the Department stated that it “intends to update these thresholds more regularly in the future.”⁸¹

Commentators have already noted that, in light of the more modest salary threshold increase, a challenge to the new rule announced on September 24, 2019 on the same grounds as the earlier final rule from May 23, 2016 is unlikely to be successful.⁸² The business community and republican lawmakers support the new rule as a modest increase compared to the aggressive version of the final rule from the Obama administration.⁸³ In fact, the new rule may “draw a legal challenge from worker advocates who have urged the department to try to salvage” the final rule that was invalidated by the Texas district court.⁸⁴ A challenge from worker advocate groups would likely be based on the Department’s compliance with the Administrative Procedure Act and “face a pretty steep uphill battle.”⁸⁵

With successful legal challenges to the new rule now unlikely and the January 1, 2020, date fast approaching as of the drafting of this article, employers that have been utilizing the overtime exemptions for executive, administrative, and professional employees need to take a look at their current salary thresholds to ensure they maintain compliance with the updated rule. This could mean either giving those employees a raise to ensure their salary stays above the new threshold and they maintain exempt status, or it could mean tracking the hours of those previously exempt employees and ensuring they are now paid appropriate overtime wages. The new rule provides additional guidance on how salaries are calculated, but allows up to ten percent (10%) of the salary to be based on nondiscretionary bonuses, as long as such bonuses are paid at least annually.⁸⁶ Penalties for noncompliance can be costly, as employees can sue an employer for the overtime wages, an equal amount in liquidated damages, and attorney’s costs and court fees.⁸⁷

81. *Id.*

82. Lisa Nagele-Piazza, *Will the New Federal Overtime Rule Face Legal Challenges?*, SOCIETY FOR HUMAN RESOURCE MGMT. (Oct. 1, 2019), available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/will-new-federal-overtime-rule-face-legal-challenges.aspx>.

83. Ben Penn & Chris Opfer, *Long-Awaited Trump Overtime Pay Requirements Unveiled (1)*, BLOOMBERG LAW (last updated Sept. 24, 2019, 11:00 AM), available at <https://news.bloomberglaw.com/daily-labor-report/long-awaited-trump-overtime-pay-requirements-unveiled>.

84. *Id.*

85. Nagele-Piazza, *supra* note 82.

86. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230, 51,231 (Sept. 27, 2019) (to be codified at 29 C.F.R. § 541).

87. 29 C.F.R. § 216 (2019).

V. *YOVINO V. RIZO*: THE SUPREME COURT PUNTS ON PAY HISTORY AS A “FACTOR OTHER THAN SEX” UNDER THE EQUAL PAY ACT

Over fifty-five years after Congress enacted the Equal Pay Act (the “Act”), the disparity in compensation between men and women that the Act sought to remedy persists. In 2019, the U.S. Supreme Court considered the Ninth Circuit’s *en banc* decision in *Rizo v. Yovino*, which held that the Act’s “factor other than sex” exception is limited to job-related factors and an employee’s prior salary is not a proper job-related factor.⁸⁸ In *Yovino v. Rizo*, however, the Supreme Court did not reach the merits of the Ninth Circuit’s decision, instead remanding based on a procedural anomaly.⁸⁹ Without the high court’s guidance on the proper construction of the Act’s catchall exception, employers remain subject to different standards in different jurisdictions.

By way background, Aileen Rizo was hired as a math consultant by the Fresno County Office of Education in October 2009.⁹⁰ Under the County’s policy, a new employee’s salary was determined by adding five percent (5%) to the new hiree’s prior salary and using that figure to place the new employee on the appropriate step of a pre-existing 10-step salary schedule.⁹¹ Rizo later discovered that male colleagues had been hired as math consultants at higher salary steps and brought suit under the EPA against the superintendent of schools in his official capacity.⁹²

In relevant part, the EPA requires “equal pay” for “equal work”⁹³ regardless of sex “except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”⁹⁴ The EPA’s four statutory exceptions function as affirmative defenses that the employer must prove. An employer must submit evidence from which “a reasonable factfinder could conclude not simply that the employer’s proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity.”⁹⁵

88. 887 F.3d 453, 459 (9th Cir. 2018), *cert. granted, judgment vac’d*, 139 S. Ct. 706 (2019).

89. 139 S. Ct. 706.

90. *See Rizo*, 887 F.3d at 457.

91. *See id.* at 457–58.

92. *See id.* at 458.

93. To establish a *prima facie* case under the EPA, a plaintiff must demonstrate that (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; (3) the jobs are performed under similar working conditions. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

94. 29 U.S.C. § 206(d)(1).

95. *Rizo*, 887 F.3d at 459 (citing 29 U.S.C. § 206(d)(1) (exempting from liability only those wage differentials where payment was “made pursuant to” an enumerated exception)).

The County moved for summary judgment, conceding that Rizo's salary was lower than those of her male counterparts, but arguing that the disparity was justified by a factor other than sex, Rizo's prior salary.⁹⁶ The District Court denied the motion, concluding that the County policy ran afoul of the EPA. The court reasoned that "a pay structure based exclusively on prior wages is so inherently fraught with the risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand."⁹⁷ The County petitioned for interlocutory review and the Ninth Circuit granted the petition.⁹⁸

By the time *Rizo* reached the Ninth Circuit, several circuits had concluded that an employer may rely on an employee's prior salary in determining the employee's pay. The majority of these courts⁹⁹ had concluded that, at least under certain circumstances, an employee's prior salary may qualify as a "factor other than sex" under the EPA's catchall exception and may therefore properly serve as the basis for a disparity in pay between employees of the opposite sex.¹⁰⁰ Among the circuits that have adopted this "legitimate business reason" standard, several have held that an employee may rely on prior salary only as *one of several* factors used to determine pay, but may not rely *solely* on prior salary to justify pay disparity.¹⁰¹

Several courts that have adopted the legitimate business reason standard based their decisions, at least in part, on an earlier Ninth Circuit opinion, *Kouba v. Allstate Ins. Co.*,¹⁰² which held that an employer may consider prior salary along with other factors, "including ability, education, [and]

96. *See id.*

97. *See id.*

98. *See id.*

99. A minority of circuits have adopted a "market force" rule with regard to prior salary and pay disparity. In these circuits, courts have held that an employer may properly base an employee's pay, and any concomitant pay disparity, on market forces, i.e. pay what is necessary and sufficient to induce individuals to accept employment. *See, e.g., Covington v. S. Ill. Univ.*, 816 F.2d 317, 321–22 (7th Cir. 1987). *But see Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (rejecting the market force theory).

100. *See, e.g., Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (holding that "an individual's former salary can be considered in determining whether pay disparity is based on a factor other than sex"; however, the Act "precludes an employer from relying solely upon a prior salary to justify pay disparity") (internal quotation omitted); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992) (holding that the "employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense"); *see also EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) (holding that "the legitimate business reason standard is the appropriate benchmark against which to measure the 'factor other than sex' defense"). *But see Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003) (declining to "establish any per se limitations to the 'factor other than sex' exception").

101. *See, e.g., Riser*, 776 F.3d at 1198, 1199.

102. 691 F.2d 873, 878 (9th Cir. 1982).

experience,” in setting employees’ salaries.¹⁰³ In *Rizo*, the Ninth Circuit revisited and overturned *Kouba*.¹⁰⁴

A three-judge panel of the Ninth Circuit initially vacated and remanded based upon *Kouba*.¹⁰⁵ The court began by noting that the employer in *Kouba* only considered prior salary as one of several factors in setting employees’ salaries and reasoned that there was no substantive significance attributed to the use of these other factors. Therefore, the panel concluded, *Kouba* also permits consideration of prior salary alone, as long as use of that factor “was reasonable and effectuated some business policy.”¹⁰⁶ The panel thus remanded, directing the District Court on remand to consider the reasonableness of the County’s proffered justification for relying on prior salary. The Ninth Circuit then granted *en banc* review of the panel’s decision, in order “to clarify the law, including the vitality and effect of *Kouba*.”¹⁰⁷

The *en banc* panel approached the question primarily as a straightforward issue of statutory interpretation.¹⁰⁸ The court reasoned that, because the EPA’s three specific exceptions—seniority, merit, and productivity—all “relate to job qualifications, performance, and/or experience[,]” the general catch-all should also be limited to “legitimate, job-related reasons.”¹⁰⁹ The *en banc* panel therefore concluded that the Act’s statutory exceptions should essentially be read as permitting “(i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other [similar] factor other than sex.”¹¹⁰ A similar factor would have to be one similar to the other legitimate, job-related reasons.

Another significant aspect of the *en banc* panel’s opinion is its express rejection of the term “business-related” (and other, similar terminology, like “legitimate business reasons”), in favor of “job-related” when assessing the propriety of any given factor other than sex. The *en banc* panel admonished that “business-related” was too broad and had enabled “too many

103. *Rizo*, 887 F.3d at 458 (internal quotation marks omitted).

104. *See id.* at 468.

105. *See id.* at 458.

106. *See id.* at 459.

107. *See id.* In the Ninth Circuit, only a decision by an *en banc* court (or the U.S. Supreme Court) can overrule a decision like that in *Kouba*. *See* *Naruto v. Slater*, 888 F.3d 418, 421 (9th Cir. 2018).

108. The court also held that the well-known and oft-cited legislative history of the EPA supported that conclusion. The catchall exception was an amendment in response to industry representatives’ concerns that the Act’s exceptions were under-inclusive and evidenced lack of understanding of industry reality. *See Rizo*, 887 F.3d at 462–63. To assuage industry, Congress added the catchall provision to enable employers setting pay to account for bona fide job-related factors: “Among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded.” *Id.* at 464.

109. *Id.* at 461–62.

110. *Id.* at 462.

improper justifications for avoiding the strictures of the Act.”¹¹¹ The court took pains to specify that “although the catchall exception applies to a wide variety of job-related factors, it does not encompass reasons that are simply good for business.”¹¹² Instead, the court explained that an employer must “point directly to the underlying factors for which prior salary is a rough proxy” (i.e., training, education, ability, or experience).¹¹³

Based on the above, in a departure from the decisions of other circuits, the *en banc* panel in *Rizo* held that “prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands.”¹¹⁴ The court concluded that “any other factor other than sex” is limited to “legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance.”¹¹⁵ In a 6-5 vote, the Ninth Circuit held that the County failed as a matter of law to set forth an affirmative defense to the plaintiff’s EPA claims.¹¹⁶ Judge Reinhardt authored the majority opinion, in which five other members of the *en banc* panel concurred, although for different reasons.¹¹⁷ Judge Reinhardt, however, died eleven (11) days before the *en banc* opinion issued.¹¹⁸ The Ninth Circuit elected to count his vote in the case anyway.

On February 25, 2019, the Supreme Court granted certiorari regarding the *en banc* panel’s substantive holding, as well as the question of what effect, if any, the demise of the opinion’s author had on the opinion.¹¹⁹

The Court did not reach the merits of the case. Instead, in a per curiam opinion, the Court held that the Ninth Circuit’s *en banc* panel erred in counting Judge Reinhardt’s vote because Judge Reinhardt was no longer a judge at the time the *en banc* decision in this case was filed. By counting Judge Reinhardt among the majority, the court “effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.”¹²⁰ As a

111. *Id.* at 465–66. Not every reason that makes economic sense (i.e., is business related), constitutes an acceptable factor other than sex. *See id.* at 466.

112. *Id.* at 467.

113. *Id.*

114. *Id.* at 456–57.

115. *Id.* at 460.

116. *See id.* at 457.

117. *Yovino v. Rizo*, 139 S. Ct. 706, 708 (2019).

118. *See id.*

119. *See id.*

120. *Id.* at 710.

result, the Court vacated the Ninth Circuit's judgment and remanded the case for further proceedings consistent with its opinion.¹²¹

The future of the legal terrain regarding the issue of prior salary is far from certain. Given that, and the prolonged stall in closing the pay gap, many advocates and legislators have been examining other possible avenues for expanding equal pay rights.¹²² Chief among these are state legislative efforts. The vast majority of states have passed or introduced at least one piece of legislation aimed at narrowing the pay gap, with Oregon, California, and Massachusetts passing especially broad new state laws.¹²³ Practitioners should familiarize themselves with these and other current developments in this area of the law.

121. *See id.*

122. *See generally* Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581 (2018).

123. For example, in California, seeking salary history is prohibited while new laws in Massachusetts and Oregon create "explicit incentives for employers to remedy their own pay disparities by providing partial defenses against state equal pay claims for such efforts." *Id.* at 644.

