

There's a lot going on out there (in employment law)

By Jeremy Pasternak



This is an interesting time to be practicing employment law in California.

Signs of the times:

Moved by the ramifications of the “gig economy,” last year the Legislature passed AB 5, which makes it much harder to define a worker as an “independent contractor.” The law codified (for the most part) the Supreme Court’s 2018 ruling in *Dynamex v. Superior Court*. Under the case and the statute, no longer are the old factors such as “control” critical to the employee vs. independent contractor determination; now, an employer must essentially prove that the work being done is outside the usual course of the business.

Even before the statute was passed, the *Dynamex* decision was considered a sea change in this area of law, and there were and continue to be intense lobbying efforts on behalf of industries that want to be “carved out” of its application. And there can be little doubt that *Dynamex* resulted in a wave of new wage and hour litigation (a field which, though hardly dying, was certainly past its heyday).

Again, signs of the times. Though the California Supreme Court is not as transparent about its thinking as the Legislature, and did not actually refer to the “gig economy,” is there really any doubt it was thinking about it?

And more signs of the times: No sooner did AB 5 go into effect, than it was partially blocked by a temporary restraining order on the basis that its application to the trucking industry could be preempted by federal law. The fight continues on other fronts, as well: A Google search of “Dynamex decision” produces a link to a political website funded by Uber, Lyft, and DoorDash.

There was a similar story with AB 51, which would have prohibited employers from forcing employees and job applicants to agree to binding arbitration of their disputes. Again, more signs of the times. The law was passed and signed in no small part because of #MeToo and the way confidentiality clauses within arbitration agreements had effectively “hidden” stories about Harvey Weinstein and others. Of course, the law has a broader reach and is not limited to sexual harassment cases. It affects “forum” more than it does substantive legal rights, but given the defense-verdict horror stories that regularly arise from binding arbitration and the notoriously low awards for employees who do prevail, it too is considered major legislation.

It has also been blocked for now on the basis that it might be preempted by federal law.

Both laws have been prompted by the events of the day, i.e., the gig economy and #MeToo. I would suggest they have also been prompted by the current political climate generally. As California legislators continue to own their place

as the lawmakers of our “bluest” state, and see themselves as part of a resistance not only to Trump but also to the wildly partisan conservatism we have seen in the last decade and particularly since the 2016 election, I suspect we will see more such legislation. For better or worse, the employment sphere is the one out of which a great deal – perhaps most – of civil rights litigation arises.

Similarly, we can expect to see more attempts to block legislation in front of conservative federal judges (many of whom, of course, were put in place by Trump and something else which is “wildly partisan,” the U.S. Senate).

Some of our articles this month touch directly on these issues. Arbitration (Josh Konecky, Nate Piller, and Leslie Joyner); Sexual harassment and predators (Jayme Walker and Brittany Smith); and AB 5 (Kevin Osborne and Katie Rabago). Steven Kaplan and Erin Kelly also touch on #MeToo in their article about how to deal with third-party privacy rights in discovery. In addition: Hali Anderson examines the relevance of a class-representative’s criminal background, mediator Tripper Ortman has some mediation advice for all of us, and employee-side attorney Anne Costin has a spirited conversation with employer-side attorney Rachel Pusey. Finally, Kevin Kneafsey, a non-attorney business consultant, has some advice for how we can better run our small firms.

There’s a lot going on in Washington these days. And “blue” as we are, there’s a lot going on here, as well. Watch the news. Watch this space. ■

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