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New Laws Affecting Common Interest Developments and Coming to You in 2020

AB 5 ... Again!

There is no doubt that the California Legislature has passed some sweeping legislation during their past session. Among the most disruptive is AB 5, which our colleague, Denis Kenny, writes about in detail below in this edition of *Perspectives*.

What most people may not be aware of, however, is that AB 5 has a significant impact upon our common interest development ("CIDs") clients. Why? Most CIDs employ a variety of contractors or vendors to maintain the common area, carry out janitorial or landscaping services, or as handymen, many of whom state they are independent contractors. In the past, and because these vendors typically carried out part-time work for multiple customers, they would safely be assumed to fall pretty squarely into the category of independent contractors.

Now, however, and in light of AB 5, many of these workers might inadvertently qualify as employees. Where this distinction becomes important is when vendors get injured while performing services at your association. If serious enough, and if the vendor did not itself carry workers' compensation insurance, these workers may look to CIDs to pay for their injuries and care by alleging the CIDs employed them. Unfortunately, there is case law that supports this, and the risk is substantially heightened by the passage of AB 5, which has a far broader impact in employment classification than merely on Uber drivers.

What can be done to mitigate this risk? Two things:

First, all CIDs should require that its independent contractors be fully insured. However, once AB 5 takes effect on January 1st, your CID could still be liable for gaps in your independent contractors' coverages.

Therefore, the second step to take is to consider obtaining a "zero payroll" workers' compensation insurance policy that covers independent contractors. These are available through multiple insurance agents. Based upon recent information we have been given, such a policy might only run between \$350 and \$550 per year.

SB 323.

Turning to CID-specific legislation, there are about half a dozen new laws that will take effect on January 1, 2020 that directly affect CIDs, but without a doubt, the single new law that has the greatest impact on CIDs is SB 323 (Wieckowski, 2019).

SB 323 amends or adds eight sections of the body of state law known as the Davis-Stirling Common Interest Development Act (California Civil Code §§ 4000-6150; the "Act"), which establishes the legal framework governing CIDs. We summarize the most notable changes brought about by SB 323 below and our suggestions as to how you should respond below.

Association Records (§5200)

We believe the most concerning change to the Act (for privacy and potential e-mail spam-prevention purposes) is the amendment that adds members' e-mail addresses to the definition of "association records." With this change, a CID member could request to inspect and copy that CID's member list, including the names, property address, mailing address, and e-mail address of members, unless those members have opted-out of permitting disclosure of email addresses.

Recommendation: If you are a member, notify your CID that you opt-out of sharing your name, property address, mailing address, and email address. If you are a Director, consider notifying the membership that they may opt-out of inclusion from the membership list.

Internal Dispute Resolution Participation Prior to Filing Litigation (§5910.1)

SB 323 will add a new code subsection to the Act, further clarifying a CID's required participation in its internal dispute resolution ("IDR") process and setting forth the requirement that a CID participate in its IDR procedure if requested by a member prior to filing a civil action in court against that member. Existing law requires that a CID provide a fair, reasonable, and expeditious IDR procedure, which includes the requirement that, if the IDR procedure is requested by a member, the CID must participate in the procedure. This new code section adds proverbial teeth to the requirement that a CID participate in the IDR procedure. Beginning January 1st, a CID may not file a civil action regarding a dispute in which a member has requested IDR unless the CID participates in good faith in the IDR procedures after a member invokes IDR.

Recommendation: Review your CID's IDR procedure. Your CID should be distributing a summary of its IDR procedure as part of its Annual Policy Statement.

Secret Ballot Elections (§5100)

Beginning January 1st, a CID will be required to hold an election for a seat on the Board in accordance with the procedures set forth in §5100 at the expiration of a Director's term, and at least once every four (4) years. Currently, the Act is silent, and the frequency of Director elections is only required to be as frequently (or infrequently) as a CID's governing documents require.

Recommendation: Check your Bylaws for compliance.

Election Rules (§5105)

Existing law required each CID to adopt election rules with certain procedures related to each CID's elections. Under SB 323, a CID will be required to ensure that its election rules require the retention of CID election materials. Among other requirements and powers relating to election rules, a CID's Inspector(s) of Elections will be required to deliver to each member a copy of the election rules, in addition to the ballot(s), at least 30 days before an election.

After January 1st, Section 5105 will include language relating to circumstances when a CID must, may, and may not disqualify a potential Board candidate nominee. A CID must disqualify a candidate for nomination if that person is not a member of the CID at the time of nomination. A CID may disqualify a person from nomination as a candidate, through its Bylaws or election rules, for four criteria, including not being a member of the CID for less than one year or if a potential nominee discloses (or if the CID becomes aware of) a past criminal conviction that would either prevent the CID from purchasing fidelity bond coverage or terminate the CID's existing fidelity bond coverage, if the potential nominee was elected. A CID may not disqualify a potential nominee for candidate for the Board if the person has not been provided the opportunity to engage in IDR.

Amending a CID's election rules will take longer after January 1st. Under existing law, election rules could be amended by following the procedures relating to operating rule changes, which require about at least 28-days' notice. After January 1st, election rules could not be amended within 90 days before an election.

Recommendation: Consider the amendment of your CID's election rules before December 31st, especially if your CID has an election in the first 90 days of 2020.

Inspector of Elections (§5110)

SB 323 will amend the Act's requirements relating to a CID's Inspector(s) of Elections to state that any third party that serves as a CID's Inspector of Elections may not also provide other services for the CID.

Current law allows a CID to expressly authorize a third party, who is employed or under contract to the CID to serve as an Inspector of Elections. This might include their lawyer or property manager. SB 323 removes that exception; the third-party Inspector(s) of Elections may not be employed or under contract to the CID other than serving as Inspector(s) of Elections.

A CID may continue to select one to three Inspector(s) of Elections, who may be voluntary poll workers with the county registrar of voters, licensees of the California Board of Accountancy, notary publics, or a member of the CID, so long as that member is not a director, candidate for director, or relative to a director or candidate for director.

Also, the new law would amend the Act to make it clear that an Inspector of Elections must perform all duties in a manner that protects the interest of all CID members, which requirement was not previously included in the Act.

Recommendation: Whether any of your CID's Inspectors of Elections is an individual or entity that is currently employed or under contract to the CID other than serving as an Inspector of Elections. If so, your CID should consider selecting new Inspector(s) of Elections, as appropriate.

Secret Ballot Procedures (§5115)

Beginning January 1st, CIDs will be required to follow additional steps in the Act's secret ballot procedure. In relation to nominations for elections, CIDs must provide notice of the procedure and deadline for submitting a nomination at least 30 days before any deadline for submitting a nomination. Also, CIDs will be required to provide notice of the following items at least 30 days before secret ballots are distributed:

- The date and time of the deadline to return the ballots, and the physical address where the ballots may be returned;
- The date, time, and location of the meeting at which the ballots will be counted; and
- The list of all candidates' names that will appear on the ballot.

Recommendation: Know your CID's timeline for officer elections. Assuming officers are elected at the Annual Meeting, the timeline would be as follows:

- At least 90 days from the Annual Meeting: the CID should send notice of the nomination procedure and deadline, select the Inspector(s) of Elections, and set the date of the Annual Meeting.
- At least 60 days from the Annual Meeting: the CID should provide notice of the deadline and location where ballots may be returned, the date, time and location of the Annual Meeting; and the candidates list.
- At least 30 days from the Annual Meeting: the CID should deliver the ballots and copy of the election rules.

If you have further questions regarding these new laws and their impact upon your common interest development, please contact Bill Scherer at wms@sfcounsel.com or Louis Sarmiento at ljs@sfcounsel.com.

- Written by William Scherer & Louis Sarmiento



Employment Law Updates: (1) Independent Contractor Classification (AB 5) and (2) Mandatory Sexual Harassment Training for Small California Employers

2019 has been a busy year in the employment law front. We update you on two substantial updates that impact employers and employees alike: (1) the legislative pronouncement of the reach of the ABC Test on independent contractor classification and (2) the brief extension for small employers to provide mandatory sexual harassment training.

Independent Contractor Classification (AB 5): Dynamex ABC Test is the Law

When the California Supreme Court decided *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, this marked effectively a seismic shift in the classification of employees v. independent contractors ("IC") for claims under California's Industrial Welfare Commission Wage Orders ("Wage Orders") leaving an after-shock of open questions in its wake. To recap, the *Dynamex* Court adopted the ABC Test for classifying ICs, which brought much needed clarity while making it more difficult to classify workers as ICs, but left a number of open questions. (Our September 2018 article, "Impact of *Dynamex* California Supreme Court Decision on Use of Independent Contractors," noted that the *Dynamex* opinion left a number of open questions, including retroactivity and possible application to non-Wage Order claims.)

To that end, California's legislature has brought some clarity to the *Dynamex* decision. On September 18, 2019, Governor Gavin Newsom signed Assembly Bill 5 ("AB 5") into law, which will now appear as California Labor Code Section 2750.3 and amended California Unemployment Insurance Code Sections 606.5 and 621. In brief, under AB 5, the ABC Test applies to claims grounded in the Labor Code, the Unemployment Insurance Code and the Wage Orders, which are essentially California's wage-and-hour laws.

Like any legislation, there are exceptions built into AB 5. For example, AB 5 exempts certain occupations from the reach of the ABC Test, including physicians, surgeons, dentists, lawyers, defined "professional services" occupations, certain direct salespersons and commercial fishermen working on a U.S. vessel, among others. While these specific occupations are "exempt" from the ABC Test, this does not mean that hiring entities have carte blanche to classify these occupations as independent contractors. Rather, AB 5 reiterates that the multi-factor, more flexible (and ambiguous) test(s) applied by California courts before *Dynamex*, commonly referred to as the Borello Factors Test, still apply.

Consequently, AB 5 will now control the issue of IC classifications. But the issue of retroactivity remains nebulous. AB 5 states that the ABC Test "does not constitute a change in, but is declaratory of, existing law with regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders" (emphasis added), but, in a later subsection, states that the ABC Test applies to "work performed on or after January 1, 2020."

We should expect possible future legislative clarification of AB 5 as prominent opponents and proponents, alike, continue to lobby for change in its application. Moreover, the California Supreme Court will be revisiting one of its open questions concerning retroactivity. Notably, on September 24, 2019, the United States Court of Appeals for the Ninth Circuit—withdrawing its own decision holding that *Dynamex* applies retroactively (*Vazquez v. Jan-Pro Franchising Int'l* (9th Cir. May 2, 2019) 923 F.3d 575, 588, withdrawn, 9th Cir. July 22, 2019) 930 F.3d 1107)—certified to the California Supreme Court the question: "Does *Dynamex Operations West Inc. v. Superior Court*, 4 Cal.5th 903, 232 Cal.Rptr.3d 1, 416 P.3d 1 (2018), apply retroactively?" And, on November 20, 2019, the California Supreme Court granted the Ninth Circuit's request to review that certified question. We should expect guidance on the retroactivity of *Dynamex* in the coming months.

Mandatory Sexual Harassment Training for Small California Employers

For those who have attended our Mandatory Sexual Harassment Trainings, we have emphasized the importance and the impact of the #MeToo movement on trainings to identify, prevent, and remedy discrimination, harassment, and retaliation in the workplace.

In the past, California law only required mandatory harassment training for supervisors employed by companies with 50 or more employees, but on September 30, 2018, the Governor signed SB 1343 into law that required employers with as few as 5 employees ("small employers") to provide sexual harassment trainings of one-hour (for non-supervisors) and two-hours (for supervisors) every two years effective January 1, 2020.

While employers scrambled to comply with the January 1, 2020 deadline, in a last-minute reprieve, the Governor extended the deadline for small employers to provide the above sexual harassment training to their entire workforce from January 1, 2020 to **January 1, 2021**. (See SB 778.) So, small employers can breathe a sigh of relief as 2019 draws to a close, but should make efforts to comply with these mandatory training requirements, which will educate their workforces on #MeToo issues and prevent discrimination, harassment, and retaliation in the workplace.

We here at Scherer Smith & Kenny LLP remain available to address any questions you may have related to independent contractor classification and any other employment- or business-related issues. For additional information, please contact Denis Kenny at dk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or John Lough, Jr., at jl@sfcounsel.com

- Written by Denis Kenny



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Partner Notes



Brandon Smith

This Fall I was lucky enough to attend my 25th USF Law School reunion. Reunions tend to bring up strong feelings for people and this was no exception. Some classmates reacted with the standard "everyone I want to see, I already see" response when asked if they were going to go, while others said they were looking forward to seeing everyone. For me, reunions offer the opportunity to reconnect with classmates, many of whom I was close friends with during my time in law school, as well as to meet or get to know others better. As we move through life I find that these reunions offer a fascinating chance to see the different paths that friends and classmates have taken to this point in their lives. How choices they made earlier worked out financially, emotionally and physically.

For some it was linear. They took a job out of law school and are still working for the same firm (the minority for sure!). Others have moved firms multiple times, and often transitioned to different areas of the law or moved from plaintiff to defense; prosecutor to defender, or vice versa. Still others left law entirely to raise kids or pursue a new career entirely, often going into business or real estate. On the personal side, some are married, some divorced and some chose to stay single.

It was a great reminder that we cannot assume life will take a linear path. When we all graduated many of us assumed that we'd live forever, get jobs, make partner, raise a family and retire. Life of course does not work that way. Some friends did get jobs, marry, become partner and are starting to look at retiring but that is the vast minority. The reality is that some have passed away, some stopped practicing law or never started to begin with, finding it too difficult to get a job during the recession of the early 1990s. Some took the "safe" route when we graduated by taking a job with a big law firm only to have the law firm shut down unexpectedly (not too surprising in hindsight given the high number of large law firms that have closed or consolidated over the past two and half decades). Still others, like myself, decided to take the "risky" path and go out on our own with partners or by themselves and develop their practice.

The great thing though was that the individuals who encountered these changes or obstacles largely emerged out the other side stronger and wiser. They took the lessons they learned through going through these changes and have applied them to their lives and to their practice and are better individuals and better attorneys because of it. It was these stories that reminded me of why I like attending reunions and reconnecting with friends and classmates after long periods of time. I hope that you remember to expect the unexpected and that you will be able to learn when you are inevitably faced with life's changes.

- Written By Brandon Smith