



Cal ISBOA Update: New Legal Developments for Independent Schools in 2020

PRESENTED BY SUSAN ANSBERRY
NOVEMBER 20, 2019

© FOLGER LEVIN LLP 2019

Key Legal Developments for Schools in 2020

Independent Contractor
Classification Changes

New Limits on Medical
Exemptions for Vaccinations

Requiring Employee Arbitration
Agreements Now Unlawful

Leave of Absence Requirements
Change

Harassment Prevention Training
Deadline Extended

Independent Contractors Before 2018

- Multi-factor tests from different courts and agencies
- “Totality of Circumstances”
- Control most important factor



3

The *Borello* Multi –factor Test

- Is the work separate from the company’s regular business?
- Does the worker supply the equipment, tools, and the place for the work?
- Is skill required for the work?
- Is the work a type normally done without supervision?
- Does the worker have a real opportunity for profit or loss depending on their own managerial skill?
- Are the services to be performed for a limited time?
- Is the worker paid by the job rather than the hour?
- Do the parties believe they are creating an independent contractor relationship?

4

Dynamex's New "ABC" Test in 2018

- Just 3 Factors
- Employer must prove each one
- No "Totality of Circumstances" consideration



5

The Dynamex ABCs

A

Worker is free from hiring entity's control and direction over the work; AND

B

Work is outside the usual course of hiring entity's business; AND

C

Worker is actually and customarily engaged in an independent business of the same nature.

6

AB 5—Dynamex *Plus*

Expands Application of Dynamex “ABC” test

- Wage Orders
- Labor Code
- Unemployment
- Workers’ Compensation

Effective January 1, 2020, except

- Retroactive for at least Wage Order and certain Labor Code claims
- Effective July 1, 2020 for workers’ compensation

Adds long list of exemptions where *Borello* test will still apply

- Specific Occupations
- Professional Services Contracts
- Construction Subcontractors
- Business-to-business contracts
- Referral Agencies
- Motor Clubs
- Real Estate and Repossession Agencies

7

AB-5 Professional Services Exemption

- Includes Marketing, Human Resources Administration, Graphic Design, Grant Writing, Fine Artists, Freelance Writers or Editors, Still Photographers and others
- The individual must meet criteria including:
 - Maintains a business location separate from hiring entity’s location
 - Holds business license and required professional licenses or permits
 - Has ability to negotiate or set their own rates
 - Sets own hours outside of project completion dates and reasonable business hours
 - Customarily engages in the same type of work for other customers
 - Exercises independent judgment and discretion
 - Limits on the amount of work for certain professional services

8

AB-5 Business Service Provider Exemption (other than licensed contractors)

- Sole proprietorship, partnership, limited liability company, limited liability partnership or corporation (but not individual worker)
- The business service provider must meet criteria including:
 - Free from hiring entities control
 - Provides services directly to the contracting business, not the business's customers
 - Has a written contract
 - Has any required business license or business tax registration
 - Maintains a business location separate from hiring entity's location
 - Customarily and actually engages in the same type of work for other customers and advertises its services to others
 - Provides its own tools, vehicles and equipment
 - Has ability to negotiate or set its own rates
 - Can set its own hours and work location consistent with the nature of the work

9

Remember!



- The “exemptions” to AB 5 are complicated, with different criteria for each and a lot of open questions.
- Even if an “exemption” to AB 5 applies, the worker still has to pass the *Borello* test for independent contractors.
- Misclassifying a worker as an independent contractor can result in significant penalties whether or not the worker wanted to be an independent contractor.

10

The Fight Over Medical Exemptions for Vaccinations—SB 276 and 714

New requirements for
physicians to issue
medical exemptions

New requirements for
schools to admit or
continue to enroll
students who have not
been fully immunized

New review process
for medical
exemptions

Requirements for Medical Exemptions— January 2021

Physicians must use a
standardized electronic form to
be provided by the Department
of Public Health

Physicians must submit all
exemptions to the California
Immunization Registry
(CAIR)

Requirements for School Enrollment

- Beginning July 1, 2021, a school cannot “unconditionally admit or readmit” a student *or* “admit or advance” any student to 7th grade unless the student is fully immunized or has a medical exemption that complies with the new law.
- Medical exemptions issued *before* January 1, 2020 are grandfathered until the student enrolls in the next grade span-- (a) birth to preschool, (b) transitional/kindergarten to 6th grade, and (c) 7th to 12th grade
- Schools are prohibited from accepting exemptions in some cases, such as when a physician or surgeon is on probation for actions relating to the immunization standards of care.

13

What
about
exemptions
issued in
2020?

Students are
required to get a
new medical
exemption
complying with the
new law in order to
enroll in any grade
in 2021

14

Grandfathering Students who had Medical Exemptions in Fall 2019

1st
grader

- No new exemption required until 7th grade in Fall 2025

6th
grader

- Must have a new exemption issued after January 1, 2020 to enroll in 7th grade in Fall 2020 *and* an exemption under the new law for Fall 2021

15

Reporting and DPH Review

- Schools must continue to report on students' immunization status *at least* annually.
- The Department of Public Health will review all medical exemptions from:
 - Schools with an overall immunization rate of less than 95%;
 - Schools that do not submit the required report; and
 - Physicians and surgeons submitting more than five exemptions per year.

16

AB-51:
California
continues to
try to ban
employment
arbitration
agreements

Unlawful to require as a condition of employment or continued employment that employees agree to arbitrate FEHA or Labor Code claims.

Applies to agreements entered into, modified or extended after January 1, 2020.

Not unlawful to enter into *voluntary* arbitration agreements with employees

“Opt-out” agreements are considered condition of employment

Current or future arbitration agreements governed by the Federal Arbitration Act are not invalidated (just unlawful!)

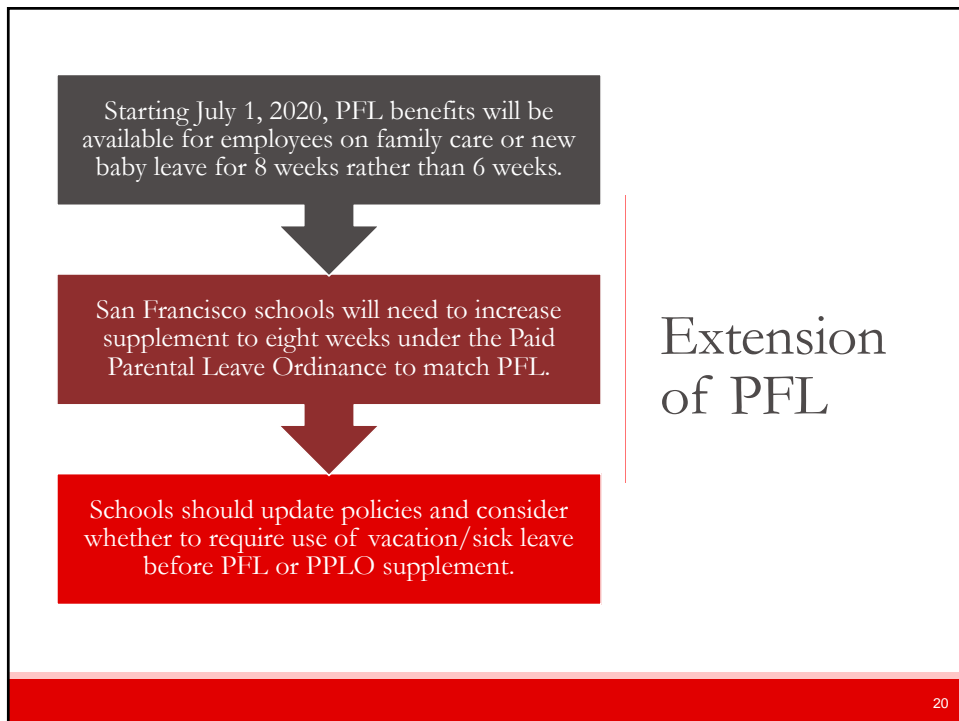
17

What should
schools do
about
arbitration
agreements?

- ✓ Cease imposing arbitration agreements as a condition of employment after January 1, 2020 or risk claims for violation of law.
- ✓ Review whether arbitration agreements are in the school's interest. See our article [here](#) on the pros and cons of arbitration.
- ✓ For future arbitration agreements, make clear agreement is voluntary.

18

Leaves of Absence



Organ Donor Leave Extended

- Current law
 - Requires 30 business days of job-protected paid leave (with benefits) for organ donation and 5 business days for bone marrow donation
 - Leave does not count against FMLA/CFRA entitlement
 - Applies to employers with 15 or more employees
- Effective January 1, 2020, employers must provide an additional 30 business days of unpaid leave for organ donors (with benefits)

21

Schools
should
review leave
of absence
forms and
policies

- ✓ Organ donor and PFL/SFPPLO policies
- ✓ New CFRA medical certification form
- ✓ New SDI and PFL Brochures
- ✓ Amendment to California lactation accommodation law requires new language in policy and new notices to pregnant employees and new hires
- ✓ **BUT** be careful of new US DOL FMLA forms that do not comply with California law.

22

US DOL
Opinion
Letters:
FMLA leave

Mother entitled to intermittent FMLA leave to attend children's IEP because IEP would include speech pathologist, OT/PT and psychologist addressing children's care.

US DOL Opinion Letter FMLA 2019 2-A (8/8/2019)

Employer is required to designate leave as FMLA-covered within 5 business days rather than let employees voluntarily defer FMLA designation to first exhaust sick leave and vacation.


US DOL Opinion Letter FMLA2019-a-A (March 14, 2019)

23

Harassment Prevention Training Deadline Extended to January 2021

- By January 1, 2021, employers with 5 or more employees must provide:
 - 2 hours of harassment prevention training to all supervisors
 - 1 hour of harassment prevention training to all non-supervisors
 - Additional training every two years thereafter
- Employers that provided training in 2019 are not required to provide refresher training until 2021.
- New non-supervisory employees or employees promoted to supervisor must receive training within six months of hire or promotion.
- Beginning January 1, 2020, employers must provide training to seasonal or temporary employees hired to work for less than 6 months within 30 calendar days of hire or 100 hours of work, whichever occurs first.

24



2020 “To Do” List

- Review status of all independent contractors
- Start preparing for new vaccination requirements
- Review arbitration agreements
- Update leave of absence policies
- Add temporary and seasonal employees to harassment prevention training schedule

25



Questions?

26

-
- This presentation provides general information and is not intended to provide legal advice as to any specific factual situation.
 - Please remember that many of the laws discussed in this presentation may be updated or clarified by legislation, court decisions or regulatory action.
 - If you have questions about the application of these laws to a particular situation, you should consult with legal counsel. The attorneys in our **Educational Organizations Practice Group** would be happy to assist you.

27

**Folger
Levin**

SUSAN ANSBERRY
(415) 625-1060
sansberry@folgerlevin.com
www.folgerlevin.com
