

FINEX Observer

Fall 2019 Edition

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Welcome to the Fall 2019 edition of the FINEX Observer. This edition highlights the recent and emerging trends in employment practices liability (EPL) both domestically and internationally.

In this edition, we discuss the EPL environment in the state of California specifically in how workers are classified in today's gig economy and why EPL claims are challenging in the state. We also present a current look into discrimination against LGBT+ individuals in the workplace including the benefits of a culture of inclusion and diversity. We'll also discuss the trends, issues and risks surrounding the use of artificial intelligence (AI) in employment-related processes. We also provide an overview of the complex interplay between the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act Amendments Act (ADAAA). Finally, we'll provide an overview of employment practices liability trends in other regions of the world.



Classifying workers in the gig economy – A view through the lens of changing California law

By John M. Orr and Jullly Y. Rojas

The emerging nature of employment in today's "gig" economy has given rise to changes in the laws of the country's most populous state. From the 2018 California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* (*Dynamex*), to the state legislature's recent codification of *Dynamex* in Assembly Bill 5 (AB 5), many companies may be compelled to re-classify certain "independent contractors" as "employees." Changes in worker classification have the potential to impact employers and employees relative to wages, unemployment benefits, employment practices liability insurance and beyond. Because of California's well-earned reputation for being a first to enact transformative legislation, the issue has national significance.

Background – The gig economy and growth in the use of independent workers

The gig economy in 2019 is more expansive than ever, with the number of independent workers in the U.S. having increased by more than 19% in a 10-year period.¹ The gig economy, generally understood to include individuals paid by the "gig" (musicians, freelance journalists, ride share and truck drivers, or temporary workers), has grown, in part, due to greater accessibility to jobs through social networks and digital platforms that connect consumers seeking specific services to individuals who are willing to provide such services.

With the expansion of the gig economy, independent workers have enjoyed access to new sources of revenue and new work opportunities. Employers who rely on independent workers also have benefitted from technology platforms that put them in touch with candidates. Notwithstanding these benefits, and as discussed below, a company's classification of gig workers as independent "non-employees" may not hold up under state or federal law. In this regard, companies may be compelled to treat certain independent contractors as employees, giving rise to numerous corporate, employment and related financial issues.

For many of these companies, whether a worker is an employee or independent contractor also impacts how they view their employment practices liability insurance program. Specifically, companies must question how many employees they actually have, in what locations they reside, and how they should be evaluating the adequacy of limits they purchase.

Dynamex Operations West, Inc. v. Superior Court

In April 2018, the California Supreme Court issued a landmark decision entitled *Dynamex Operations West, Inc. v. Superior Court*. In *Dynamex*, the state's highest court adopted a test commonly referred to as the "ABC" test, which was a departure from the more traditional "right to control" test. Unless a business can satisfy the ABC test, an individual designated as a contractor by a company would be deemed, instead, to be an employee. For a business in the gig economy, this could result in the classification of hundreds, if not thousands, of gig workers as employees, and with it, increased financial responsibilities for the business.

Under the ABC test, a worker is presumed to be an employee *unless* the hiring business can establish three factors for such worker to be properly classified as an independent contractor:

- (A) The worker is free from the control and direction of the hirer in connection with the work, both under any contract for the performance of such and in fact.
- (B) The worker performs work that is outside the usual course of the hiring entity's business.
- (C) The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

¹ Istrate, Emilia and Harris, "The Future of Work: The Rise of the Gig Economy," National Association of Counties, November 2017, <https://www.naco.org/featured-resources/future-work-rise-gig-economy>



The underlying case in *Dynamex* concerned a class action by delivery drivers alleging their employer, a trucking company, had misclassified them as independent contractors. The trucking company maintained that the classification of these workers as independent contractors was based on a contractual arrangement that deemed all drivers as independent contractors rather than employees. The drivers, however, argued the company's misclassification led to numerous violations of California wage orders and the state's Labor Code.

The court analyzed the classification issue in the context of wage orders, which impose obligations relating to wages, maximum hours and basic working conditions of California employees. Recognizing the history and purpose of the wage orders to provide protection to *all* workers who would ordinarily be viewed as working in the hiring business, the court held that the proper standard to determine if a worker is properly considered an independent contractor is the ABC test articulated above.

Notably, *Dynamex* represents a departure from prior state case law which sets forth a multi-factor standard to distinguish employees from independent contractors. (S.G. *Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 [1989]) Under *Borello*, a principal factor was the "right to control" – whether a hiring business had the right to control a worker's manner and means of accomplishing the services provided. By replacing it with the new ABC test, *Dynamex* moved away from a standard that emphasized "control" and replaced it with a broader standard requiring, among other factors, to show that a worker performs work outside the usual course of the hiring business. Thus, when determining whether a worker is an employee or an independent contractor for purposes of obligations imposed by a wage order, the ABC test is the new legal standard that applies in California.

California Assembly Bill 5 – *Dynamex* codified

On the heels of *Dynamex*, in September 2019, the California legislature passed AB 5, scheduled to take effect January 1, 2020. The new law largely codifies the ABC test adopted in *Dynamex*, meaning the test would serve as the standard in California for determining employment status. While certain industries or professions are exempt – such as doctors, architects, engineers and independent hair stylists – industries, such as the ride share industry, are not.

As of this writing, debate remains on the extent of impact the law will have on these companies. In this regard, arguments have been made challenging whether the work that the independent contractors do falls within the “usual course” of the companies’ business.

Stated differently, *Dynamex* and AB 5 may have established standards for the classification of workers in the state, but whether those standards will or will not apply to any given company may need to be resolved in potentially time-consuming and costly litigation.

In addition, many affected companies are backing efforts to put the issue before the California voters, pledging millions of dollars in support of a ballot initiative that could have the effect of undoing AB 5.

How *Dynamex* has played outside California

Although *Dynamex* and AB 5 represent the standard to determine the independent contractor vs. employee question in California, the standard is not followed in all jurisdictions. For example, the Department of Labor (DOL) opined recently on whether gig workers in a “virtual marketplace company” are properly classified as employees or independent contractors under the Fair Labor Standards Act (FLSA). Unlike the ABC test in *Dynamex*, the DOL’s focus is on whether a worker is “economically dependent” on a potential employer.

In determining such economic dependence, the DOL applies a six-factor test, including the nature and degree of the potential employer’s control. In this case, the hiring business provided an online and/or smartphone-based referral service connecting workers to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting and household services. According to agreements in place, only the

workers would provide services to consumers in the virtual marketplace, and the gig workers (or service providers) were classified in the agreements as independent contractors.

Applying the facts to the six-factor test, the DOL concluded that the gig workers were independent contractors, not employees, as the facts demonstrated economic independence rather than economic dependence, in the working relationship between the hiring entity and its service providers.

Similarly, in an opinion letter of its own, the National Labor Relations Board (NLRB), through the Office of General Counsel, determined that certain drivers of ride-sharing company are independent contractors, not employees, for purposes of the National Labor Relations Act. In making that determination, the NLRB applied a common-law agency test by examining the factors through “the prism of entrepreneurial opportunity” set forth in prior NLRB precedent.

Weighing in favor of these drivers as independent contractors was the fact that they have “virtually complete control of their cars, work schedules and log-in locations, together with their freedom to work for competitors.” According to the NLRB, these factors provided them with significant entrepreneurial opportunity given that, at any moment, “the drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether.”

These cases demonstrate that there is no one test or uniform standard that answers the question of whether workers are properly classified as independent contractors or employees. When viewed through the lens of *Dynamex* and AB 5, it appears that the status of gig workers as independent contractors could be more difficult to establish under the ABC test. Companies that are based on a gig platform whose core services are to provide connections between contractors and customers would have to show that services provided by a gig worker are outside of the company’s core business – a fact that could prove difficult for companies to establish. When viewed through the lens of other standards or through the prism of “entrepreneurial opportunity,” however, the outcome could very well be different and favor an independent contractor status.

Impact on employment practices liability insurance

When companies purchase employment practices liability (EPL) insurance, a threshold area of underwriter inquiry is headcount. How many employees does the company have overall? How has the number of employees changed year over year? How is headcount broken down by location? Pre-Dynamex, answers to these and similar questions were quantifiable in nature. Post-Dynamex and AB 5, the answers may be complicated by broader legal scrutiny. The cost of EPL coverage potentially lies in the balance.

Another factor for companies to consider is how changes in employee count should affect the amount of insurance the company purchases. If the Dynamex decision and AB 5 force certain companies to acknowledge a headcount increase, how does that affect decisions to increase limits of liability and, if so, by how much? Seeking guidance from their insurance broker will be essential to addressing these questions.

Finally, affected companies should seek the guidance of their brokers on specific EPL policy wording that may be negotiated to mitigate coverage uncertainties. Although traditional EPL policies are not designed to cover employee classification and related wage claims, companies may wish to explore customized wording to ensure that the extent of new risk emerging from Dynamex and AB 5 is addressed as they intend.

Key takeaways

Just as the gig economy is evolving, so too are the laws with respect to classification of workers. The import of *Dynamex* and AB 5 in terms of scope and effect remains to be seen. As a result, whether workers are classified as independent contractors or employees should be an often-asked question – the answer today may not be the same down the road.

In light of potentially conflicting authorities, the classification and treatment of workers will give rise to numerous issues ranging from how classification should be handled, whether there are contractual or other legal workarounds, to how EPL insurance may be impacted. Ultimately, companies should confer with employment and corporate counsel, as well as their insurance brokers.



Where are we 50 years post-Stonewall?

By Talene M. Carter and Alison Miller

This year marks the 50th anniversary of the Stonewall Uprising and the start of the gay rights movement. A lot of progress has been made since then – same-sex marriages have been legalized by the U.S. Supreme Court, the LGBT+ community's voice is being heard, and many states and cities have enacted legislation that specifically prohibits discrimination based on sexual orientation and gender identity.

Despite this progress, discrimination against LGBT+ individuals in the workplace is still prevalent. Twenty percent of LGBT+ individuals have experienced discrimination based on sexual orientation or gender identity when applying for jobs;¹ 22% have not been paid equally or promoted at the same rate as their peers.² In 2015, 27% of the transgender population said they were not hired, were fired or were not promoted due to their gender identity or expression;³ and 80% of the transgender population who were employed experienced harassment or mistreatment on the job or took steps to avoid it.⁴

Part of the reason for the above may be that the question remains as to whether federal law, Title VII, covers discrimination based on sexual orientation and gender identity. Title VII prohibits hiring or employment discrimination on the basis of an employee's race, color, religion, sex or national origin. The question is: What does "sex discrimination" entail? Specifically, does it include discrimination based on sexual orientation and/or gender identity? The U.S. Supreme Court set the stage for this discussion over 20 years ago in *Price Waterhouse* and *Oncale*, but there is still a lack of clarity among the courts, leaving the issue unresolved.

There may soon be less uncertainty as to whether Title VII prohibits sexual orientation discrimination and gender identity discrimination. Lower courts are split on this important issue, which has resulted in contradictory decisions across our country's legal landscape.

Division between courts

In February 2019, the U.S. Circuit Court of Appeals for the Fifth Circuit ruled that discrimination on the basis of sexual orientation is not prohibited by Title VII (*Wittmer v. Phillips 66 Company*). The Eleventh Circuit had already taken the same position in its 2017 ruling in *Evans v. Georgia Regional Hospital*.

In contrast, two circuits which have ruled that Title VII prohibits employers from discriminating based on sexual orientation are the Second and Seventh Circuits (*Zarda v. Altitude Express* and *Hively v. Ivy Tech Community College*). Likewise, in 2018, the Sixth Circuit held that Title VII protects employees from discrimination on the basis of transgender status (*R.G. and G.R. Harris Funeral Homes v. EEOC*).

Contrasting positions of executive agencies

Adding to the legal divide are the differing positions of the executive agencies. The EEOC's view of the law is that Title VII does apply to sexual orientation and gender identity. In fact, LGBT+-based sex discrimination charges have steadily increased since January 2013 (when the EEOC first started tracking this data). Further, the EEOC has obtained approximately \$6.4 million in monetary relief for the claimants, as well as numerous employer policy changes. The Justice Department on the other hand outlined its position in an October 2017 letter from then Attorney General Jeff Sessions stating that Title VII does not prohibit discrimination based on gender identity and transgender status. Further, the Department of Justice filed a brief in the *R.G. and G.R. Harris Funeral Homes v. EEOC* case arguing that Title VII does not prohibit sexual orientation and gender identity discrimination.

¹ National Public Radio, the Robert Wood Johnson Foundation, and The Harvard T.H. Chan School of Public Health, *Discrimination in America: Experiences and Views of LGBTQ Americans* (2017).

² *Id.*

³ Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, and Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality, 2016).

⁴ *Id.*



State-specific legislation

Despite the lack of clarity at the federal level, many states and cities have taken matters into their own hands and passed state-specific legislation addressing this issue. For example, 20 states and the District of Columbia prohibit discrimination based on sexual orientation and gender identity; six states prohibit discrimination against public employees based on sexual orientation and gender identity; and five states prohibit discrimination against public employees based on sexual orientation only.

Embedding a culture of inclusion and diversity throughout organizations

In addition to the legal developments, many organizations are moving beyond diversity-oriented recruiting strategies to embedding inclusion and diversity throughout the entire employee experience and further, establishing healthy company cultures where all employees feel a sense of safety, self-worth, opportunity, acceptance, and can bring their authentic selves to work. The outcome of implementing a healthy company culture is increased productivity, increased brand recognition, risk mitigation (i.e., fewer employment-related claims) and increased talent retention and acquisition.

To attain or maintain an inclusive, healthy culture, below are some best practices that can be implemented:

- Leadership is in the best position to shape the culture of an organization - ensure that leadership support of inclusion and diversity initiatives is clearly articulated to the entire organization and visible.
- Ensure that your harassment and discrimination policies and trainings include sexual orientation and gender identity as prohibited forms of discrimination and harassment and remove gendered language from such policies.
- Ensure that management is trained properly on how to treat all employees in a non-discriminatory manner.
- Include options beyond male and female on employee surveys and documents and provide opportunities for employees to voluntarily list pronouns on email signatures and name tags.
- Ensure that all policies, benefits, job offers and promotions apply equally to all employees and applicants.
- Work with industry experts to review appropriate risk transfer strategies and ensure your employment practices liability insurance policy provides coverage for sexual orientation, gender identity and gender expression discrimination claims.

Given this divide, the Supreme Court granted certiorari and will hear arguments on three cases next term: *Bostock v. Clayton, Altitude v. Zarda* and *R.G. and G.R Harris Funeral Homes v. EEOC*. The consolidated cases of *Bostock v. Clayton* and *Altitude v. Zarda* concern sexual discrimination on the basis of sexual orientation, and involve a child welfare services coordinator and skydiving instructor, respectively, who argued that they were fired due to their sexual orientation. The third case, *R.G. and G.R Harris Funeral Homes v. EEOC*, involves gender identity where a funeral director alleged she was fired for being transgender.

The Supreme Court is now poised to resolve this issue which has divided the courts and executive agencies when the next term begins in October 2019. However, there is no real consensus as to how they will rule. One of the possible outcomes is that the Supreme Court defers to Congress. To that end, on May 17, the House of Representatives passed the "Equality Act of 2019" which would prohibit discrimination based on sexual orientation and gender identity in employment, housing, public accommodations, education, federally funded programs, credit and jury service. While it has not passed the Senate yet, it is backed by many large organizations.

California nightmares – why EPL claims are so challenging for Golden State employers

By Adam Cantor

In their 1965 hit song “California Dreamin’,” The Mamas and the Papas harmonized about a Golden State which was viewed as a destination spot by many Americans attracted by beautiful beaches, mild weather and a dynamic economy. But for employment practices liability (EPL) underwriters in 2019, it’s more like a dissonant “California Nightmare,” where the struggle to keep pace with increased claims and expanding losses doesn’t seem to end.

What makes California such a tough state for employers and, by extension, EPL insurers? There are multiple factors, including (1) the influence of the *Dynamex* decision in 2018, (2) the PAGA Act and (3) new California-specific laws enacted in 2019. We’ll briefly address each in this article, then conclude with a few additional thoughts and takeaways.

Dynamex and its fallout

April 2018 saw the California Supreme Court issue a landmark decision in the case of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. The decision jolted the business community by rejecting 30 years of precedent and making it much harder for companies to designate workers as independent contractors. We’ll take an in-depth look at the *Dynamex* decision and whether it applies retroactively (per the *Vazquez v. Jan-Pro Franchising Int’l Inc.* case) later in this issue, in the article “[Classifying workers in the gig economy – a view through the lens of Dynamex](#).” Simply note for now that the Court embraced a presumptive standard that all workers are deemed to be employees (instead of independent contractors), while putting the burden on employers to overcome that presumption by proving each of the requirements in *Dynamex*’s new ABC test, a rigid and formulaic test for determining whether a worker is properly classified as an independent contractor for California wage order claims.

The *Dynamex* and *Jan-Pro* decisions have major implications for California businesses that rely on independent contractors (e.g., gig economy companies) or franchises (e.g., the Ninth Circuit defendant Jan-Pro, an international commercial cleaning company). If *Dynamex* is ultimately held to apply retroactively, it could subject employers to potential liability for misclassifying workers as contractors as far back as 2014 and might even compel some businesses to simply reclassify contractors as employees and change pay and benefits (at much higher costs for those businesses).

By restricting when companies can classify workers as independent contractors, *Dynamex* raises labor costs for California businesses (e.g., in the form of increased overtime, sick leave and minimum wage benefits now owed to employees). In addition, misclassification of a worker as an independent contractor carries many risks and potential liabilities for businesses including wage and hour liability, Employment Development Department (EDD) fines and assessments, IRS fines and assessments, I-9 violations, penalties for violation of state workers compensation insurance laws and liability for unpaid premiums, entitlement of misclassified workers to coverage under the company’s employee benefit plans, and penalties for willful misclassification.

For businesses, the only positive thing about *Dynamex* is that it currently applies only to wage order claims. For claims not brought under wage orders – such as claims based on labor statute violations, which would include most other types of EPL wrongful act claims, e.g., wrongful termination, discrimination, etc. – courts can continue to rely on the more flexible multi-standard *Borello* test¹ for classifying workers as employees versus contractors. (See *Garcia v. Border Transportation Group, LLC*, 28 Cal.App.5th 558, Oct. 22, 2018.) The Appellate Court in *Garcia* found no reason to apply the ABC test categorically to every working relationship, holding that the more flexible *Borello* test should apply when a claim is predicated solely on the Labor Code.

¹ Under the more flexible *Borello* test, the primary factor for determining contractor status is whether “the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”

Garcia aside, not everything is settled. Assembly Bill 5 (AB 5) is currently pending before the California legislature and is being closely watched. It is the most consequential labor bill of the year. While AB 5, if passed, would exempt certain occupations from *Dynamex*'s ABC test, it would also codify *Dynamex* and extend that decision to all provisions of the Labor Code unless another definition of "employee" is provided. The ABC test would then apply to a labor-code claim for wrongful termination in violation of public policy – a typical, garden variety EPL claim. That will certainly have a negative effect on EPL claims experience.

Whatever the outcome, it is clear that *Dynamex* and its fallout have had a massive impact on workers, businesses and entrepreneurs considering doing business in the Golden State.

PAGA

Fifteen years ago, California set up a powerful tool for enforcing its complex labor and wage laws. The Private Attorney General Act of 2004 (or PAGA) provides employees injured by their employer's Labor Code violations with an opportunity to file private actions for statutory penalties on behalf of him or herself and other aggrieved employees, as well as the State of California. PAGA thus allows an individual employee to stand in the shoes of the government agency that enforces the labor laws and sue the employer on behalf of a class of company employees, asserting the rights of all injured workers. While the intent of the law is to protect workers by "achieving maximum compliance with state labor laws," in reality, PAGA has allowed predatory trial lawyers to take advantage of it and has resulted in a flood of litigation against California businesses, often over minor or technical violations of the law where the employee(s) suffered no harm.

Because PAGA representative actions can carry substantial liability for employers, insurance companies often exclude coverage for wage and hour claims under their EPL policies. However, over the past few years, as certain insurers have expanded their policies to include some wage and hour coverage, the insurance market's exposure to PAGA wage actions has correspondingly increased.

Moreover, PAGA actions are not just limited to wage and hour claims – they can also involve typical covered EPL wrongful act claims. For example, in January 2019, a gender discrimination lawsuit was filed in San Diego Superior Court under PAGA against a law firm and five of its current and/or former male leaders by a female equity partner representing a class of similarly situated female employees at the firm. Whether the underlying PAGA liability is or is not covered by

insurance, the defense costs in litigating the claim may well be – and those costs can be quite high. So PAGA is another component of California's unique legal environment that results in more claims and, consequently, more worries for EPL underwriters.

New California laws for 2019

In 2018, the California Legislature passed some labor and employment bills signed by then Governor Brown. These laws became effective on January 1, 2019 and include:

- **SB 1300** – Significant New Protections and Prohibitions Under the California Fair Employment and Housing Act (FEHA)
 - This law makes a sweeping change to the landscape in which FEHA harassment claims are litigated by making it easier for employees to bring such claims, while simultaneously making it much harder for employers to obtain quick dismissals (noting that harassment cases "are rarely appropriate for disposition on summary judgment"). In SB 1300, the California legislature has rejected the higher "severe or pervasive" standard for unlawful harassment established by the U.S. Court of Appeals Ninth Circuit; instead, a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct unreasonably interfered with plaintiff's work performance or created an intimidating, hostile or offensive working environment.
- **SB 1343** – Harassment Prevention Training Requirements Extended to Smaller Employers and Nonsupervisory Employees
- **SB 820** – Settlement Agreements Cannot Prevent Disclosure of Factual Information Related to Sexual Harassment or Discrimination Claims
- **SB 224** – Makes it easier to bring sexual harassment claims under California Civil Code Section 51.9
 - One element for a sexual harassment claim in California requires that there is a "*business, service or professional relationship between the plaintiff and defendant*," and SB 224 adds elected officials, lobbyists, and "directors or producers" to the statute's non-exhaustive list of such relationships. Another element of the law required that there was an "*inability by the plaintiff to easily terminate the relationship*," but SB 224 has removed that element thereby making it easier for plaintiff to bring a claim. Finally, SB 224 makes it unlawful for a person to deny, or to aid, incite or conspire in the denial of rights created by section 51.9.



Ok, so California's tough...but is it really unique?

So far, we have examined why the Golden State's legal environment presents some real challenges for companies vis-à-vis exposure to EPL claims. But is California really an outlier, or are other states and jurisdictions moving closer to its model? Perhaps it is the latter. For example, New York has rolled out a slew of new, broad, pro-worker employment laws in 2019 which are leading some to question whether New York is the new California! Some of the NY highlights include:

- **NYS Assembly Bill A08421** – Similar to California's SB 1300, it removes the requirement that workplace harassment be "severe or pervasive" to constitute a hostile work environment in discriminatory or retaliatory harassment cases. The "severe or pervasive" test was the prior standard under the New York State Human Rights Law (NYSHRL). The sweeping bill also realizes a number of other pro-worker changes that likewise inflate employers EPL claim exposures, including:
 - Makes the NYSHRL applicable to all employers regardless of size, by removing the prior "four-employee threshold"
 - Expands 2018's non-disclosure and mandatory arbitrations restrictions related to sexual harassment claims to all discrimination claims
- Requires (rather than permits) courts to award attorneys' fees to a prevailing party under the NYSHRL where the employer has committed an unlawful discriminatory practice; the previous standard applied to cases under the New York
- Enlarges the statute of limitations for administrative charges before the NYS Division of Human Rights from one year to three years
- **NYS Senate Bill S6209** – Upon signing by the governor, the law will immediately take effect to clarify that race discrimination under the NYSHRL will now include "traits historically associated with race, including but not limited to, hair texture and protective hairstyles." For example, the law will bar as discriminatory a company grooming policy that prohibits twists, braids, cornrows, Afros or fades, or which requires employees to change the state of their hair to conform with company appearance standards.
- **GENDA: Gender Expression Non-Discrimination Act** – Effective February 2019, GENDA makes it illegal under the NYSHRL to refuse to hire, fire or discriminate based on an employee's gender identity or expression. Gender identity or expression is defined as a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.

- **New York City's Marijuana Testing Ban** – Enacted May 10, 2019, it will become effective one year from now. This law makes it an unlawful discriminatory practice (under NYC's Human Rights Law) for employers to require prospective employees to submit to marijuana or THC testing as a condition of employment. There are exceptions to the law for some types of employment (e.g., certain types of law enforcement, medical and child supervisory positions) and employers can still forbid marijuana use at work and prohibit employees from working while impaired.

Another example is Illinois. In June 2019, and similar to recently passed CA and NY legislation, the Illinois legislature passed a 'MeToo-inspired bill (Public Act 101-0221) which expands and reforms sexual harassment and discrimination law by creating extensive employer obligations to prevent workplace discrimination and harassment and to increase employee protections. The bill was signed into law in August. The new law (1) prohibits unilateral agreements to arbitrate claims for discrimination, harassment and retaliation for complaining about discrimination or harassment; (2) changes sexual harassment reporting and training requirements; and (3) impacts how union representation is handled during sexual harassment claim proceedings. It undoubtedly raises the compliance bar for employers and subjects Illinois companies to increased EPL claims exposure.

Key takeaways

When pulling together a management and executive risk liability program, clients often focus on the trendy coverages which have either the board's or the media's frequent attention (e.g., D&O and cyber) and overlook EPL and its attendant exposures. They should not. As shown by California, New York and Illinois, legislative action and public sentiment continue toward increasing and expanded protections for employees. In this environment, a robust EPL policy with sufficient coverage – *plus* an experienced and knowledgeable insurance broker that knows what to look for – are an absolute must.



Will AI without EQ mean more EPL is needed?

By Andrew Doherty

Well, we obviously need a definitions key after reading this title:

AI	Artificial intelligence. An area of computer science that emphasizes the creation of intelligent machines that work and react like humans (per Techopedia)
EQ	Emotional quotient (intelligence). In business, it is the capability of individuals to understand their own emotions and the emotions of others and effectively apply that understanding in facilitating more collaboration and increasing productivity
EPL	Employment practices liability insurance

Before we explore this question, let's set some generally accepted principles regarding AI.

- AI is here to stay and will only become more ingrained in our lives as technology evolves. We all (hopefully) will be able to control how pervasive it will be in our personal lives, but there is little doubt about the fast-paced progression of AI in business. **McKinsey Global Institute research suggests that by 2030, AI could deliver additional global economic output of \$13 trillion per year.**
- Notwithstanding the above, AI is still in its infancy, and the unknowns outweigh the knowns. The value gained from AI, even if at a profound level, likely will still produce some unintended, negative consequences. Those that society (and potentially regulators and prospective plaintiffs) will almost certainly monitor closest are those that impact people the most – namely risks involving physical security, privacy, access to information, reputation and discrimination (including employment discrimination).

Immediate employment practices liability (EPL) risks

Today, the most pointed question regarding AI and employment-related issues is: **Given recently introduced regulations, will firms using artificial intelligence in the hiring process have more EPL claims made by prospective employees?**

The legislation closest to the intersection of AI and employment-related risk is the Illinois Artificial Intelligence Video Interview Act (IL Act), which will require employers using AI in their hiring process to:

- Let the job applicant know about the use of AI
- Explain “how the artificial intelligence works”
- Obtain consent to evaluation by the AI program
- Refrain from sharing video interviews
- Delete the videos within 30 days of a request by the potential employee

Assuming Illinois will not be the only state to enact this type of legislation, this could quickly become a leading EPL issue. The overarching accusations will likely be that employers, by using AI in the recruiting and hiring process, are screening applicants out based on a protected class status; i.e., gender, race and disability. If employers violate any of the specific rules set out by legislation, they would seem to be walking into the cross hairs of regulators and the plaintiffs’ bar, exposing the company to penalties and increased litigation/ EPL insurance claims. Furthermore, the IL Act does not address what happens if an individual does not consent to the use of artificial intelligence in the process. Will this eliminate the candidate from consideration entirely? Could the candidate allege discrimination and/or failure to hire?

Privacy implications

Let's add more complexity. If the employer fails to adhere to the specific notice requirements of the IL Act or any equivalent legislation, are companies also opening the door for invasion of privacy type claims? While these allegations could implicate various other types of liability insurance policies, it is important to point out that many EPL policies are duty-to-defend policies (meaning the insurer must defend all allegations made in the claims(s), even if there is ultimately no coverage under the policy). Insurers, therefore, may face losses even if the allegations get dismissed and don't result in any insurance payments for judgments or settlements.

Looking to get in front of this issue, we will see EPL underwriters asking questions about training and education on the use of AI in the recruiting and hiring process.

Those industries that are public facing will get questions about the use of AI when interacting with consumers.

And then there are third-party claims

Third-party EPL extends coverage for claims made by non-employees: a customer, a vendor or an independent contractor, for example. Covered third-party allegations typically include discrimination and harassment. Consider whether the increasing use of AI to interact with customers, vendors or other third parties could result in allegations of discrimination. Also, call to mind recent attempts by leading technology companies to use AI to engage with users only to have the 'chatbots' engage in inflammatory and offensive conversations. This is reminiscent of another prevalent Illinois law, the Illinois Biometric Information Act, passed in 2008 to guard against the unlawful collection and storing of biometric information – often done with the use of AI. This law sets a private right of action that, for example, would allow a consumer to sue a company that has not complied with the law, even without the need to allege actual injury or an adverse effect.

Longer-term EPL risks

The longer-term employment-related question is also quite clear: **Will AI cause companies to eliminate jobs, putting large numbers of employees out of work?** This fear of potential widespread job losses due to AI-driven automation can quickly escalate to panic, with workers, politicians and undoubtedly EPL underwriters following the developments closely. An EPL underwriter will always fear the impact of RIFs (reductions in force) on the frequency of EPL claims, especially if RIFs are likely industry-wide as opposed to company-specific. If AI eliminates an entire set of jobs industry-wide, and those impacted do not pursue training in a new set of skills, many workers may be out of work for longer periods of time, something that adds to the likelihood of EPL claims. Some hopeful news: While a widely cited 2013 Oxford study states that as much as 47% of current U.S. jobs are at risk of automation, there are well regarded arguments that suggest that this concern is overblown, including the findings of [Willis Towers Watson's Global Future of Work survey](#) which notes that “Machine intelligence will be more about employee augmentation rather than elimination. Nevertheless, this journey toward higher productivity through human/machine collaboration also creates new challenges for HR executives....”

Enter EQ

Time only will tell how impactful the acceleration of AI will be on jobs and how deftly companies welcome and use the evolving technology. It seems that mitigating AI-related liability will be less about controlling the development of the technology and more about managing its impact on people, particularly a company's own employees. Organizations can mitigate these emerging risks by applying fundamental principles, with the most impactful being strong **organizational EQ**.

EQ is becoming universally recognized as being just as important (if not more important) as IQ in success – both personally and organizationally. High EQ companies will have strong internal communication methods, senior executive-supported employee training programs and overall professional development efforts. From simple skill cross-training commitments to broader leadership programs, utilizing EQ as AI implementations increase should benefit all.



But how do you teach a machine? Generally speaking, if a person is described as a “machine,” it can have both positive and negative connotations. The pros of high productivity and extreme efficiency may come with emotional rigidity that fails to recognize how emotions play into deeper engagements and communications with others. Clearly, actual machines present an even more difficult challenge and specific strategies will go a long way in effectively transitioning job responsibilities from humans to AI, limiting potential EPL risks. Harvard Business Review (HBR) concludes that “those that want to stay relevant in their professions will need to focus on skills and capabilities that artificial intelligence has trouble replicating – understanding, motivating, and interacting with human beings” concluding that “...a human being...is still best suited to jobs like spurring the leadership team to action, avoiding political hot buttons, and identifying savvy individuals to lead change.” (The Rise of AI Makes Emotional Intelligence More Important; Megan Beck and Barry Libert; FEBRUARY 15, 2017)

Key takeaways

The added power of AI will raise the bar of responsibility for the benefactors of AI, and like any material change, judgments of success or failure will be made about how the evolution is handled, not necessarily about the changes themselves. Those companies that are proactive and anticipate the impact of AI on their business and their workforce will prove to be less risky to insurers, particularly in the area of employment practices liability.

Interplay between Family and Medical Leave Act and the Americans with Disabilities Act

By Mike Bayonne, Esq; Kristi Dalby-Jones and Joann D. Obi

The interplay between the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act Amendments Act (ADAAA) can be complicated and often confuses employers. First, it is important to distinguish the primary differences between the FMLA and the ADAAA laws. The FMLA is a federal law mandating 12 weeks of unpaid, job-protected leave within 12 months for certain qualifying events (e.g., serious health condition of the employee or an employee's qualified family member, pregnancy, birth, bonding etc.). There may also be state or jurisdictional mandates expanding the definitions for qualified family member, reducing eligibility requirements and/or increasing entitlement time.

The ADAAA is a federal law that addresses employment discrimination for individuals who have had or currently have disabilities impacting their ability to perform their essential job duties. Similar to the FMLA, state and/or jurisdictional mandates may exist that broaden an employee's protections under the ADAAA.

Unlike the FMLA, the ADAAA is only applicable to the employee and does not apply to an employee's family members. This law requires that employers provide reasonable accommodations for applicants or employees, whenever possible, if the accommodations do not create an undue hardship on the company. When an employer provides an accommodation, the expectation is that the individual (applicant or employee) would be able to perform the essential functions of his/her job immediately or at some time in the future. A vast majority of accommodation requests are for additional time off work, which is similar to FMLA. Contrary to FMLA, however, the accommodation timeframe is not as clear cut as 12 weeks and many employers struggle with how to evaluate the appropriate amount of time to approve. While it is reasonable for an employee to be granted leave as an accommodation when other accommodations are not available or if the treatment of the employee requires time off for recovery, all requests must have an estimated return to work timeframe before the employer can determine if the request can be approved without causing a hardship

to the company. Furthermore, employers must work with impacted employees and engage in the "interactive process" to evaluate appropriate accommodations. We will further explore the concept of the interactive process below.

The ADAAA and FMLA have Separate and Distinct Goals

The two Acts have distinctively different purposes: the ADAAA is intended to ensure that qualified individuals with disabilities are provided with equal opportunity to work with or without an accommodation, while the FMLA's purpose is to provide job protected leave from work due to their own serious health condition or the condition of a qualified family member.

While both laws provide employees with job protected medical leave, the leave provisions of the FMLA are time limited and have an independent set of eligibility criteria which the employee must satisfy. To be clear, if an employee is eligible for FMLA leave under the law, and provides the appropriate certification, then the right to leave is an entitlement; i.e., the employee shall be granted **the FMLA leave up to 12 weeks in 12 consecutive months**.

ADAAA's Interactive Process vs. FMLA's Certification Process

Unlike the ADAAA, the FMLA process does not require engagement in the interactive process. Instead, it focuses on the completed certification from the healthcare provider. The ADAAA asks the employer to determine the "reasonableness" of the accommodation requested and permits an employer to offer an alternate accommodation, other than the *exact one* requested by the employee, if it is effective and consistent with the medical provider's assessment of the condition. This differs significantly from the FMLA, where an employer cannot substitute an alternative or modified accommodation that deviates from a valid FMLA certification to keep an employee at work.

Impact of ADAAA on Leave Taken under FMLA

Under the ADAAA, when an employee has exhausted job protected leave taken for reasons qualified as disabilities under the ADA – including certain leave permitted under FMLA – employers are advised to engage in a timely, good faith, interactive conversation with the employee. The goal of the interactive process is to identify accommodations that will meet the employee's needs without unduly burdening the employer. This could include implementation of alternative accommodations that result in improved attendance, a reduction of unnecessary leave, smarter scheduling of medical appointments, or simply the opportunity to talk with an employee about how best to manage the leave needed.

The ADAAA and FMLA Should Not Be Applied in a Vacuum

When considering these laws, it is important for employers to be particularly aware of the Pregnancy Discrimination Act (PDA) and its relationship with the FMLA and ADA.¹ The PDA prohibits discrimination based on pregnancy, childbirth or related medical conditions. As set forth above, the FMLA provides leave to eligible employees, which includes pregnancy-related medical care. Additionally, although pregnancy itself is not a disability, pregnant workers may require an accommodation to perform the essential function of the job, i.e. no lifting over 20 pounds or frequent breaks. Pregnant workers may have impairments related to their pregnancies that also qualify as disabilities under the ADAAA. A number of pregnancy-related impairments are likely to be disabilities – even though they are temporary – such as back pain, post-partum depression and gestational diabetes. Accordingly, if a qualified employee has a pregnancy-related impairment that is also a disability under the ADAAA, the employer must provide the individual with a reasonable accommodation, which may include leave, if needed.

Finally, employers should be aware of the increasing enforcement exposure relative to the ADAAA, FMLA and PDA. Within the last five years, the Equal Employment Opportunity Commission (EEOC) received more than 25,000 claims alleging violations of the ADAAA.² This does not include charges filed with the state or local Fair Employment Practices Agencies. Additionally, during this period, the EEOC took in hundreds of millions of dollars between voluntary resolutions and litigation.³ Likewise, employers paid out approximately \$75,000,000.00 in connection with PDA claims at the agency level alone. Similarly, the Wage and Hour Division, Employment Standards Administration, of the Department of Labor (DOL) recorded that employers paid out approximately \$1,800,000 in back wages in 2018 in connection with FMLA claims.⁴ These figures not only underscore the need for employers to understand their legal obligations but also the need to mitigate risk. Thus, in addition to maintaining the proper infrastructure and providing training, an employer should consider working with industry specialists to develop risk mitigation strategies, including obtaining employment practices liability insurance (EPL) designed to protect employers against the “people risks” associated with running a business. According to researchers, three out of five employers will be sued by a prospective, current or former employee while they are in business. While many suits may be groundless, defending against them is costly and time-consuming.

Key takeaways

- When an employee reports the need for an accommodation, the employer should engage in a timely, good faith, interactive process under the ADAAA.
- Consider whether additional leave is being requested and if it is reasonable under the ADAAA or the PDA. If uncertain, consult with qualified employment attorney prior to taking action.
- Diligently document all interactions, especially on reasonable accommodation. Employers must be able to show that they engaged in a good faith interactive dialogue about potential accommodations.
- Provide manager training and awareness to recognize a condition that may qualify under FMLA or ADAAA.
- Consider risk mitigation strategies, including EPL.

¹ As noted above, there may be other state and/or jurisdictional laws in place that afford greater protections to employees than those provided under the ADAAA and FMLA.

² See U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics. ADA Charge Data – Monetary Benefits,

³ See U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics. ADA Charge Data – Monetary Benefits, FY 1997 - FY 2018

⁴ See Wage and Hour Division, Employment Standards Administration, of the U.S. Department of Labor, FMLA Data.

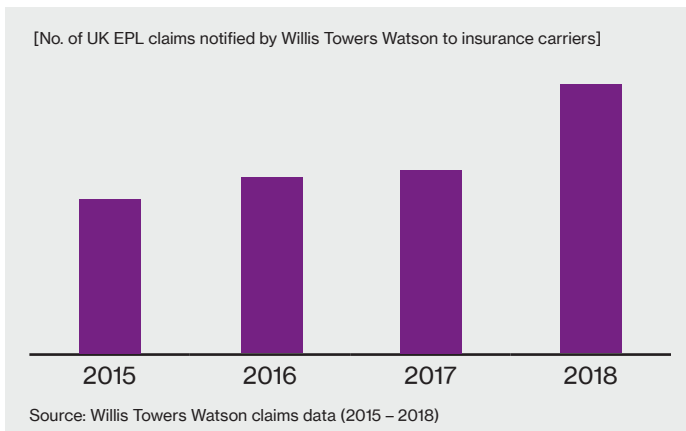
Employment practices liability trends across the globe

By Tom Pemberton, Samuel Trost and Amber O'Brien

While employment-related claims are more prevalent in the United States (U.S.) than in any other country, trends are certainly developing in other global jurisdictions. In this article, we touch on emerging employment-related claim trends in the United Kingdom (U.K.), Switzerland and Australia.

United Kingdom

In the U.K., there has been an uptick in employment practice liability (EPL) claims over the past few years. According to Willis Towers Watson claims data, U.K. EPL claims have increased year on year since 2015.



This uptick in claims may be due, at least in part, to the public spotlight on the #MeToo movement, which has exposed the prevalence of sexual assault and harassment/gender discrimination, particularly in the workplace. The #MeToo movement has created an environment that encourages individuals to speak out about workplace sexual harassment/discrimination and bring claims that they might not have brought in the past. In addition, in August 2017, the Supreme Court in the U.K. removed a potential obstacle for employees looking to take action by ruling that employment tribunal fees imposed on claimants were unlawful,¹ which has created, in effect, a no costs jurisdiction for EPL claims. This represents a significant shift and is also likely to have contributed to the rise in claims being brought by employees against their employers.

Another potential factor for a continuing rise in U.K. EPL claims is the Financial Conduct Authority (FCA) showing increased interest in holding senior individuals accountable for poor personal misconduct (including allegations of sexual misconduct) through the implementation of the Senior Managers & Certification Regime (SM&CR). As of December 9, 2019, the SM&CR will apply to all FCA regulated firms (it is already in effect for banks, building societies and insurers) and is designed to strengthen individual accountability of senior individuals through increased powers of approval and enforcement for the regulators. Consequently, non-financial misconduct can also have regulatory implications for senior individuals.

Under the SM&CR, firms are also required to appoint a senior manager as their “whistle-blower’s champion,” to put in place internal whistleblowing arrangements to handle disclosures and to inform U.K.-based employees about the FCA and PRA whistleblowing services. With the knowledge that the FCA is more focused on the conduct of senior individuals, employees may feel further empowered to speak out against misconduct, including sexual misconduct, in the workplace.

Businesses are coming under intense scrutiny to ensure they can demonstrate a work culture where sexual harassment/misconduct is not tolerated and that employers are doing all they can to heighten awareness and ensure appropriate policy and practices are in place.

As well as having appropriate EPL insurance protection, firms should, first and foremost, put in place suitable procedures and protocols to combat and prevent sexual harassment in the workplace. In July 2018, the Women & Equalities Committee (a new select committee appointed to examine the U.K. government’s performance on equalities issues) published a report on sexual harassment² recommending a Code of Practice for employers, setting out good practice guidance, which includes **having proper reporting systems and procedures in place (including guidance on anonymous reporting), support for victims, and targeted training and inductions.**

¹ R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51

² <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>

Switzerland

Privacy breaches leading to EPL claims

As technology becomes more advanced and data breaches become more frequent, the potential for employee claims increases. While issues concerning privacy breaches in their narrow definition are more a matter for a cyber risk policy than an EPL insurance policy, there has been an uptick in “privacy related” EPL cases. Such claims regularly emerge from a pure privacy breach claim brought by an employee who includes further claims against the employer, such as damages for grievance and distress.

Notably, in a recent case, a Swiss-based international organization inadvertently placed sensitive, personal information of its employee on a shared drive accessible to his colleagues.

Initially, the employee brought a claim against the employer under the Privacy Act (that was not covered under the EPL insurance policy) as well as significant claims for grievance and distress damages in excess of USD 100,000. The EPL policy responded under “employment practice violation” and covered the employer’s defense costs and settlement amount.

With increasing awareness and regulatory scrutiny all over the world to better protect privacy interests (e.g., GDPR in Europe, California Privacy Act), Willis Towers Watson anticipates EPL claims to continue to rise that involve breach of privacy issues.

What is important to consider?

While pure privacy issues do not find cover under current EPL insurance policies, modern conditions have developed over time, including language to also cover “invasion of privacy” or employment-related breach of applicable data privacy legislation. It is noteworthy being aware that the pure privacy incident could develop into claims against the employer, for which the EPL policy should be notified at an early stage in line with policy obligations. Also, as typical EPL insurance policies are silent on “privacy-related” matters (while some matters are excluded, such as breach of legislation relating to collective redundancies or ERISA claims in the U.S.), it is important to review the exclusions sections under the policy, especially in this context, if “bodily injury” is excluded, that it contains a carve-back allowing emotional distress under the policy.

Australia

Australia continues to see annual increases in the number of EPL claims. The Australian employment practices landscape is complex; it is made up of a number of different forums for bringing claims, including the Fair Work Commission, unfair dismissal and general protections claims in the Federal Court, discrimination claims before the Australian Human Rights Commission and various other state courts and regulators. According to the Fair Work Commission, 17,712 claims were made for unfair dismissal against Australian businesses in the last financial year. Most claims are settled before getting to court, but if not properly managed, legal costs of an employment dispute can quickly outstrip claim value, stymieing resolution.

Until recently, it was relatively uncommon in Australia for workers or employees to bring class actions against employers. However, there is a recent, developing trend in Australia relative to EPL class actions; there are currently four (funded) class actions in the Federal Court (and a number of others in the pipeline and/or being contemplated by litigation funders), which allege sham contracting arrangements and underpayment of employee entitlements. One such class action was recently successfully defeated by the defendant employer; the Federal Court found that the class failed to establish that they fell within the scope of the enterprise agreement. The Court’s ruling was fatal to the action proceeding and represents an important win for employers.

There is a well-documented proliferation of wage-and-hour class actions in the U.S. Based on the similarities between the Fair Labour Standards Act in the U.S. and the Fair Work Act in Australia, similar class actions may become more common in Australian courts and, indeed, workplace class actions are already on the rise. Employment practices liability is a no-costs jurisdiction in Australia. However, it remains to be seen whether the Australian courts will entertain cost recovery direct from a litigation funder notwithstanding the non-costs jurisdiction. Such an approach may cause litigation funders to reconsider their funding model for workplace class actions and have a significant impact on the EPL class action activity in Australia.



Key takeaways

In summary, what this article demonstrates is that other jurisdictions outside the U.S., be it through developing regulations or class actions and generally as a result of the empowerment of the employee, are likely to see an increased prominence of employment-related claims. Employers globally need to take note and do all they can to ensure a positive work culture with appropriate policies and practices in place. Having effective and appropriate EPL insurance cover is also important for companies should they still face claims against them, and in order to benefit from such insurance coverage, companies will need to demonstrate that they have such policies and practices in place.

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