

# [Podcast]: Recent Developments in California Law

**Law and the Workplace Blog** on June 5, 2018

In this episode of The Proskauer Brief, partner [Tony Oncidi](#) and senior counsel [Harris Mufson](#) discuss key developments in California employment law, including a new test to determine whether workers are independent contractors or employees and what's new on the #MeToo front.

**Harris Mufson:** Hello, welcome to the Proskauer Brief Hot Topics on Labor and Employment Law. I'm Harris Mufson. On today's episode I'm joined by Anthony Oncidi and we're going to discuss recent developments in California Law.

So, Tony, on April 30 the California Supreme Court issued a unanimous decision in a case involving a new test for independent contractors. Can you describe what happened in that case?

**Anthony Oncidi:** Sure. What the California Supreme Court did in that case is essentially overrule itself from a 30 year precedent. The rules had been well-established in California with respect to who was and was not an independent contractor and the net result of this ruling is that far fewer workers now can be or will be properly characterized as independent contractors, which means that far more workers will be characterized as employees and that has a number of very significant implications obviously.

**Harris Mufson:** And so this California Supreme Court ruled that a new test applies to assess whether or not an individual is an employee versus an independent contractor. Can you describe the new test that now is applicable to analyze that issue?

**Anthony Oncidi:** It's actually relatively simple and they dub it the ABC test. It's almost schoolyard simple and maybe that's good news, maybe that's bad news. It's perhaps good news in terms of being able to follow what the rules may be I think always a good thing - maybe - but maybe bad news in terms of the application that we're going to probably see, which is, as I say, sweeping many more people into an employment relationship who - many of them may not have wanted to be in an employment relationship, that's one of the interesting aspects of the independent contractor situation.

There's almost a conspiracy many times between the hirer and the worker to be so characterized as an independent contractor not as an employee because there are benefits that flow to both parties by having the independent contractor status.

So the ABC test is three parts, obviously. The first of which is that the worker must be free from the control and direction of the hirer in connection with the performance of the work so there's essentially going to be no supervision that's being exercised over the independent contractor. Number two, the worker must perform work that's outside the usual course of the hiring entity's business. That's the biggest problem I think for most of these workers – you have a situation where if you're hiring an individual who's essentially doing the same thing your business is doing or some aspect of what your business is, that's probably not going to be an independent contractor that's going to be an employee of some sort. The Supreme Court gives the example of a department store hiring somebody to do work on the plumbing. Well the department store is not in the business of plumbing and so they are bringing in an individual to work on their plumbing: that probably would be an independent contractor. On the other hand if they're bringing in somebody who's going to work in the capacity that the business itself operates, much less likely that's going to be an independent contractor. And then finally, the worker must be customarily engaged in an independently established business or trade of the same nature as the work that he or she is performing for the hiring entity. Against essentially suggesting there's got to be an independent business that they are in which is separate from the business that they are performing services for.

**Harris Mufson:** I thought one other interesting aspect of this decision is that the Court now ruled that workers in California are presumed – the default presumption is that they are employees as opposed to independent contractors, and also I guess there's now this distinction between the economic realities test that is applied under Federal Law versus the ABC test that is now applicable in California.

**Anthony Oncidi:** Correct

The Multifactor Test, which is really what this ABC Test replaces, was a little bit more fuzzy and I think there are some disadvantages that come with some kind of ambiguity like that but the clarity of this test and the severity of this test is going to make it much more difficult for many employers I think to deal with this because I think many were caught flatfooted by this development, where we're going to see an immediate and significant impact, obviously, in the gig economy where you have essentially all Uber drivers for the most part and all Lyft drivers for the most part and all Grub Hub delivery people basically treated as independent contractors now. Of course, there's been tons of litigation over that but this may very well close down that debate and they will all now quite possibly be characterized as employees.

**Harris Mufson:** So in addition to the Supreme Court's decision addressing the tests associated with independent contractors versus employees there's also been some additional key developments in California law or potential legislative developments. Can you talk a little about the pending bills in the State senate?

**Anthony Oncidi:** Sure. This is a species of what I call "don't just stand there do something," and since the Me Too Movement began last October there have been efforts on both the state and federal level to do something about what is perceived to be this significant wave of sexual harassment allegations and activities. I'm not sure anything has changed since last October other than the fact that it's become much more apparent because many more people are talking about it, and I think many more people are bringing claims but I'm not sure activities have spiked since last October.

Nonetheless what legislatures such as California are doing are considering new laws and sharpening existing laws in a way that would make it essentially easier for victims of discrimination and harassment to file and win their claims. And so right now there are pending at least three separate pieces of legislation in California, none of which are yet passed, none of which yet been signed into law, but all of which may in some form or another make it into law; and, essentially what these do is they limit or they ban nondisclosure agreements in the context of sexual harassment or sexual assault allegations and lawsuits. They make it easier for victims of sexual harassment to prove their cases by adjusting the standards that need to be satisfied in order to prove a case in instances of situations where you got the already existing laws that protect non employees, for example, unpaid interns, volunteers, independent contractors.

There's an extension now of liability not only for sexual harassment but all forms of harassment and discrimination, which would be a significant change in the law. There's an expansion of training that would be required right now in California for large employers with fifty or more employees, they need to train supervisors once every two years for at least two hours. This would expand the requirement of training to non-supervisors in addition to the existing employers that must be trained and that alone is going to be a significant change because many employers don't currently train in a formalistic way their non-supervisory employees and this may now become a new requirement.

And then finally, and maybe even most importantly, is the fact that the whole Me Too Movement is being used, I think, in some respects, by the plaintiff's bar as a way to, kind of as a Trojan horse, to attack arbitration agreements. They don't like arbitration agreements. In California, we have seen with alarming regularity ten and fifteen million dollar single plaintiff verdicts come down from the juries in Los Angeles and some of the other big cities. Plaintiff's lawyers obviously like to have those kinds of verdicts, either in fact, or by way of threat when you're trying to settle a case – that rarely happens in an arbitration context. And so as a result of that most plaintiffs' lawyers in California don't like arbitration and so they are jumping, I think, on the bandwagon with respect to this Me Too set of developments by saying "oh and by the way let's also get rid of arbitration agreements" and I think that's a completely different debate. It has nothing to do with real liability issues. It has to do with the expected potential outcome of a particular case.

**Harris Mufson:** It's interesting that as the Me Too Movement has developed we haven't seen much legislation on the Federal front. I mean there's been an IRS regulation that was passed in connection with the tax cut bill but beyond that there really hasn't been any legislation from the Federal level, but States are now picking up the ball. So we've seen some recent legislation in New York that has passed both the State and the New York City level that has mandated additional training, has expanded statutes of limitations, has addressed the issue of arbitration agreements, etc. We actually had [a podcast](#) on that the other day. So I think we'll continue to see more states, particularly blue states, picking up the ball and generating additional legislation on this front.

**Anthony Oncidi:** Yeah I think that's right and especially we're in an election year and so this is a great issue for legislators to run on – either candidates who are already in office or those who seek to be in office and, as I said, it's a perfect example of “don't just stand there do something.” So everybody wants to be viewed as being proactive in this important area.

**Harris Mufson:** Yes, that's something we'll continue to monitor. Thank you for joining us on the Proskauer Brief today. Stay tuned for more insights on the latest Hot Topics in Labor & Employment Law and be sure to follow us on iTunes.

[Listen to “The Proskauer Brief”](#)

#### [Related Professionals](#)

---

- **Anthony J. Oncidi**  
Partner