jackson lewis

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CLASS ACTION TRENDS REPORT

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Are you my *employee*?

Ayanna is working as an IT consultant at Globo Worldwide, part of a large team brought on to assist the e-commerce company in updating its website and email servers for EU General Data Protection Regulation (GDPR) and California Data Privacy Protection Act (CDPPA) compliance. She works under the direction of Jin, a project manager in Globo's IT department. She landed the six-month assignment through ITinerant, a staffing agency that places computer professionals in short-term or project-based assignments. Ayanna's professional services agreement with ITinerant provides that she is an independent contractor retained by ITinerant to perform consulting services for ITinerant clients, and that she will be compensated at an hourly rate and paid on a semi-monthly basis.

ITinerant's service contract with Globo states that ITinerant is to handle all payroll and personnel functions related to the consultants, including criminal background screening. In addition, all consultants assigned to Globo must demonstrate proficiency in PHP and C#, and are to work exclusively for Globo for the duration of the contract. Highly protective of its proprietary information and trade secrets, Globo requires consultants assigned to Globo to work on Globo premises and use Globo computers, alongside Globo's IT staff. Globo issues consultants a "Globo Worldwide" badge to access its secure facilities and prohibits consultants from working on the premises outside normal business hours or on their personal laptops or devices. Globo also requires ITinerant consultants to sign nondisclosure agreements.

Ayanna was enjoying her Globo assignment and her coworkers on the company's IT team. However, as it became apparent that the project would not be completed before her six-month contract expired, the project manager began to put the pressure on. Despite the contractual restrictions, he required Ayanna and the other consultants to work evenings and weekends in order to achieve the weekly deliverables. Raul, one of her Globo colleagues who had worked through similar projects for the company, assured her that the extra hours would all be worth it when they received their handsome bonus once the project was complete. But Jin quickly dashed that expectation. "Raul's Globo—you're contract," Jin told her. "You want a bonus? Talk to ITinerant."

Ayanna did talk to ITinerant—which directed her to the compensation terms of her service agreement and told her that no bonus would be forthcoming. Once

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A WORD FROM STEPHANIE, DAVID, AND ERIC

With the advent of the Internet, smartphones, and mobile devices that permit on-demand shopping, delivery of goods, and provision of services (e.g., transportation), the economy continues to evolve from the remnants of the industrial- and manufacturing-based system. From the consumer to the device, from the device to the website or merchant, from the website or merchant to the supplier, from the supplier to the deliverer, and from the deliverer to the consumer, this circular economy has created countless opportunities at many levels. The delivery of a product now involves several steps beyond the traditional model and has led to reliance upon independent contractors to round out the circle.

While the independent contractor relationship is beneficial from certain perspectives (e.g., tax, insurance, liability, benefits, etc.), businesses engaged with independent contractors run the risk of collective actions, class actions, and agency enforcement actions that may pose greater exposure. Companies may be subject to class actions or collective actions for minimum wages, overtime, or employment benefits for alleged misclassifications of independent contractors. Additionally, to the extent a court or agency deems independent contractors to be misclassified, a company also may be subject to actions under federal and state statutes that prohibit discrimination, harassment, or retaliation in the workplace.

Companies that rely upon arbitration agreements, class action waivers, and other contractual provisions designed to avoid such liabilities may successfully protect themselves from court actions, as the U.S. Supreme Court has consistently made clear. (Notably, in its latest opinion on the subject, as we discuss in this issue, the Court recently construed an exemption in the Federal Arbitration Act as applying both to workers classified as independent contractors and employees.) However, state and federal agencies are not bound by any such agreements and may aggressively pursue companies for misclassification. The results of such enforcement actions could prove catastrophic to a company's operations.

In this issue, we will take a deeper dive into the independent contractor relationship and its place in the economy. We will review recent cases, the risks posed to companies that utilize independent contractor relationships, and potential strategies to protect your company in the event of a lawsuit or enforcement action challenging the classification. We believe this issue is particularly important in light of the changing economy and the emergence of independent contractors in the provision of goods and services.

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About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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the Globo contract ended, ITinerant assigned Ayanna to another client. Unhappy about the whole situation, Ayanna filed a putative collective action against Globo for unpaid overtime, contending that she and her fellow consultants were incorrectly classified as independent contractors while they were employed by the company.

In our last issue of the *Class Action Trends Report*, we considered who is an "employer"—in particular, the critical and timely question of whether an entity is a "joint employer" of a given group of workers. Here, we look at the equally important question of who is an "employee," with a focus on the distinction between "employees," as defined by statutory and common law, and "independent contractors." That long-entrenched distinction has faced increasing challenge in a steady stream of class action litigation alleging that workers who have been designated as independent contractors are, in fact, employees. Similar to the legal dispute regarding whether an entity is a joint employer of a group of workers, the issue of whether individuals are properly designated as independent contractors has attained critical significance amid a rapidly changing economy brought on by the advent of new business models, sweeping cultural changes, and a technology transformation that has forever changed the way we work.

The changing world of work

"Jobs are more technology-dependent, more project-oriented, and more amenable to remote work. Companies need workers with complex and specific skill sets that aren't feasible to keep in-house. All of these factors lend themselves toward an independent contractor model," notes Stephanie J. Peet, Principal in the Philadelphia office of Jackson Lewis. Workers are increasingly employed not by monolithic corporations, but by smaller, more nimble business entities. Decades-long employment relationships have given way to fluid, project-based and transactional work arrangements. Moreover, independent contractor arrangements are attractive to a rising generation of workers who value independence, flexibility, variety, and the ability to create their own schedules and profit from their entrepreneurial drive.

Perhaps the clearest illustration of this evolving employment landscape is the burgeoning "gig" or "sharing" economy, in which rideshare and meal delivery drivers, dog walkers, and other "one-off" task performers can sign on to piecemeal "jobs" with the click of a button through online platforms. These arrangements are the source of many lawsuits alleging independent contractor misclassification—a clear indicator that the law simply has not kept up with the contemporary economy. In fact, one federal judge in Pennsylvania described the gig economy as a "disruptive business model in search of a legal theory." Businesses and workers are left trying to fit the square peg of these and other novel work arrangements into the round hole of traditional legal principles. This uncertainty creates a climate ripe for litigation.

Businesses and workers are left trying to fit the square peg of these and other novel work arrangements into the round hole of traditional legal principles. This uncertainty creates a climate ripe for litigation.

Of course, independent contractor arrangements themselves aren't new. Construction crews, information technology professionals, technical writers, and other professionals have long been employed on a contract or contingent basis, performing work that is project-based or fixed in duration. Today, drivers, cable installation technicians, exotic dancers, and other workers typically provide their services as independent economic actors as well.

Why it matters

There are numerous advantages to retaining independent contractors rather than employees. Companies are not required to withhold payroll taxes or to pay Social Security, unemployment insurance, or workers' compensation premiums for individuals hired as independent contractors. Independent contractors are not covered by the Fair Labor Standards Act (FLSA) or state wage and hour laws, so the parties can agree to mutually beneficial terms of payment outside the narrow confines of statutory minimum-wage and overtime dictates. Sometimes hiring managers see independent contractors as an option for shortcutting

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lengthy hiring and onboarding processes, which may take much longer than engaging a contact worker. "It certainly can be appealing for both parties," Peet said of the mutual benefits to independent contractor arrangements.

In the growing gig economy, in particular, the independent contractor model can be essential to a company's very survival. Enterprises operating in this innovative space structured their operations around the presumption that individuals engaging with their platforms for entrepreneurial gain are not statutory employees. Indeed, so critical is this understanding that one company facing a massive misclassification suit agreed to pay $100 million to settle wage and hour claims, contingent on the plaintiffs' agreement that their status as independent contractors remained intact.

The consequences are costly, however, to the company that gets it wrong. If an employer erroneously designates employees as independent contractors in the eyes of the law, it faces significant liability at both the federal and state levels for violations of wage and hour statutes, workers' compensation, unemployment, and employee benefits laws, as well as substantial tax liability. "A lot is at stake if you misclassify workers as independent contractors," Peet cautions. "Additionally, the government has been cracking down and taking the position more often than not that certain workers are employees, not independent contractors."

Misclassification claims

"Everyone is happy about independent contractor relationships—until the relationship goes sour," Peet said. For example, when a contract ends and the contractor goes to apply for unemployment compensation benefits. Or, a dispute arises between the parties and the individual goes to see an employment lawyer.

Independent contractor misclassification cases primarily arise in the wage and hour context and often are pursued on a classwide basis. "The typical case is a collective or class action filed by independent contractors who contend they are not getting paid minimum wage or overtime because they are treated as independent contractors and not employees," Peet explained. ERISA may come into play as well in these cases. "If individuals were misclassified as independent contractors, but are in fact employees, then they would be qualified for benefits plans that typically come with full-time employment, such as health insurance and retirement contributions."

When a plaintiff pursues independent contractor misclassification claims on a classwide basis, it's possible they have been encouraged in part by plaintiff's counsel. For example, said Peet, "if an exotic dancer meets with a plaintiff's lawyer, and the lawyer knows this isn't the only person doing what this individual does under a contractor arrangement, the lawyer may ask the prospective client, 'How many other dancers are there at the club?'" Although the exotic dancer scenario might sound atypical, dozens of such actions have been filed in recent years—indicative of the fact that the independent contractor model is being tested on many, many fronts of late. Gig employers and gentleman's clubs, couriers and trucking companies, commercial bakeries, cable installation services, and businesses that service the oil and gas industry have been frequent targets of such claims.

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The retiree "consultant"

Although we focus on class claims here, independent contractor misclassification cases, of course, are brought as individual lawsuits as well—and often in a context that will be quite familiar to many employers:

"A common example is the retiree who may be brought back on to consult on an independent contractor basis," Peet said. "In this typical scenario, it's a person in IT or an executive who has a unique specialty or skill, and historical knowledge about the company—company policies and procedures, or the nuances of the clients' needs. It's enticing for the company to be able to tap into that individual's experience and knowledge, so it converts him to a 'consultant,' in an ostensible independent contractor capacity."

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What's the test?

In FLSA cases (again, most independent contractor misclassification cases assert wage and hour claims), courts apply the "economic realities" test to determine an individual's employment status. They consider six non-exclusive factors to decide whether, under the "totality of the circumstances," the individual in question works under the corporate entity's control or is in fact in business for herself. Courts examine:

1. The permanency of the relationship between the parties;
2. The degree of skill required for the rendering of the services;
3. The worker's investment in equipment or materials for the task;
4. The worker's opportunity for profit or loss, depending upon his skill;
5. The degree of the alleged employer's right to control the manner in which the work is performed; and
6. Whether the service rendered is an integral part of the alleged employer's business.

It is the plaintiff's burden to establish that she is not an independent contractor but rather, a covered employee under the FLSA. It's an extensive fact-based inquiry, and "employee status" is often in the eye of the beholder.

Case in point: Independent contractors

Exotic dancers who performed at an adult entertainment nightclub in Texas were found to be properly classified as independent contractors, not employees. The club did not require dancers to have prior experience or formal training to perform, but it did require them to have a license to work, meaning

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Are these individuals *"employees"*?

As the nature of employment itself continues to be redefined (in practice, if not under decades-old employment statutes), the plaintiff's bar seeks to capitalize by bringing suits that aim to classify more individuals as statutory employees covered by labor and employment laws. In recent years, individuals who were never treated as employees under historical precedent have been bringing claims alleging they were employees entitled to compensation for their efforts:

- College students enrolled in internship programs with private companies;
- Cosmetology and massage therapy students who practiced their budding talents on paying customers as part of their credentialing curriculum;
- Independent sales consultants for a direct sales stalwart;
- Volunteers seeking perks at National League baseball events and consignment stores;
- Church members performing services such as waiting tables at their church's nonprofit restaurant;
- An individual who shadowed his father while he worked at an auto dealership so that he could learn his wholesaler job, in hopes of taking over the position when his dad retires;
- College student-athletes.

In addition to the private plaintiffs' bar, federal enforcement agencies during the Obama administration aggressively pursued the legal theory that these and other individuals are statutory employees. In the last two years, the agencies have largely reined in the previous administration's overreach. Still, the issue continues to arise in investigations by federal agencies such as the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance (OFCCP). For example, in OFCCP audits, the agency may investigate whether affirmative action plans and required compensation reviews should include any workers classified as contract or contingent workers.

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they had to pay $50 to the sheriff's office to get fingerprinted. The licenses had to be kept on the premises where they performed, which the dancers said made it difficult for them to work at other clubs. However, the evidence indicated they were free to ask for the return of their licenses, and they could work whenever and wherever they wanted. The dancers had to sign in when they reported to perform, but the club did not control when a dancer showed up, and never fined a dancer for absences or tardiness. The nightclub did not compensate the dancers—they earned their pay in tips—and they had to pay rent to the club, which spent about $500,000 each year maintaining and promoting the venue, including some $10,000 a month for radio and newspaper ads. The club determined the operating hours and cover charge; the type of drinks provided to customers; the interior decor, lighting, and stage; and the dressing rooms and furniture. Dancing was the only type of entertainment provided at the club. The dancers selected and paid for their own costumes. The club did not control their costumes, hair or makeup, or their conduct while on the floor. Dancers were discouraged from remaining in the dressing room for more than one hour, but that instruction was flexible and usually not enforced. Also, dancers were free to set prices for private dances. The dancers argued that the club exercised significant control over their opportunity for profit and loss because it was responsible for the advertising, business hours, and the club milieu, but there was also evidence that a dancer's profit and loss "was determined by her physical appearance" and to a lesser extent, her personality and initiative. Therefore, the court found the dancers were not economically dependent upon the club under the economic realities test.

Case in point: Employees

Exotic dancers were found to be employees of two entertainment clubs under the FLSA and the Florida Minimum Wage Act. The dancers had to sign an agreement under which they were given license to "utilize the stage, other entertainment facilities and the dressing rooms located within the Club for the performance of exotic dance routines." The clubs did not require the dancers to have specialized skill. They did not receive compensation from the clubs, but retained fees and tips collected directly from patrons. However, the clubs set the minimum charges for services they performed, such as private dances, and required the dancers to pay the clubs $5 per dance. The agreement required the dancers to abide by "Entertainer Rules" and instructed them not to walk through the clubs in "street clothes," chew gum on stage, bring significant others into the clubs, leave early, arrive late, or miss shifts. Failure to follow the rules could result in immediate termination. A dancer could also be prohibited from working if the club thought she was no longer in dancing form. The clubs provided security, bartenders, waitresses, music, food, liquor, and advertising. In return, dancers paid mandatory house fees and tip-outs to club employees and contractors. Dancers had virtually no control over customer volume, hours, food and drink, or overall atmosphere at the clubs. The services rendered by the dancers were "obviously essential" to the clubs' business. The clubs invested in the facilities, parking, staff, and music for the entertainment provided. The only factor weighing against employee status was the permanency and duration of the relationship, because the dancers were free to choose when they worked and were not restricted from working for other clubs. On balance, though, the court found that the nightclubs had significant control over the manner in which the dancers performed their work, and the dancers were therefore employees under the economic realities test.

Same duties, same industry, but different outcomes. A number of factors might explain why: most notably, perhaps, that the "employee" dancers had to follow detailed behavioral rules and were subject to discharge for violating them. But the factfinder and the jurisdiction are also critical variables.

State-law and/or hybrid claims. In nationwide misclassification cases, a company typically faces claims under the FLSA as well as a number of state laws. For

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such hybrid federal-state complaints, the applicable tests of employee status often vary, meaning that class members may well be "employees" under federal law, but "independent contractors" under the state statute; alternatively, class members in one state may be "employees" while class members in other states are "independent contractors."

Case in point: Delivery drivers worked under an operating agreement that identified them as independent contractors. The 1- to 3-year contracts were automatically renewed for 1-year terms unless either party opted out. The agreement also included an arbitration provision that prevented the company from terminating drivers at will—a contract term more typical of a business partnership than an employment relationship. The company did not require prior commercial driving experience; all that was needed was the ability to drive. In addition to the terms of the operating agreement, the drivers had to adhere to other company policies and procedures. The company's managers evaluated the drivers' performance on "ride-alongs," although the drivers were free to ignore the managers' guidance.

The drivers drove their own vehicles, but they had to be company-approved, well-maintained, painted a specific shade, and marked with the company logo. Drivers were not required to procure the needed tools and equipment through the company. However, the scanners they had to use on the job weren't available elsewhere, so most drivers purchased a scanner through the company. The drivers also had to wear company uniforms in accordance with extensively detailed grooming and appearance standards. The operating agreement provided that the drivers would be barred from working if they did not conform to these vehicle and grooming standards. The agreement also stated that drivers must comply with company "standards of service" such as maintaining a professional image and using "proper decorum at all times" in order to protect the company's reputation.

The company told the drivers what to deliver and when. Each driver was assigned a specific service area that could be altered at the company's sole discretion. Drivers could choose the order in which to deliver their assigned packages; however, the company negotiated delivery windows directly with customers. Drivers couldn't leave the company's terminals in the morning until all of their packages were available to load, and they had to report back to the terminals before a specified time. The company structured the drivers' workloads so that they had 9.5 to 11 hours of work each day. Managers maintained the right to adjust workloads to ensure that drivers never had more or less work than could be completed in that timeframe. They were allowed to take on multiple routes and vehicles and to hire third-party helpers, but the right was contingent on the company's approval, and only if it was consistent with the company's business needs and the specific terminal capacity. Also, to hire additional help, a driver had to be "in good standing" with the company—which reserved the right to determine whether replacement drivers were "acceptable."

A federal court overseeing consolidated class actions brought by drivers in 40 states concluded that most of them were properly classified as independent contractors as a matter of law. However—again reflecting the unpredictable nature of independent contractor misclassification cases—a federal appeals court resolving the matter as to drivers in two states concluded they should have been treated as employees, not independent contractors. The appeals court applied the economic realities test to drivers in one state and a "right-to-control test" applicable (at the time) to employees in another state, and found under both analyses that the company exercised considerable control over the manner in which the drivers performed their jobs. The court also reasoned that the drivers were "wholly integrated" into the company's operations and performed duties principal to the company's core business.

The disparate legal tests are, of course, a common dilemma in defending wage and hour claims (particularly those involving allegations that employers improperly classified workers as exempt from overtime). These differing tests add significantly to the complexity of preventing and/or defending such lawsuits for employers with operations in multiple jurisdictions.

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The IRS test

The IRS has traditionally used a checklist of 20 criteria to determine whether a "1099" independent contractor is more properly classified as a "W-2" employee. The IRS considers these common-law factors to assess the degree of control that an entity exercises over the individual's work, and the extent to which the worker is economically dependent upon that entity. More recently, the IRS has grouped these factors into three broad categories:

Behavioral Control: A worker is an employee when the business has the right to direct and control the work performed by the worker, even if that right is not exercised. Behavioral control categories are:

- Type of instructions given, such as when and where to work, what tools to use or where to purchase supplies and services. Receiving the types of instructions in these examples may indicate a worker is an employee.
- Degree of instruction, more detailed instructions may indicate that the worker is an employee. Less detailed instructions reflects less control, indicating that the worker is more likely an independent contractor.
- Evaluation systems to measure the details of how the work is done points to an employee. Evaluation systems measuring just the end result point to either an independent contractor or an employee.
- Training a worker on how to do the job—or periodic or on-going training about procedures and methods—is strong evidence that the worker is an employee. Independent contractors ordinarily use their own methods.

Financial Control: Does the business have a right to direct or control the financial and business aspects of the worker's job? Consider:

- Significant investment in the equipment the worker uses in working for someone else.
- Unreimbursed expenses, independent contractors are more likely to incur unreimbursed expenses than employees.
- Opportunity for profit or loss is often an indicator of an independent contractor.
- Services available to the market. Independent contractors are generally free to seek out business opportunities.
- Method of payment. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time even when supplemented by a commission. However, independent contractors are most often paid for the job by a flat fee.

Relationship: The type of relationship depends upon how the worker and business perceive their interaction with one another. This includes:

- Written contracts which describe the relationship the parties intend to create. Although a contract stating the worker is an employee or an independent contractor is not sufficient to determine the worker's status.
- Benefits. Businesses providing employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay have employees. Businesses generally do not grant these benefits to independent contractors.
- The permanency of the relationship is important. An expectation that the relationship will continue indefinitely, rather than for a specific project or period, is generally seen as evidence that the intent was to create an employer-employee relationship.
- Services provided which are a key activity of the business. The extent to which services performed by the worker are seen as a key aspect of the regular business of the company.

Many state statutes and court decisions mirror the IRS test. As a practical matter, businesses should evaluate independent contractor status under these common-law criteria as well in order to ensure compliance with both federal and state law.

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"There are so many different potential analyses and issues," Peet explained. "The Department of Labor has its own test, the IRS has its own test, although they are certainly similar." Several measures have been introduced in Congress over the years to consolidate the disparate independent contractor tests (at least one business group has advocated for an amendment to the FLSA that would incorporate the IRS test, for example), though none have gained traction.

Employers have state laws to worry about as well. Several states use the "ABC test," which is different from the economic realities test. (California has recently adopted the ABC test. The unique challenges facing California employers is discussed in "Only in California" on page 13.)

Corporate form not conclusive. Independent contractors often work under their own "companies." In some instances, the company that retains the individual will require him or her to form a corporate entity to facilitate payment or, in part, to ensure that theirs is construed as a business partnership and not an employment relationship. Sometimes the independent contractor operates under a franchise model: he or she establishes an entity, which in turn enters into a formal franchise agreement with the franchisor, thereby securing the right to service a particular route or customer base under the company's brand. Although the corporate form is a factor in the analysis, the fact that an individual incorporated does not conclusively demonstrate independent contractor status. Even in these cases, the economic realities of the working relationship control, not the label or structure overlaying the relationship. The presence of the corporate form is just one more data point that factors into the analysis.

Even more common is for companies to retain independent contractors through a staffing agency, as in the case of IT consultant Ayanna, above. Notably, Ayanna has not sued ITinerant (in which case a joint-employer analysis would also come into play) and surely defendant Globo will argue that if Ayanna is an employee, she *is* employed by the staffing firm. The court nonetheless would consider whether, given the totality of circumstances, Globo exercised sufficient control over Ayanna that she should have been treated as an employee of Globo during her tenure there as a matter of economic reality.

Defending independent contractor claims

"One goal is to defeat conditional certification, but many courts grant conditional certification in these independent contractor cases," according to Peet. "Plaintiffs attempt to make workers like delivery drivers or exotic dancers appear to all be doing the same thing. At the early certification stage, it is easier for plaintiffs to make these superficial arguments," said Peet. "But the focus is not just on defeating certification. A second, and just as important, goal is to prevail on a summary judgment motion. That is, convince the court that as a matter of law, the workers were properly classified as independent contractors, and they are not employees."

Note, too, that courts won't automatically rule out a class comprised of both "employees" and "independent contractors." In one case, a company argued that it retained both employees and independent contractors, and treated them as one or the other based on the circumstances of each individual worker—indicative of the fact that it had no identifiable decision, policy, or plan to misclassify workers. The court rejected this "hybrid workforce" defense to class certification, rejecting the notion that, because it had W-2 employees and independent contractors performing the same functions, it could not be said there was a common policy in place affecting all putative class members.

The initial focus, then, is on the merits of the independent contractor misclassification dispute. This means turning to the economic realities test. Depending upon the federal circuit, courts approach the analysis differently, placing greater emphasis on certain factors over others. Therefore, geography is an essential consideration, as the defense strategy will vary by jurisdiction.

"Different circuits are going to be looking at different parts of the economic realities test," Peet advised. "In one case, the Fourth Circuit focused on control and dependence. In another case, the Sixth Circuit's emphasis was on whether the worker had authority to make staffing decisions, and whether the company kept employment records for the workers in question. Most circuits stress that no single factor is controlling. There is no bright line."

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"As a practitioner, you have to be familiar with the factors the courts have been focusing on. You need to be sure the company can meet all of those tests," Peet stressed. Consequently, it's critical for employers to consult with experienced counsel in the jurisdiction where they operate, both when establishing independent contractor relationships and when defending misclassification claims.

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Is Ayanna a Globo employee?

Are Ayanna and her ITinerant colleagues Globo employees, or bona fide independent contractors? Under the economic realities test (*and* the IRS common-law criteria), it's a mixed bag. In Globo's favor: she was paid by another entity, she had a contract in place with that entity, and she was promptly placed with a new client as soon as the Globo contract ended. Certainly the six-month duration of the contract, and Globo's rigid adherence to that end date, shows an impermanence reflective of a genuine independent contractor relationship. That the assignment was a discrete short-term project also weighs in favor of an independent contractor finding. Moreover, unlike exotic dancers in a dance club or delivery drivers for a delivery service, the consulting services rendered were *not* core business functions of the e-commerce company; rather, the consultants met an operational business need prompted by a one-time regulatory change.

The consultants' specialized programming skills, a qualification for the position, suggest that a high degree of skill was required to perform the services in question, which is also indicative of independent contractor status. On the other hand, Globo employed in-house staff with the same skill set, perhaps undermining this conclusion. Moreover, the consultants did not make their own equipment investments; Globo provided the tools of the trade—insisting, in fact, that they use the company's computers to perform their work. Globo exercised considerable control over the manner in which their work was performed, too, placing them under the direction of a Globo project manager and dictating their work location and hours. Also, the consultants were integrated into the Globo worksite, as they worked alongside the in-house IT team, on Globo premises, using Globo-issued ID badges for access. The fact that Ayanna was not entitled to a Globo company bonus was a significant counterpoint, though, negating any contention that the consultants were treated just like Globo employees. Yet, the consultants had little opportunity for profit or loss based on their own skill or drive because they were paid by the hour, their work hours were circumscribed, and they were restricted from taking on other clients. These factors don't support a finding that the consultants were in business for themselves.

In cases like this, where the factors support alternative conclusions, courts often look to the "totality of the circumstances" to make a decision. "Courts have acknowledged that they adapt the economic realities analysis to the particular working relationship at issue," Peet emphasized, and our hypothetical scenario takes place in an industry that has traditionally utilized independent contractor arrangements. Certainly the facts here were unusual—indeed, IT consultants quite regularly work remotely on their own laptops and on their own time. Yet Globo will argue that the considerable control it exercised over its outside consultants in this instance was premised on a heightened security need, as it was engaged in the sensitive project of conforming its systems to the exacting data privacy requirements of newly enacted legislation. Placing the economic realities factors in this context, Globo has a strong chance of convincing a fact-finder that the ITinerant consultants were properly designated as independent contractors. ■

Prevention pointer: *An "independent contract" isn't enough*

It's not always easy to determine whether an individual can properly be classified as an independent contractor—and it's critical to get it right. Even if both parties agree that theirs is an independent contractor relationship, a court may see it differently.

"Often, employers think that as long as there is an independent contractor agreement in place, that's sufficient. But it's not," cautions Stephanie Peet, a Principal in the Philadelphia office of Jackson Lewis. The four corners of a contract don't determine whether, as a matter of economic reality, an individual is an independent contractor. "You certainly want to have a strong independent contractor agreement in place," Peet said. "But in practicality you have to ensure you aren't treating contractors like employees."

The contract. A well-drafted independent contractor agreement is the first line of protection. The agreement should clearly state that the worker is performing services for the company as an independent contractor. Where possible, the contract should have a clear end date. If an extended arrangement is desired, include a provision for renewable terms of a duration appropriate for the circumstances. Alternatively, provide a clear description of the scope of the fixed project, a breakdown of who is responsible for what aspects of the project (e.g., tools, supplies, design, etc.) and the specific deliverables that will signal the project's completion.

An arbitration provision with a class action waiver is an essential protection. It ensures that, in the event an independent contractor does challenge his or her classification as such, the dispute will be resolved through individual arbitration, rather than costly class litigation. Moreover, if your contractors are engaged to work for client companies (as with the Globo Worldwide-ITinerant scenario discussed above), the arbitration agreement can be drafted so that it also protects clients from litigation as third-party beneficiaries of the agreement. An indemnification clause is another important protection. When retaining independent contractors through a staffing company, the contract should provide that the labor contractor agrees to indemnify your company for any damages or attorneys' fees or costs incurred in defending against claims of independent contractor misclassification.

Consult with counsel when drafting an independent contractor agreement to ensure that the independent contractor arrangement is properly constructed and that, if independent contractor status is challenged, it is likely to stand up to legal scrutiny.

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Noncompete agreement? Careful there.

Can a company require an independent contractor to enter into a noncompete agreement? There is no *per se* rule holding that all noncompete agreements with independent contractors are unenforceable. That said, it can be a risky proposition given the expectation that independent contractors are in business for themselves and have no duty of loyalty to the company. The presence of a noncompete agreement can support a finding of "employee" status. However, there is a recognition that in some circumstances, noncompetes are important and necessary, even for those working on a contractor basis.

Before entering into a noncompete agreement with an independent contractor, businesses should consider the following issues, among others:

- Will the independent contractor interact with the company's customers?
- Who developed these clients—the contractor or the company?
- Will the contractor have access to the company's confidential information, and if so, how much?
- Did the company spend significant time, money, and resources on the contractor?

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Due diligence. Employers should consult with counsel when hiring independent contractors to ensure that a true independent contractor relationship is formed. Peet also urges companies to involve Human Resources at the outset when contemplating bringing on workers on a contractor basis, as well as the supervisors most familiar with the type of work that the individuals in question will be performing. Their input will allow the company to best determine whether the individual truly will be performing as an independent contractor. "You have to really appreciate and understand the type of working relationship and worker at issue," Peet said, "which is all the more reason you need to consult counsel on these issues."

Hands off. "Courts are going to look at how much control the company exercises over the workers," Peet notes. A useful rule of thumb: Control the results obtained, not the manner in which the results are achieved. That means no supervision over their day-to-day work, or their hours of work. "Are you telling them when they need to report to work? To the extent you can avoid that, do so."

Independent contractors should be permitted to subcontract, or to hire their own staff to perform the work. If an independent contractor is going to hire someone, it is best to not offer input as to who he or she is going to hire. "If it's important for the business to have significant input in how the work is going to be performed, then you should consider hiring an employee, not an independent contractor," Peet said.

A clear demarcation. Because independent contractors are *not* employees, they should *not* be treated as such. Ensure a clear separation between your regular employees and independent contractors: separate workspaces, separate supervisors (if supervision is required), and separate records and forms. Contractors should not be included on the company email distribution list or attend departmental meetings. No benefits, no bonuses, no company t-shirts. "No performance evaluations, no employee IDs or business cards, and no disciplinary actions if the contractor is not properly performing his or her job," Peet advised.

Managing the contractor

What can a company do when an independent contractor is not performing as expected? This is not a performance management or employee discipline issue—it's a breach of contract matter. If the contractor works through a staffing agency, address the problem through the agency and, if necessary, request a different contractor. Alternatively, terminate the contract in accordance with the terms you've set out in the independent contractor agreement.

Moreover, companies have the right to expect independent contractors to conduct themselves professionally when they are working on-site, and to adhere to anti-harassment policies and similar handbook provisions. These expectations are distinguishable from directing the contractors' work; rather, they are the ground rules for how *all* persons on the premises must behave. Businesses must not let an individual's independent contractor status deter them from enforcing these essential policies.

Other pointers

- Independent contractors should not be asked to sign standard new hire paperwork or other documentation that refers to them as "employees."
- When possible, arrange to pay the independent contractor's business instead of paying the contractor individually.
- Independent contractors should perform different duties than those performed by regular employees. "If you employ employees in a similar capacity, it probably won't pass the smell test," Peet warned. Independent contractors should have different job titles too.
- Don't provide tools or supplies. Independent contractors should be equipped with their own computers and other "tools of the trade" necessary to perform their assignments. In addition, don't reimburse contractors' expenses (as you would a full-time employee). Independent contractors factor these expenses into their client billing.
- When retaining an independent contractor through a staffing agency, require the agency to confirm it has carefully screened the contractors and to certify that it complies with all applicable employment statutes and regulations.
- Protecting trade secrets and proprietary information is essential when non-employee contractors are working on the premises and have access to such confidential information. Require independent contractors to sign nondisclosure agreements to ensure some measure of protection against theft or improper disclosure. ■

Only in California

The California Supreme Court last year made it much harder to classify individuals as independent contractors.

Diverging from decades-old precedent, the state high court, in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, revised the standard for evaluating whether an individual is an employee or independent contractor, broadening the definition of "employee" in the context of the California Labor Code and California Industrial Work Commission (IWC) wage orders. The new standard may impose a higher hurdle than the "economic realities" test used under the Fair Labor Standards Act (FLSA). Moreover, unlike the federal standard, which places the burden on the worker to establish employment status, the onus is on the business to show that an individual is *not* an employee under California law.

The old test. Previously, California courts applied the "*Borello* test," set forth by the California Supreme Court in the 1989 decision *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*. In that case, the court adopted the common-law "control-of-work" test, which focuses on "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." The Court identified several non-exclusive factors that inform the independent contractor analysis, including:

- The right of the company to discharge the individual without cause;
- Whether the individual is engaged in a distinct occupation or business;
- Whether, in the location at issue, the work is usually done without supervision by the company;
- The skill required in the particular occupation;
- Whether the company or the individual supplies the necessary equipment, tools, and place of work;
- The length of time for which the services are to be performed;
- Whether payment is made by the job or by the time spent;
- Whether the work is a part of the company's regular business; and
- The apparent intent of the parties as to whether an employer-employee or independent contractor relationship exists.

In its *Dynamex* decision, the Court recognized the importance of these *Borello* factors, but concluded that this highly nuanced, multi-factor test "makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision."

According to the Court, the "control-of-work" test "often leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly, on a day-to-day basis." Moreover, it reasoned, the use of a complex standard "affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying the working conditions of individual workers within such categories."

The ABC test. Consequently, the *Dynamex* court adopted the simpler "ABC" test used by some other state courts for determining whether an employment relationship exists. The Court said this standard most closely matches the pertinent wage order, which defines "employ" as "to engage, suffer, or permit to work." In the Court's view, the ABC test is most appropriate in light of the history and remedial purpose of the wage order, which covers minimum wages, maximum working hours, and meal periods and rest breaks.

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Under the ABC test, a worker is *presumed* to be an employee, and thus covered under IWC wage orders, unless the worker:

A. Is free from the employer's control and direction;
B. Performs a service that is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
C. Customarily engages in an independently established trade, occupation, profession, or business.

A company must prove all three elements of the ABC test to establish independent contractor status. Its failure to prove any one of these three criteria is enough to establish that the worker is a covered employee, rather than an independent contractor.

The impact. While the test is said to be simpler, uncertainty remains as to its application. How will an entity's "usual course of business" be determined? Are "gig" workers and street-corner musicians engaged in an established trade or business? Yet to be seen, too, are the broader implications of this substantial challenge to independent contractor relationships in the state. The new standard may well upend the entire business model of companies that built their businesses on independent contractor relationships, and it risks hampering emerging enterprises premised on innovative work arrangements.

California companies must tread carefully when seeking to hire workers on an independent contractor basis. The standard for doing so is far more demanding under *Dynamex*; moreover, it remains to be seen how courts, on the whole, will interpret the ABC test when applying its three factors to various scenarios. In addition, companies that currently have ostensible independent contractor relationships in place must carefully review the status of those individuals under the ABC test—particularly as to workers not traditionally deemed independent contractors (e.g., electricians and other tradespersons, and IT professionals).

Dueling bills are pending. Currently pending in the California legislature are two competing measures: Assembly Bill No. 5, legislation that would codify the *Dynamex* ABC test for determining whether a worker is an employee or an independent contractor, and Assembly Bill No. 71, which would amend the California Labor Code to provide that the *Borello* factors will guide the analysis of employee status under the state's wage laws.

The prospects for passage for either bill are unclear. Meanwhile, rigid compliance is critical, as the *Dynamex* decision has surely piqued the interest of the plaintiffs' bar in California. Along with the heightened risk of class action lawsuits, the Division of Labor Standards Enforcement can also impose civil penalties of $5,000 to $15,000 per violation for willful misclassification of independent contractors ($10,000 to $25,000 per violation for a pattern or practice of misclassification), in addition to any other penalties or fines permitted by law.

Headline notwithstanding, it is not, in fact, "only in California" where the ABC test is applied. The standard is used in several other states, including Massachusetts and New Jersey. A number of other states have adopted a modified version of the test, focusing on the "A" and "C" prongs. Again, it's essential to know what standard applies in your jurisdiction.

Regulatory roundup

While private class action lawsuits are always a significant concern for employers, government enforcement agencies are also quite active in addressing independent contractor misclassification.

Misclassification means lost tax revenues for both federal and state governments. Consequently, they have a strong incentive to investigate such claims and to find that independent contractors should have been treated as employees. Indeed, the agencies collaborate on independent contractor enforcement: the U.S. Department of Labor and Internal Revenue Service entered into a Memorandum of Understanding to share information on misclassification in an effort to improve compliance; the DOL has similar MOUs in place with enforcement agencies in a number of states.

It is clear ... that the Trump DOL is taking a more realistic view of the contemporary economy and the changing nature of employment.

DOL's independent contractor stance. During the Obama administration, the DOL said it wanted to ensure the nation's workers were protected under federal laws that did not envision the work relationships that are becoming increasingly common today. To that end, Wage and Hour Division Administrator Dr. David Weil issued Administrator's Interpretation No. 2015-1, an informal guidance on independent contractors. The guidance document took the position that most workers are employees under the Fair Labor Standards Act (and the Migrant and Seasonal Agricultural Worker Protection Act, which the DOL also enforces), and came down strongly on the side of finding an employment relationship, as opposed to an independent contractor arrangement. Citing the Fair Labor Standards Act (FLSA) definition of "employment" as "to suffer or permit to work," the guidance focused on the economic realities test, discussing each factor in that test, and providing case law and examples to flesh out its interpretation.

Critics of the DOL's efforts, however, argued the agency exceeded its statutory authority. As a practical matter, they feared the DOL's interpretation would impose barriers to small businesses and job growth. In fact, the fierce opposition sparked several rounds of congressional committee hearings.

Under the Trump administration, the DOL is pulling back. In 2017, with little fanfare, current Labor Secretary R. Alexander Acosta withdrew the 2015 "sub-regulatory" guidance document (along with a 2016 informal guidance on joint employment). In a brief news release announcing the rescission of these documents, Acosta was careful to note their removal "does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law. The department will continue to fully and fairly enforce all laws within its jurisdiction, including the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act." It is clear, however, that the Trump DOL is taking a more realistic view of the contemporary economy and the changing nature of employment.

However, the DOL's narrower view of "employment" does not mean the agency is retreating from enforcing the law when it comes to independent contractor misclassification. Indeed, the DOL recently announced a $3.2 million consent judgment resolving an enforcement action against an Oregon courier company, a case brought during the waning days of the Obama administration. "The facts here were clear and unequivocal: These drivers, under unambiguous and long-settled federal law, are and were [the courier's] employees," the DOL's regional solicitor stated. The underlying complaint alleged the defendant and his trio of companies systematically denied paying minimum wages and overtime to courier drivers by misclassifying them as independent contractors. The company charged the drivers for gas and other costs attendant to using their own vehicles for the company's delivery work, according to the DOL. In addition to $3.2 million in monetary relief, the defendants agreed to immediately classify all drivers as employees.

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"It is not just employees here who were cheated of millions of dollars in wages due, but also taxpayers who bore the burden of [these] unlawful practices, as the company used this unlawful practice to avoid payment of federal and state payroll taxes," the agency stressed in its press release. "Employers that do so enjoy an unfair and unlawful advantage over their law-abiding competitors, to the significant detriment of both the employees and taxpayers."

EEOC: independent contractor issues a priority. For its part, the Equal Employment Opportunity Commission (EEOC) in 2016 added independent contractor relationships to its priority areas in its Strategic Enforcement Plan for fiscal years 2017-2021. The EEOC has identified these relationships among "Emerging and Developing Issues" the agency deems will have strategic impact in advancing equal opportunity in U.S. workplaces. The EEOC noted it will add to its enforcement priorities "issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy."

The EEOC enforces Title VII's protections against employment discrimination, which apply to employees but not to independent contractors. Generally, courts apply a "hybrid" test when deciding whether a worker is an employee or independent contractor for Title VII purposes—a combination of the FLSA's "economic realities" test and the common-law factors, which focus on the ostensible employer's "right of control." This standard is narrower than the FLSA's broad test of employee status. This hybrid test also applies under the Americans with Disabilities Act (ADA) and Age Discrimination in Employment Act (ADEA). The EEOC compliance manual notes 16 different factors used by the agency in applying the hybrid test to questions of worker status.

NLRB calls for briefs. Just as joint employer questions implicate traditional labor law, the question of whether a worker is an employee or independent contractor determines whether that individual is protected under the National Labor Relations Act (NLRA)—and thus whether a company also could be liable for an unfair labor practice with respect to the worker. Is misclassifying an employee as an independent contractor a separate violation of the NLRA?

In February 2018, the National Labor Relations Board (NLRB) solicited briefs on the question, seeking input on under what circumstances, if any, the Board should deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the NLRA, which makes it unlawful to interfere with employees' right, under Section 7 of the Act, to engage in protected, concerted activity. The Board had taken up a case in which an agency administrative law judge (ALJ) found that a company unlawfully interfered with protected rights under the Act by classifying its employees as independent contractors, and unlawfully discharging one of them. The ALJ found the workers were employees covered under the NLRA, not independent contractors, as the company contended. Not only was the discharge unlawful, the ALJ ruled, but the misclassification of the workers as independent contractors was itself a separate violation of Section 8(a)(1). The NLRB likely sought briefing on the matter with an eye toward striking down the notion that independent contractor misclassification, in and of itself, runs afoul of the NLRA.

The Trump NLRB has been actively reversing many Obama Board decisions which had tilted the scales decidedly against employers as it overruled longstanding doctrinal law. Most recently, the NLRB demonstrated its commitment to reversing Obama-era departures from precedent in the context of the independent contractor question. In January 2019, the Board walked back its 2014 decision in a case addressing whether independent contractor delivery drivers were in fact statutory employees under the Act (a related, but different, question than the one on which the Board sought comments: whether the act of misclassifying an employee as an independent contractor violates the NLRA). In its 2014 decision, now overruled, the NLRB rebuffed the D.C. Circuit Court of Appeals, which emphasized the importance of a worker's entrepreneurial opportunity as a key determinant for analyzing whether workers are independent contractors, and thus ineligible to organize and bargain collectively under the Act. The Obama Board downplayed the significance of entrepreneurial opportunity. However, in a 3-1 decision, the Trump Board restored the use of common-law agency factors in analyzing the independent contractor question, including the extent to which the worker in question has the opportunity for profit and loss. ■

Other class action developments

Important developments in class litigation since our last issue:

Supreme Court

FAA exemption applies to independent contractors. The Federal Arbitration Act (FAA) does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" by virtue of the transportation worker exemption set forth at FAA Section 1. In *New Prime, Inc. v. Oliveira*, the U.S. Supreme Court held that this exemption applies regardless of whether transportation workers are classified as independent contractors or employees. In 1925 (when the FAA was adopted), the ordinary meaning and usage of the terms "workers" and "contracts of employment" extended to a wide variety of employment relationships, including what we now call independent contractors, the Court reasoned. The Court concluded the drafters intended to include independent contractors under the Section 1 exemption. The Court also held that whether the FAA exemption applies to an arbitration agreement is a question for a court to decide first (not an arbitrator).

The underlying case was a class action wage suit brought by a truck driver against a transportation company with which he signed an "Independent Contractor Operating Agreement." The agreement contained an arbitration provision, which stated that disputes between the parties, including disputes about "arbitrability," would be resolved by arbitration. Therefore, the trucking company moved to compel arbitration, relying solely on the FAA. The district court denied the motion without prejudice to permit discovery on the issue of whether the FAA applied in this case. The company appealed, arguing that the district court was required to stay judicial proceedings while the parties proceed to arbitration. On appeal, the U.S. Court of Appeals for the First Circuit held that, before a court may compel arbitration pursuant to the FAA, it must determine whether the FAA applies. If the FAA does not apply, private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court—i.e., to compel arbitration under the FAA—that Congress chose to withhold.

The Supreme Court affirmed the First Circuit's conclusion that the court lacked the authority under the FAA to compel arbitration in this case. A court must determine whether the exemption in Section 1 of the FAA applies *before* it may consider exercising the power to compel arbitration set forth in the FAA's Sections 3 and 4. Essentially, the Court held that if the FAA does not apply at all pursuant to Section 1, it does not reach the issue of delegation of arbitrability.

Circuit court decisions

Class certification reversed in loan officers' suit. The U.S. Court of Appeals for the Third Circuit struck down a decision granting class certification in a suit brought by mortgage loan officers claiming they were denied overtime pay. Reversing the lower court's Rule 23 certification on interlocutory appeal, the appeals court found the district court's "barebones analysis" did not permit it to conclude that the lower court undertook the "rigorous review" required for Rule 23 certification. There was not enough evidence to determine whether the loan officers had sufficiently shown that the employer had an unofficial policy that contradicted its official policy on off-the-clock work to satisfy the commonality and predominance prongs of Rule 23. The Third Circuit vacated the district court's order and remanded the case with instructions to conduct a "rigorous" examination of the factual and legal allegations underpinning the plaintiffs' claims before deciding whether class certification was appropriate. However, the appeals court declined to review the lower court's decision to certify the Fair Labor Standards Act (FLSA) collective action.

Class certification properly denied in "fair share" fee suit. On remand from the Supreme Court, the U.S. Court of Appeals for the Seventh Circuit held that the High Court's decision in *Janus v. AFSCME*, which barred unions from imposing "fair share" or "agency" fees (to cover the union's cost of collective bargaining and grievance processing) on public-sector employees who are not union members, did not require a different outcome on the narrow question of whether a class action was the proper device for home health care assistants to pursue their claims against the union for refunds of those fees. The employees moved to certify a

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class of "all non-union member assistants from whom fair share fees were collected." The proposed class included some 80,000 members, and class representatives asserted that the total amount to be refunded was approximately $32 million. A district court denied certification. The appeals court agreed with the court below that the question of whether damages are owed for many, if not most, of the proposed class members could be resolved only after a highly individualized inquiry and would be particularly ill-suited for class treatment. Further, the union would be entitled to litigate individual defenses against each member. Also, the union presented evidence of disharmony within the class: some workers supported the union and had no desire for a refund, while others were eager to get their money back. In addition, the district court made clear that it was not averse to considering a more targeted class, but the plaintiffs spurned the opportunity to suggest a narrower class in favor of a "go for broke" strategy. Finding that nothing in *Janus* speaks to the suitability of class treatment of the issues under the unusual circumstances of this case, the Seventh Circuit concluded that the district court acted well within its authority when it declined to certify a class action.

The appeals court agreed with the court below that the question of whether damages are owed for many, if not most, of the proposed class members could be resolved only after a highly individualized inquiry and would be particularly ill-suited for class treatment.

Dismissal of cheerleader's wage-fixing suit upheld. The U.S. Court of Appeals for the Ninth Circuit, in an unpublished opinion, upheld the dismissal of a former National Football League cheerleader's class action antitrust suit. The cheerleader brought an action against the NFL and 27 of its member teams alleging that the teams conspired to suppress the cheerleaders' wages and to prevent cheerleader recruitment in violation of the Sherman Act and California's Cartwright Act. The allegations largely centered on an anti-tampering provision that has been in the NFL's constitution and bylaws for decades (which broadly prevents NFL teams from tampering with other teams' employees while they are under contract), and the fact that NFL executives and team owners re-ratified that provision annually. A federal court in California dismissed the suit for failure to state a claim, finding that the cheerleader failed to show "parallel conduct with plus factors" and an antitrust injury, and that the complaint failed to allege acts supporting an inference of "an overarching conspiracy of two *per se* illegal agreements: a No Poaching Agreement and a Wage Fixing Agreement." The Ninth Circuit found that the cheerleader failed to plausibly allege *per se* illegality of either agreement.

District court decisions

Hours spent in training program compensable. Participants in a long-haul trucking company's driver training program were entitled to compensation for time spent in excess of eight hours in truck sleeper berths while required to be out on the road with driver-mentors, ruled a federal court in Arizona. The court granted summary judgment in favor of a 10,000-member class of truck drivers on their FLSA claim seeking pay for those hours. It also denied summary judgment to the trucking company on the drivers' claims for time spent studying for a required written test while they were logged in as being in the sleeper berth. The court rejected the employer's argument that time spent studying was not compensable because it was done to satisfy a condition of employment: passing the written test. The test was administered *after* the training program participants completed the behind-the-wheel portion of their training—at which point they were considered employees and not trainees. Thus, there was at least a question of fact as to whether that time was compensable, the court found.. The drivers also sought pay for time spent logged in as (noncompensable) sleeper berth time, but during which they were asked to perform tasks such as paperwork. The court said the key issue was whether the employer knew or should have known that some sleeper berth time was actually spent doing work. It found material factual issues precluded summary judgment on the question.

FCRA class of 5 million job applicants certified. A federal court in California certified a class of roughly five million members in a suit alleging that a national

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retailer's background checks failed to satisfy the notice requirements of the Fair Credit Reporting Act (FCRA) and California law. According to the plaintiffs, when they applied for jobs with the company, the retailer performed a background check without informing them of their rights under the FCRA and providing proper and legal authorization. They also alleged the retailer provided noncompliant disclosure forms that included extraneous information. The employer argued that the class representatives lacked standing and that common issues didn't predominate because some job applicants knew about the background checks and didn't suffer a concrete injury. However, the court disagreed. It noted the claim that the company accessed class members' personal information in violation of their protected rights constituted a concrete harm rather than a "mere technical" violation of the FCRA. Also, the court found that whether the employer complied with the "standalone" and "clear and conspicuous" disclosure requirements were issues common to the class. Finding the requirements of Rule 23(a) and 23(b) met, the court certified the class.

Did the California Supreme Court's decision in Dynamex Operations West, Inc. v. Superior Court*, issued one month later, require the court to vacate its judgment? Only if the* Dynamex *ABC test applied retroactively.*

Did *Dynamex* merit reversal? In one of the first cases to apply California's longstanding *Borello* test of independent contractor status to gig workers, a federal court held, following a bench trial, that the drivers were independent contractors. The case was a wage and hour class action involving food delivery drivers who procured restaurant delivery gigs through an online app. Did the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*, issued one month later, require the court to vacate its judgment? Only if the *Dynamex* ABC test applied retroactively. There was reason to assume that it does (as a general rule, judicial decisions have retroactive effect in California) and, if so, the court likely would revisit its judgment, at least as to the drivers' overtime and minimum wage claims, it said. However, the court was not inclined to make a determination as to retroactivity on the plaintiff's motion to vacate the judgment. It did, however, find the retroactivity question was enough to raise a substantial issue in the case. The case is currently up on appeal before the Ninth Circuit.

Misstatements did not invalidate all settlement agreements. A federal court in California found that a blanket invalidation of all settlement agreements was too extreme a sanction for an employer's *ex parte* communications attempting to obtain class members' settlement agreements and releases. The plaintiffs in this class action suit contended that the employer required employees to sign a background check authorization that contained an unlawful credit check provision, and that violated numerous provisions of California wage and hour law. They established the employer engaged in misleading, obfuscating and coercive conduct with class members. For example, the employer had called a "voluntary" meeting with currently employed class members to discuss the case and an offer of settlement but refused to provide a copy of the proposed settlement and release or the operative complaint; failed to mention that the parties had agreed to mediation; and sent a letter misspelling the name of plaintiffs' counsel, omitting the law firm's contact information. The court held, however, that none of the employer's individual acts rose to an egregious level. The employees wanted the court to ban the employer from communicating with putative class members about the case, and to invalidate all settlement agreements. However, the court found that the appropriate remedy was to send a curative notice to the putative class, make all settlement agreements voidable, require the employer to shoulder those costs, and consider awarding fees for the plaintiffs' motion.

Class certified in unjust enrichment action. A federal court in Connecticut certified a proposed class in a lawsuit by cleaning service franchisees that claimed a franchisor misclassified them as independent contractors instead of employees and was therefore unjustly enriched by the fees the franchisees paid in order to be employed. The franchisees brought a class action against the national franchisor, and against the local

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sub-franchisors under which they performed cleaning services for the franchise. They alleged the franchise agreement was in fact an employment agreement that conditioned initial or continued employment on a nonrefundable $15,000 payment or other fees. They moved to certify a class of approximately 70 members: all individuals who have performed cleaning work for the company in Connecticut since December 2010. The franchisees asserted that the franchisor controlled the methods and procedures for servicing their customers; that all putative class members were entirely dependent on the franchisor for work assignments; and that the franchise deducted monthly sums from the franchisees' wages, such as royalty and advertising fees. The court certified the proposed Rule 23 class, finding it was sufficiently definite and numerous and that the issue is the same for all class members: whether the underlying franchise agreement was an employment agreement that conditioned initial or continued employment on payment of a down payment or any number of other fees. The court also found that common questions of law and fact predominated because all class members performed the same cleaning work, all class members worked for the same company, all class members had materially identical franchise agreements, all class members paid the same up-front fees, and all class members had to adhere to the same policies and procedures. Finally, the court found that the individual plaintiffs' recovery would be sufficiently small that the cost of litigation would be prohibitive and some class members still worked for the franchisor, raising the possibility of retaliation for filing individual claims.

No stay of conciliation while parallel class action not certified. In what appears to be a continuing battle for control over the legal recoveries by women who allegedly experienced discrimination at auto plants where they are or were employed, a federal court in Illinois refused to stay the distribution of notices about awards under the conciliation agreement that the automaker had entered with the Equal Employment Opportunity Commission (EEOC). Despite the employer's apparent "gamesmanship" in seeking to undercut class certification by settling with the EEOC through its conciliation process, that agreement includes a detailed claims process under which all women and African-Americans employed at the plants during the relevant period are eligible to be compensated from a settlement fund of between $7.75 million and $10.125 million and the court would not interfere with it on behalf of a class that had not been certified. The court rejected the plaintiffs' motion to stay the notice—filed two days before notice was to issue—filed by asserted representatives of a putative class that had not been certified, seeking to represent women who do not file claims under the conciliation agreement or who reject them once they learn the amount of monetary relief to which they are entitled. The plaintiffs argued to no avail that the class certification issue should be resolved first and that the employer had "cut a back-room deal with the EEOC" in a settlement not overseen by the court in order to undercut class certification. Because

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New guidance on settlement from Northern District of California

The U.S. District Court for the Northern District of California published procedural guidance for parties submitting class action settlements for preliminary and final approval in the district. The detailed guidance provides a roadmap of topics and issues for parties to consider during class action settlement negotiations, when drafting class notices, and in preparing and submitting preliminary and final approval documents. While many of these issues are generally known and discussed among experienced class action counsel, some of the more granular considerations include requests to provide information about "lead counsel's firms' history of engagements with the settlement administrator over the last two years," consulting "relevant prior orders by the judge" related to incentive awards, and submitting information about lead counsel's "past comparable class settlements."

Parties attempting to avoid unnecessary delay or denial of approval in the Northern District would be well-served to carefully review and follow the court's new guidelines when appropriate, in addition to the specific orders of their presiding judge.

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no class had been certified, the individual plaintiffs lacked standing to seek to stay the distribution of award notices and releases to persons who submitted claims under the conciliation agreement. Even if they had standing, the court lacked authority to interfere with the EEOC conciliation process, it said. Also, although Rule 23(d) allows for notice to class members after a class had been certified, it was not clear that Rule 23(d) gives courts authority to issue notice to putative class members when no class has been certified. The court instructed that both the named plaintiffs and absent putative class members retained the option of pursuing their claims in court and seeking any relief the court could provide, while potential claimants in the EEOC process who were unhappy with the amount of the awards they were being offered in that process would be free to reject it and remain in this action.

[A]lthough Rule 23(d) allows for notice to class members after a class had been certified, it was not clear that Rule 23(d) gives courts authority to issue notice to putative class members when no class has been certified.

Waivers were valid despite missing information. Former aerospace company employees laid off during a reduction in force could not persuade a federal court in Kansas that the waivers they signed pursuant to a severance agreement were invalid. The company laid off nearly 300 employees from one of its facilities. Of the 271 laid off employees, 260 executed the release agreement, and the company paid out approximately $6 million in severance benefits. However, the employees who signed releases argued their waivers of Age Discrimination in Employment Act (ADEA) claims were not knowing and voluntary under Older Workers Benefit Protection Act (OWBPA) standards. They contended the waivers were invalid because the company failed to inform them of the class, unit, or group of individuals considered for termination; the criteria for deciding who would be selected for termination; the company's layoffs of employees at other facilities and other times; or that newly hired workers were excluded from consideration for layoff. However, the court held the waivers signed by most of the employees were valid. Therefore, it granted in part and denied in part cross-motions for summary judgment in this collective action brought under the ADEA.

Settlements

Sponsor companies agree to pay $65.5M to settle au pair litigation. A proposed $65.5 million deal was reached that, if approved by a federal court, will end litigation brought by au pairs alleging violations of the Sherman Antitrust Act, the Racketeer Influenced and Corrupt Organizations Act, the FLSA, and state laws. The au pairs were participants in a "cultural exchange" program, working 45 hours per week and providing childcare to host families. They sued the sponsor agencies that placed them with families under the J-1 visa program, claiming that despite federal regulations requiring that they receive "not less than" the applicable minimum wage, the agencies conspired and agreed to set all of their weekly wages at the purported minimum amount: $195.75 per week plus room and board. The au pairs also claimed the agencies falsely informed au pairs and host families this weekly salary was the non-negotiable, maximum wage au pairs could receive. The au pair class is large: plaintiffs were granted conditional certification of a Rule 23 class of more than 91,000 members. Class counsel are expected to seek 35 percent of the total settlement amount in attorneys' fees and, after legal fees and administrative costs are paid, about $40 million will remain available to distribute to class members.

Settlement approved for 5,200 rideshare drivers. A federal court in North Carolina approved a proposed settlement agreement in a collective action involving FLSA claims made by rideshare drivers who alleged they were misclassified as independent contractors. The court granted conditional class certification for persons who worked as drivers anywhere in the United States and had opted out of arbitration; approximately 5,200 class members opted in. The agreement has a maximum gross settlement amount of $1.3 million, of which 56.3 percent will go to class plaintiffs; 33 percent will be paid in attorneys' fees (the fee request was significantly less than the total $965,015 in fees incurred, using the lodestar method, according to plaintiffs), and $90,205 (6.9 percent) will go toward litigation expenses. Each class member will receive a payment based on the hours worked and

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expenses incurred. The payments to class members will range from $50 to almost $5,000, and the average recovery is about $140. In approving the settlement, the court observed that the defendant mounted a vigorous defense in another court and prevailed on the independent contractor question for a similar group of drivers; thus, the plaintiffs demonstrated that the defendant had a significant chance of prevailing on the merits here should the case go to trial. Also, the parties likely would incur substantial costs by engaging in discovery for the 5,200 drivers who opted in, by litigating motions for summary judgment, and by trying the case. Settlement was thus appropriate, the court said.

Agency enforcement actions

Class suit over appearance policy resolved. A national courier company agreed to pay $4.9 million and provide other relief to settle class allegations that it violated Title VII by maintaining an appearance policy that conflicts with certain religious practices and failed to provide religious accommodations for those practices at facilities throughout the United States. According to the EEOC, the company prohibits male employees in supervisory or customer contact positions from wearing beards or growing their hair below collar length. In addition, the EEOC contended that the company failed to hire or promote individuals whose religious practices conflict with its appearance policy and did not provide religious accommodations to the policy. The EEOC also alleged that the employer segregated employees who maintained beards or long hair in accordance with their religious beliefs into nonsupervisory, back-of-the-facility positions without customer contact. The EEOC contended that the strict appearance policy operated to exclude Muslims, Sikhs, Rastafarians, and other religious groups from equal participation and advancement in the workforce. Under the terms of a four-year consent decree resolving the lawsuit, the employer will pay $4.9 million to a class of current and former applicants and employees identified by the EEOC; amend its religious accommodation process for applicants and employees; train managers, supervisors, and HR personnel; and publicize the availability of religious accommodations on its internal and external websites, among other relief.

Fashion retailer resolves claims of systemic pregnancy bias. A North Carolina-based women's fashion and accessories retailer will pay $3.5 million to resolve EEOC allegations of systemic violations of Title VII and the Americans with Disabilities Act (ADA) after a nationwide investigation conducted jointly out of the agency's Chicago and Philadelphia offices found that the employer denied reasonable accommodations to certain pregnant employees or those with disabilities, made certain employees take unpaid leaves of absence, or terminated them because of their disabilities. The deal provides for a claims process to distribute $3.5 million to employees who were terminated due to their pregnancy or disabilities. It also requires the employer to revise its employment policies to more fully consider whether the medical restrictions of its pregnant employees or those with disabilities can be reasonably accommodated, conduct companywide training for more than 10,000 of its employees, and report to the EEOC periodically for three years on its responses to requests for reasonable accommodation by pregnant employees or those with disabilities.

DOL independent contractor claims resolved. A federal court entered a consent judgment against three Oregon-based delivery services and their owner/operator, requiring the defendants to pay $3.08 million in wages and liquidated damages to courier-driver employees to resolve a DOL lawsuit alleging the drivers were misclassified as independent contractors. The DOL alleged that the owner/operator illegally required the drivers to sign contracts with a corporate shell entity and charged the couriers a host of expenses, including the cost of gas and other costs attendant to using the drivers' vehicles for the company's delivery work. Under the consent judgment, in addition to the $3.2 million in unpaid back wages, liquidated damages, and penalties, the owner operator and the companies must immediately classify all drivers as employees who are entitled to the full payment of the federal minimum wage, overtime pay, and reimbursement for work-related expenses, such as gas and use of drivers' personal vehicles. The delivery service also must pay $112,900 in civil money penalties. Finally, to ensure they remain FLSA-compliant, the defendants must obtain a third-party audit of their employment practices within six months and issue notices to their workers and managers about employees' rights under the FLSA.

Healthcare network settles pregnancy discrimination action. A California court entered a three-year consent

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decree under which a healthcare employer will pay $1.75 million to an employee and a potential class of more than 250 similarly situated claimants to resolve EEOC allegations that the employer violated the ADA and Title VII by discriminating against the employees based on pregnancy, childbirth, or related medical conditions. The EEOC contended the employer failed to engage in the interactive process in good faith, failed to provide reasonable accommodations, and subjected employees to adverse employment actions. The consent decree also enjoins the employer from engaging in discrimination or retaliation based on disability, sex, pregnancy, childbirth, or related medical conditions, and requires the employer to retain a third-party EEO monitor to ensure compliance. The employer also must assign an internal ADA and Pregnancy Discrimination Act (PDA) coordinator to review and process requests for accommodation, complaints about disability, sex, or pregnancy discrimination, and retaliation, and review (and if necessary, revise) its policies and procedures on the ADA, Title VII, and the PDA. The employer also will train new hires and employees on federal laws regarding disability and sex discrimination, with a particular emphasis on pregnancy discrimination, and train supervisors on their obligations to handle accommodation requests and engage in the interactive process. ■

On the radar

Lawsuit alleges PAGA is unconstitutional. A California trade group formed for the specific purpose of accomplishing the appeal or reform of the state's Private Attorney General Act (PAGA) has filed suit contending that the law violates the U.S. and California Constitutions. The California Business & Industrial Alliance, which represents the interests of small and mid-sized businesses in the state, contends that the state should enforce its own laws—"rather than transferring the state's powers to private attorneys who operate for their own personal gain."

According to the complaint, which names California Attorney General Xavier Becerra in his official capacity, the PAGA has "become a tool of extortion and abuse by the Plaintiffs' Bar, who exploit the special standing of their PAGA plaintiff clients to avoid arbitration, threaten business-crushing lawsuits, and extract billions of dollars in settlements, their one-third of which comes right off the top." The PAGA expressly prohibits arbitration of claims; consequently, plaintiffs routinely add PAGA claims to class actions brought in California in an attempt to evade class waivers in arbitration agreements.

The lawsuit, which was filed in the Orange County Superior Court, seeks a temporary restraining order and preliminary and permanent injunctions prohibiting the attorney general from implementing or enforcing PAGA. The complaint also requests that the court issue a judgment declaring PAGA unconstitutional and unenforceable.

"This will be a closely watched case by employers as well as employment attorneys on both the defense and plaintiff's sides as the outcome of this case will have a lasting impact on how representative actions are being litigated and on the penalties that are being awarded for PAGA causes of action either through judgments or settlements," notes Jaclyn P. Floryan, an associate in Jackson Lewis' Los Angeles office.

High Court tackles CAFA removal question. The U.S. Supreme Court heard oral argument in January and considered whether a defendant may remove a class action suit to federal court under the Class Action Fairness Act when the defendant has filed a counterclaim against a third party in the litigation.

On the JL docket

Mark your calendars for these timely and informative Jackson Lewis events:

March 7, 2019	Albuquerque Business First Grow NM: What Cannabis Legalization Means for your Business (Albuquerque, NM) New York City Breakfast Series: How to Conduct an Effective Internal Investigation (Brooklyn, NY)
March 13-15, 2019	2019 Corporate Counsel Conference (Miami, FL)
March 21, 2019	Avoiding the Top 10 Wage and Hour Traps (Melville, NY)
March 28, 2019	Avoiding the Top 10 Wage and Hour Traps (Riverhead, NY)
April 10, 2019	Focus on Connecticut: Harassment Education and Training (Hartford, CT)
April 11, 2019	Portsmouth Spring Employment Law Update (Portsmouth, NH)
April 18, 2019	'But I Just Hired You!' Top 10 Stumbles During the Hiring Process (Melville, NY)
April 25, 2019	'But I Just Hired You!' Top 10 Stumbles During the Hiring Process (Riverhead, NY)
May 16, 2019	The Age of Medical Marijuana: Top 10 Employer Drug Testing Mistakes (Melville, NY)
May 23, 2019	The Age of Medical Marijuana: Top 10 Employer Drug Testing Mistakes (Riverhead, NY)

*Watch for news on important developments affecting class litigation on Jackson Lewis' **Employment Class and Collective Action Update** blog!*

Up next ...

In a matter of first impression, the U.S. Court of Appeals for the Fifth Circuit recently held that a district court may not send notice of an FLSA collective action to employees who have signed arbitration agreements waiving the right to participate in collective or class litigation. The court of appeals ruled that a district court erred in ordering that notice be sent to employees who signed such agreements, and in requiring the employer to provide contact information for those employees. The procedural question is critically important in class litigation, and courts increasingly must grapple with it. We'll discuss this emerging issue in our next *Class Action Trends Report.*