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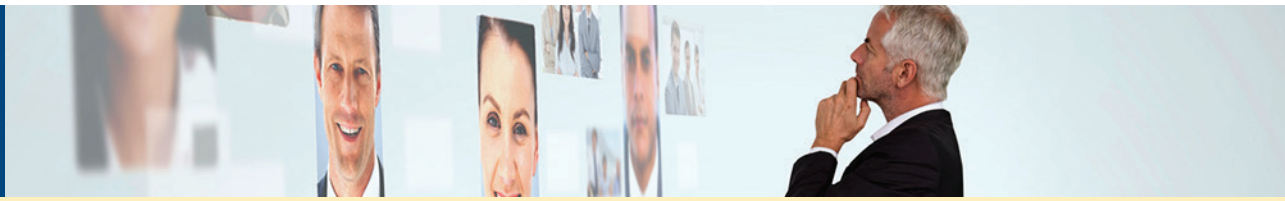

The Job Description

The newsletter of the
Employment and Labor Law Committee

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Committee Leadership

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In This Issue

Leadership Note

From Your Vice Chair

By Dessi Day

Stan Graham and I just returned from the annual DRI Leadership Conference in Chicago. While the outside temperature was too chilly for me coming from sunny San Diego, the temperature of this gathering was warm and inviting. Always inspiring and informative, the DRI leadership forum is a constant reminder for both Stan and me that we made the right choices when we joined DRI decades ago and pledged to serve, promote and lead this amazing committee.

Many of you have heard me refer to this group as my "tribe," my DRI family and a place I feel home. This journey began for me almost 20 years ago. As I navigated my way through DRI Young Lawyers, Product Liability, Drug and Medical Device, and the fabulous Woman in the Law Committee, I walked into a room of employment lawyers at this committee's gathering in Scottsdale, Arizona, and I immediately felt a sense of belonging. The welcoming atmosphere of this group has always amazed me. Like no other professional group, DRI to me is not only comprised of talented, smart and impressive professionals, but also of people with rich and inspiring lives who are eager to collaborate and share their experiences.

As we begin this new decade, let this be a reminder to use every opportunity we can to connect with one another, at our seminars and through the online community or publications. The relationships you create will not only enrich your professional lives and serve your clients, colleagues and law firms well, but you will forge bonds that will enrich your personal lives forever.

The opportunities to get involved and contribute to our committee are endless. One of the valuable things you can do is help us grow our professional web by inviting other employment lawyers to join us. Our membership goal last year was 26 new members. With your help, we not only met it, but we exceeded it. Behind these positive stats is more than a number; it is the recognition that that we have added value to our committee by welcoming new members who will contribute their unique professional knowledge and experiences to our growth efforts.

And, what better way to connect than to join us in Denver?! Attending the DRI Employment and Labor Law Seminar in May 20, 2020, in Denver is a must. Registration is now open! Go to the DRI website, register, book your flight, make your hotel reservations, and meet us there. If you are new to the committee, we will have networking events for new attendees. The Women in the Law Luncheon, for which you can register through EventBrite, is a staple and you do not want to miss it. The Young Lawyers Reception is always a hit. We know better than to discriminate based on any protected classifications, so all are welcome to all events!

Thank you for being part of our community, and for your personal and professional contributions to the team efforts! We look forward to seeing you in Denver, and at the DRI 2020 Annual Summit in Washington, D.C., in October.

Be good, be kind, be helpful to one another, come join our team and thrive!

Dessislava N. (Dessi) Day has practiced law in California for 20 years, during which time she has represented employers in a wide spectrum of employment law disputes, including wrongful termination, discrimination, harassment, retaliation, wage and hour, whistleblower, trade secret violations, and representative actions. She counsels employers on employee discipline, leaves of absence, accommodations, compensation, and employment agreements. In addition to her law practice, Ms. Day is also actively involved in several professional organizations. She is the Vice Chair of the DRI Employment and Labor Law Committee and has served on the DRI Employment and Labor Law Steering Committee for over a decade.

Feature Articles

The NLRB Sets the Stage for a Sea of Change in Employment Practices for 2020

By Kerri A. Wright and Melanie D. Lipomanis

In the final month of 2019, the National Labor Relations Board ("Board") followed through on its promise to reverse course on a number of precedents established during the Obama administration. Recent employer-friendly Board decisions and Advice Memoranda address a broad spectrum of employment issues for both unionized and non-union workforces, all of which will have a significant impact on business practices and workplace policies. This article provides a summary of the Board's whirlwind of activity in closing out 2019 and how to counsel clients on their employment practices going forward in 2020.

Employers May Restrict Use of Email and Other Information Tech Systems

In a very welcome 3–1 decision, the Board overturned *Purple Communications, Inc.*, 361 NLRB 1050 (2014), which held that employer policies prohibiting employees from using the employers' email systems for non-work related purposes were presumptively invalid as they impinged upon employees' rights under Section 7 of the National Labor Relations Act ("NLRA").[1]

In *Caesars Entertainment Corp d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (December 16, 2019), the Board held that employees' Section 7 activities must yield to employers' property rights in controlling the use of their equipment. It further held that employees "do not have a statutory right to use employers' email and other information-technology (IT) resources to engage in non-work-related communications." Accordingly, employers may lawfully exercise their right to restrict the uses for which those email and other IT systems are intended. The Board noted the prevalence of smart phones, personal email and social media and found restrictions on employer-provided platforms are lawful, as long as those restrictions are not discriminatory, *i.e.*, apply only to Section 7 activity.

The *Caesars* decision recognized that, while the majority of workplaces will allow employees adequate access to communicate for concerted efforts without using their employer's equipment, there will be rare circumstances in which an employer's IT resources are the only reasonable means for employees to do so. Under those circumstances, the Board held that the employer's property rights must yield, and employees must be permitted to use employer-provided email to the extent required to ensure adequate avenues of communication. The Board declined in *Caesars* to define the scope of the exception, leaving it to "be fleshed out on a case-by-case basis." Accordingly, when advising employers on implementing policies restricting use of email and other systems, it is important to be mindful of the nature of the work environment, particularly where a substantial portion of the workforce is comprised of remote or virtual employees, as that is a situation in which the exception might become applicable.

Employers May Require Confidentiality During Workplace Investigations

One of the more controversial and problematic precedents from the Obama-era Board was the 2015 decision in *Banner Health Systems*, 362 NLRB No. 137 (2015), which required an employer to determine on a case-by-case basis "whether its interests in preserving the integrity of an investigation outweighed presumptive employee Section 7 rights." At its core, this decision prohibited an employer's blanket rule of insisting on confidentiality during workplace investigations, which certainly could have a chilling effect on employee candor and participation. It also could compromise the integrity of the investigation (call to mind the sensitive nature of many employers' proactive internal investigations following the Me-Too movement).

In *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (December 17, 2019), the Board rejected the holding in *Banner Health,* which put employers in the untenable position of either complying with the NLRA,

[1] Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Because Section 7 affords employees with the right to engage in concerted activities for general "mutual aid or protection" and is not restricted to organizing and collective bargaining efforts, those rights apply to non-unionized as well as unionized workforces.

or protecting employees (*i.e.*, the accuser, accused and witnesses) and safeguarding the integrity of open internal investigations. Instead, the Board used the analysis standard established in *The Boeing Company*, 365 NLRB No. 154 (2017), which weighs the nature and extent of the effect on employees' Section 7 rights and the employer's legitimate justifications for the rule. Under this framework, the Board held that, while an employer's facially neutral rules mandating confidentiality during an investigation necessarily impact employees' Section 7 rights, such impact is "comparatively slight" and is "outweighed by the substantial and important justifications associated with the [employer's] maintenance of the rules."

This change in policy is reflected in the Board's acknowledgement that federal agencies—including the NLRB, Equal Employment Opportunity Commission, and the Occupational Safety and Health Administration—all require confidentiality during their own active internal investigations to protect employee privacy and maintain the integrity of the investigation. The Board noted, however, that an employer's investigative rules that do not expressly limit confidentiality to *ongoing and open* investigations could be subject to higher scrutiny and may require the employer to proffer additional legitimate business justifications. Therefore, while employers may now implement blanket confidentiality rules during investigations of alleged wrongdoing, they should be instructed to draft such policies to apply to ongoing investigations only. Once the investigation is over, nonsupervisory employees should be permitted to speak about their role in the investigation unless there remains significant reasons to continue to require confidentiality. In such a situation, the significant reason(s) should be clearly communicated to the applicable employees and recorded in writing for posterity (and possible future litigation on the issue).

Employers May Limit Union Buttons and Other Insignia in the Workplace

Employees' protected right to wear union insignia, *e.g.*, buttons, pins, *etc.*, stems from the Supreme Court's decision in *Republic Aviation Corp. v NLRB*, 324 U.S. 793 (1945), which recognized workers' right to wear union insignia and presumed that an employer's restrictions of that right were unlawful unless they could demonstrate "special circumstances" justifying the restriction. Special circumstances that would justify an employer's limitations on union and other insignia have been exceptionally narrow and generally are only permitted to stand where such items would (1) jeopardize employee safety; (2) damage machinery or products; (3) exacerbate employee dissension; or (4) unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees. *In-N-Out Burger, Inc.*, 365 NLRB No. 39 (2017).

At issue in *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (December 16, 2019), was Wal-Mart's dress code policy that only permitted employees to wear "small, non-distracting logos or graphics" no larger than the size of its employee name badges. There, the Board returned to the balancing analysis established in its 2017 *Boeing* decision and found Wal-Mart's facially neutral policy was lawful for some employee groups, but not others. Specifically, the Board held that Wal-Mart's policy was lawful as it applied to employees who dealt directly with customers on the sales floor, because the employer's interest in providing its customers a satisfying shopping experience, on balance, outweighed the employees' interest in having no restrictions on the size of the insignia they were permitted to wear. The policy was held unlawful, however, in "employee-only" areas, because "the whole point" of wearing a large or distracting union insignia was precisely to "catch the attention of coworkers" for communications protected by Section 7 of the NLRA.

The takeaway from this decision is that employment policies should be narrowly tailored to limit insignia worn by frontline employees only while they are working in the employer's sales areas or in view of customers or clients. For such a policy to apply to employees working in non-public areas, employers must meet the narrow special circumstances enumerated above from the Board's *In-N-Out Burger, Inc.* decision.

Employers May Stop Collecting Union Dues Upon the Expiration of a Contract

In *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 368 NLRB No. 139 (December 16, 2019), the Board overruled the 2015 decision *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) and returned to precedent governing union check-off dues established decades earlier under *Bethlehem Steel*, 136 NLRB 1500 (1962).

The Board's decision in *Valley Hospital* reinstated the long-standing rule that employers have no statutory obligation to check-off and remit employees' union dues after the expiration of the parties' collective bargaining agreement that contains the check-off provision. The Board held that dues collection provisions belong in the limited category of mandatory subjects of bargaining which are

created exclusively by the collective bargaining agreement and are enforceable under the NLRA solely for the duration of the contractual obligation negotiated by the parties. This returns collective bargaining agreements to standard principles of contract formation, under which obligations created by contract do not extend beyond the expiration of the instrument that created them.

Employers may now unilaterally cease deducting union dues through employee-payroll upon the expiration of a contract. This reversal of fortunes restores to employers an economic advantage in seeking prompt agreement on, and ratification of, successor contracts.

Deferential Treatment of Arbitration Awards Is Back in Full Force

The Obama-era Board's decision in *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132 (2014), abolished the decades-old *Spielberg/Olin* deference standard regarding Board deferral to employer-employee-established grievance and arbitration processes (based on the seminal decisions in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984)). *Babcock & Wilcox* newly placed the burden of proof on the party seeking the Board's deferral to the parties' arbitration decision and set more stringent standards for deferral to be appropriate. This basically rendered previously negotiated final and binding dispute resolution processes wholly toothless—as optional or interim determinations only. In addition, it spawned an era of costly, acrimonious, and wildly protracted labor disputes.

In *United Parcel Service, Inc.*, 369 NLRB No. 1 (December 23, 2019), the Board unanimously overruled *Babcock & Wilcox* and restored the prior standard for determining when to defer to arbitration decisions in labor disputes, further announcing it would apply this standard retroactively. Under the restored standard, the Board will defer to the arbitrator's decision when (1) the arbitral proceedings appear to have been fair and regular, (2) all parties have agreed to be bound, (3) the arbitrator considered the unfair labor practice issue, and (4) the arbitrator's decision is not clearly repugnant to the NLRA. The burden once again will rest with the party opposing deferral to show these standards have not been met. In addition, the decision restores the corollary rules for pre-arbitral deferral established in *United Technologies Corp.*, 268 NLRB No. 557 (1984), and for deferral to pre-arbitral settlement agreements established in *Alpha Beta Co.*, 273 NLRB No. 1546 (1985).

Conclusion

Each of these decisions returns the federal labor law landscape to where it had been for many years. These and other ongoing changes to the Board's positions requires employers across the country to remain vigilant in conducting annual reviews of their policies and training materials to ensure they are up to date with current federal labor requirements.

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California Ups the Ante on Independent Contractor Arrangements

By Dessi Day, Lauren Cartwright, and Leticia Butler

On September 18, 2019, California Governor Gavin Newsom signed Assembly Bill 5, which is codified in the California Labor Code as Section 2450.3 ("AB 5"). AB 5 went into effect on January 1, 2020 and the law drastically changed the way that California distinguishes between employers and independent contractors. In sum, the default rule is that an individual doing work for a company is an employee, unless the three criteria of the "ABC test" set forth in AB 5 are met *or* an exception applies. If one of the specified exceptions apply, the *Borello* test (discussed below) and not the ABC test is applied to determine whether an individual may be properly classified as an independent contractor.

The AB 5 test is based on the California Supreme Court's decision in *Dynamex Operations West, Inc., v Superior Court of Los Angeles*, 4 Cal.5th 903 (2018) (*Dynamex*). Classifying workers in California as independent contractors has always been difficult, but the passage of AB 5 and the increased scrutiny on temporary workers and gig economy platforms, make this decision even more nuanced and risky today. Although AB 5 was originally aimed at protecting workers who provided labor through online hiring platforms such as Uber, Lyft, and Postmates, the statute applies to all industries, even though many of workers it seeks to protect would prefer to retain their independent contractor status for convenience and flexibility.

AB 5 is complicated and drafted with inherent ambiguity, including countless undefined terms, which leaves it open to interpretation. It is expected that AB 5 will be heavily litigated and that courts will be tasked with providing meaning to terms where the legislators failed to do so. In fact, the statute has already been the subject of several legal challenges and, on the eve of its effective date two restraining order were sought to block its application. In the first action, a federal judge granted a preliminary injunction enjoining the State of California from enforcing AB 5 as applied to motor carriers operating in California. *California Trucking Association, et al. v. Xavier Becerra*, *et al* U.S. District Court, Southern District of California, Case No. 3:18-cv-02458-BEN-BLM., Jan. 16, 2020. On January 30, 2020, the State of California appealed the ruling. In the second action, filed by Uber, Postmates and two of its workers on December 30, 2019, the district court is now receiving briefing on the preliminary injunction. *Olson, Perez, Postmates and Uber, et. al, v. Xavier Becerra, et al* U.S. District Court, Central District Case No. 2:2019cv10956 2:19-cv-10956-DMG-RAO. It is likely that additional challenges and amendments aimed at clarifying its terms will follow. Regardless, it is prudent for companies using contract labor in California to modify their practices based on the new law in its current form.

AB 5 and the ABC Test

Labor Code section 2750.3 (AB 5) sets forth a three-part test known as the ABC test to determine whether workers are employees or independent contractors for the purpose of the California Labor Code, Unemployment Insurance Code and California Wage Orders. AB 5 creates a presumption that workers are employees except when the employer can satisfy all three parts of the ABC test. (Lab. Code §2750.3 states "[A] person providing labor or services for remuneration *shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates,"* the three ABC requirements.].)

Under the ABC test, a worker is classified as an employee unless the employer can establish *all three* of the following:

A. That the worker is free from the hiring entity's control and direction in connection with performance of the work, both under the contract and in the actual performance of the work;

B. That the worker performs work that is outside the usual course of the hiring entity's business; and

C. That the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Part A of the test requires that the hiring entity not have the right to exercise control or direction over the worker's services. A worker who is subject, either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over employees would not meet this requirement. Depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees. The hiring entity's control must be limited to accepting or rejecting "the results" the worker

achieves, not how he or she achieves them. This factor can be difficult to satisfy in situations when the hiring entity determines the worker's hours and day to day activities in practice, even if the terms of an agreement state that the hiring entity is not managing the worker's services.

Part B, which assesses whether the work being performed is "outside the usual course of the hiring entity's business," is usually the most difficult requirement to meet. The worker cannot be doing the same work the hiring entity's employees ordinarily do, regardless of whether the individual worker is a sole proprietorship or operates through an incorporated entity, such as a limited liability company. The term "business" is not defined by AB 5, nor the underlying *Dynamex* decision that was the impetus for the legislation. However, the *Dynamex* decision provides these examples:

> … when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees.

See, *Dynamex*, 4 Cal.5th at 959-960. Requirement B is at the heart of the challenges against the statute asserted in the *Uber/ Postmates* action. These employers all take the position that they provide a technical platform, rather than rides and food delivery, and that the drivers and delivery workers providing those services are not part of their usual business. The issue will likely be litigated for some time, and it has gained traction in other gig economy cases.

Part C of the ABC test requires that the worker be engaged in an independently established trade, occupation, or business. This means that the worker's business activity must exist independently of, and apart from, the service relationship with the hiring firm. It must be a stable, lasting enterprise that will survive termination of the relationship with the hiring firm. This can be evidenced by things such as the existence of other clients the worker performs services for, advertising the business, setting up a corporate entity, obtaining licensing and hiring employees. To satisfy part C, it is insufficient that the company would allow the worker to perform work for other clients. Rather, the worker must actually work for other clients or at least actively seek such additional work. If an individual's work relies on a single employer, Part C is not met. For example, Part C was not satisfied where a taxi driver was required to hold a municipal permit that may only be used while that driver is employed by a specific taxi company. *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 575.

If the ABC requirements are not satisfied, the workers will be considered employees of the hiring entity under California law, and the state law requirements for such matters as minimum wage, overtime, meals and rest breaks, expense reimbursement, paid sick leave, paid family leave, posting, wage statements, paycheck timing, timekeeping record requirements, unemployment coverage, workers compensation coverage, travel pay, on-call, call-back and standby pay and final paycheck timing all apply.

Exceptions to the AB 5 ABC Test

Labor Code section 2750.3 applies to all California workers, except for those in several enumerated occupations that were specifically carved out of the statute. These include doctors, dentists, psychologists, lawyers, insurance brokers, architects, engineers, private investigators, accountants, securities brokers/dealers, investment advisers, real estate agents, marketing professionals, human resources professionals, graphic designers, travel agents, barbers and cosmetologists, among others. Lab. Code §2750.50(b) Those exempt entities are still subject to the independent contractor test from the decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (known as "the *Borello* test), rather than the strict ABC test. The *Borello* test (discussed below) is more flexible than the ABC test, but it still contains many of the same considerations and is not an easy standard to meet.

There is also a narrow statutory exemption from the statute applies to "bona fide business-to-business" contracting relationships. To qualify under this exception, the service provider must be an established business entity (sole proprietorship, partnership, LLC, LLP or corporation), and the contracting business must demonstrate 12 specific requirements. The contracting business has the burden to prove the 12 requirements, which include: that the worker is free from the control of the contracting entity, the service provider is an established business, negotiates its own rates, works for other clients, provides services to the contracting business directly, rather than to the

customers of the contracting business, and provides its own tools, vehicles and equipment to perform the services, among others. Lab. Code §2750.3(e). In any event, the only advantage of the exemption is that the provider would be subject to *Borello* test, rather than the strict ABC test.

The *Borello* Test

If the ABC test does not apply for any reason, the independent contractor arrangement would be scrutinized under the California common law *Borello* multi-factor test. Under *Borello*, all factors are considered, but the most important consideration is whether the hiring entity has the right to direct and control the manner and means of performing the work (sometimes referred to as the "right to control" test). Courts have emphasized different factors in the multifactor test depending on the circumstances. While the ABC test and the *Borello* test overlap, the significant difference is that the *Borello* test *does not require a business to satisfy all the factors* listed below. Rather, courts consider and weigh the factors in each case, making it more flexible and less demanding than the rigid ABC test. The *Borello* factors include:

a. Ability to discharge at will, without cause;

b. Whether the one performing services is engaged in a distinct occupation or business;

c. The kind of work, and whether it's usually done under close direction or supervision or by a specialist without supervision;

d. Skill required in the occupation;

e. Whether the principal or the worker supplies the instrumentalities, tools and the place of work for the person doing the work;

f. Length of time for which the services are to be performed;

g. Whether payment is by time or by the job;

h. Whether the work is a part of the principal's regular business;

i. Whether the parties believe they're creating the relationship of employer-employee, however the legal determination is not based on the parties' belief about whether they have an employment relationship;

j. Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;

k. Whether the work is a regular or integral part of the employer's business;

l. Whether the worker has invested in the business, such as in the equipment or materials required by their task;

m. Whether the service provided requires a special skill;

n. The worker's opportunity for profit or loss depending on their managerial skill;

o. The degree of permanence of the working relationship; and

p. Whether the worker hires their own employees.

In one case, the Ninth Circuit Court of Appeals rejected FedEx's classification of its drivers as independent contractors because FedEx exercised significant control over the drivers, including assigning services areas, controlling which packages were delivered, requiring them to wear FedEx uniforms and to paint their vehicles a specific shade of white, mark them with the FedEx logo, and restricting the times during which the drivers could provide services. Given "the powerful evidence" of FedEx's right to control the way the drivers performed their work, the court held that the drivers were employees as a matter of law. *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014).

In another decision, the court refused to grant summary judgment for Uber, based on the *Borello* test. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015). The court analyzed the "principal" control factor under the *Borello* test, *i.e.*, "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired," and found disputed issues because Uber can fire drivers at will, and drivers must dress professionally, and otherwise conform to Uber's quality control "suggestions" and a driver's not accepting trips is considered a "performance issue."

However, one federal court found that a driver for GrubHub was properly classified as an independent contractor because GrubHub did not control the manner or means of his work, including whether the driver worked at all, or for how long or how often, or whether he performed deliveries for competitors at the same time he had agreed to deliver for GrubHub. In addition, GrubHub did not provide him with any of the tools for his work, other than a downloadable mobile app and the parties contemplated only episodic work at the driver's convenience. *Lawson v.*

GrubHub, Inc. 15-cv-05128, 2018 WL 776354 (N.D. Cal. Feb. 8, 2018).

Joint Employer Considerations

Separate from the question of independent contractor status, the California Labor Code provides that temporary staffing agencies and their clients can share legal responsibility for the wages, such as overtime pay, commissions, bonuses, incentive pay and premium pay for missed meal and rest breaks—but not unreimbursed business expenses or statutory penalties. California Labor Code section 2810.3 creates a joint employment relationship for companies (known as "client employers") who use third party companies, such as temporary staffing providers (known as "labor contractors") to supply workers in the client's customary business when the work is performed at the worksite of the client. If an employer with 25 or more employees uses five or more workers at any one time from a third party, both the employer and the third party may be responsible and bear civil legal responsibility and liability for the payment of wages to the workers. (The statute expressly states that it does not impose liability for the use of an independent contractors or change the definition of independent contractor.)

Also, a company can face common law joint employer liability if it shares in the determination of the essential terms and conditions of employment for employees of another business. The factors that can create a joint employer relationship are when an employer (1) "exercise[s] control over… wages, hours or working conditions," (2) "suffer[s] or permit[s] the employee to work," or (3) " engage[s], thereby creating a common law employment relationship." *Martinez v. Combs*, 49 Cal.4th 35, 64 (2010), *as modified* (June 9, 2010); *Ochoa v. McDonald's Corp.*, 33 F.Supp.3d 1228 (N.D. Cal. 2015) ("[a]ny of the three is sufficient to create an employment relationship.").

In a recent joint-employer liability case, *Curry v. Equilon Enterprises, LLC*, 23 Cal.App.5th 289 (2018), a California appellate court held that a company leasing its service station to an operator was not liable as a joint employer for wage-and-hour claims of the operator's employees. In that case, there was a clear distinction between the company leasing the service station and the operators running the service station, and the court found that the company leasing the service station had no involvement in the station's daily operations and no control over the wages, hours and working conditions of the operator's employees.

Conclusion

Based on the new California law, companies who have hired or are planning to hire contract labor in California should be mindful of the stricter requirements for an independent contractor classification, and the potential liability exposure related to joint employment relationships. In reviewing their operations and business arrangements in California, companies may consider reclassifying workers as employees to ensure compliance with the new law, or restructuring their contract arrangements with customers for whom they supply temporary workers. It is also important to carefully review and reassess the indemnification obligations in contract arrangements with customers in situations involving temporary placement of workers.

Dessi Day, Lauren Cartwright, and Leticia Butler of Greene and Roberts, LLP, San Diego, California represent public and private employers in labor and employment-related matters. They counsel and defend employers in litigation matters, including individual and collective actions involving discrimination, harassment, retaliation, trade secret and wage and hour disputes. Dessi Day is the Vice of Chair of the DRI Employment and Labor Law Committee.