Breakout Sessions – Series 4

THE INDEPENDENT CONTRACTOR CLASSIFICATION GAMBLE

LONG SHOT OR SURE THING?

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“The workforce is changing. How we approach work is changing, and we need to start looking at our rules and recognize that what fit 20 or 30 years ago is not going to fit for the modern workplace. We’ve already said that we’re strongly considering looking at the joint employment issue . . . Right now we’re focusing on that and then we’ll look at the classification issue as well.”

~Secretary of Labor Alexander Acosta, September 2018, interview with Bloomberg Law.

With the continued increase of “gig economy” companies who routinely retain workers as independent contractors (“ICs”), along with the increased use of ICs in various other industries, IC misclassification litigation and other initiatives continue to be on the rise. This paper discusses the various legal tests used to determine IC status, recent federal and state court litigation and legislative initiatives in connection with the same, the impact of Epic Systems and New Prime on IC misclassification litigation and strategies, the “mass arbitration” endemic following Epic Systems, and recommended “best practices” for minimizing liability and structuring IC relationships in the most defensible manner possible.

I. GENERAL BACKGROUND

A. Tests Used to Determine Independent Contractor Status

There is no single legal test used to determine whether an individual is an IC or employee. Rather, the test used varies depending on the particular law involved.

In misclassification litigation involving the federal Fair Labor Standards Act (“FLSA”), courts apply the “economic realities” test. This is a multi-factor test that generally looks to: (1) the degree of control exerted by the company over the worker (a greater degree of control weighs in favor of finding an employment relationship); (2) the worker’s relative investment in facilities (a greater investment by the worker weighs against finding an employment relationship); (3) the worker’s opportunity for profit and loss (a greater degree of control by the worker weighs against finding an employment relationship); (4) the permanency of the parties’ relationship (a greater degree of permanence weighs in favor of finding an employment relationship); and (5) the skill required for the work (the greater degree of skill weighs against finding an employment relationship). In addition to these factors, most courts assess an additional factor—whether the worker’s services are integral to the company’s business. Under the economic realities test, no single factor is dispositive. Instead, courts employ a “totality of circumstances” approach.¹

Another common IC test is the IRS’s “right to control” test, which consists of several factors in three general categories: Behavioral Control, Financial Control, and the Type of Relationship. Some of the factors under this test are similar to those under the economic realities test—such as the amount of investment by the worker or the permanency of the relationship. But there are also many other different factors under the right to control test, such as the type of instruction given to the worker, the amount of training provided to the worker, and so on. In sum, under the right to control test, a company’s degree of control over the work plays a significant role in the determination of whether a worker is IC or employee. For example, the

¹ The Department of Labor generally relies on these six factors, but also considers a seventh factor: the degree of independent business organization and operation. See DOL Fact Sheet #13. The DOL further takes the position that certain factors are immaterial in determining whether an employment relationship exists—e.g. the place where the work is performed; the absence of a formal employment agreement, etc.
IRS’s general rule is that an individual is an IC if the person or entity for whom the services are performed has the right to control or direct only the result of the work and not the manner, method and methods of accomplishing the results. Depending on the law at issue, as well as the jurisdiction, courts may apply different versions of the right to control test—including the version articulated by the U.S. Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (commonly referred to as the *Darden* test).

Another commonly used IC test is referred to as the “ABC” test. This test, which is the hardest to satisfy by far, is typically applied in the unemployment context but recently has been adopted in various states. There are two versions of the ABC test—the “regular” and “strict” version. Under the regular version of the test, to be an IC, a worker must: (A) control the manner, method and means of performance; (B) perform services outside of the usual course of the employer’s business or outside the employer’s place of business; and (C) perform services in an independently established trade, business or occupation. Under the strict version, companies may satisfy prong B only if the worker performs services outside the usual course of its business. As discussed below, several states, such as Massachusetts, New Jersey, and California have adopted the ABC test for broader use (beyond unemployment), resulting in a much tougher standard to meet to prevail in IC misclassification challenges.\(^2\)

**B. Risks Associated with the Use of IC Models**

While the use of ICs can have several business advantages, given the current economic and political climate, IC relationships have been facing and continue to face increased scrutiny. Both the IRS and the Department of Labor (“DOL”) believe that up to 30 percent of companies—if not more—are misclassifying workers. The Government Accountability Office also estimates that misclassification costs the federal government $2.7 billion a year in unpaid unemployment, FICA, FUTA and other taxes. However, the risks associated with implementing an IC business model can be significant and include, for example:

(a) Federal and state DOL wage and hour investigations, testing the IC classification, and seeking unpaid overtime compensation and/or other relief if employee status is found;

(b) Private individual and collective/class lawsuits under the Fair Labor Standards Act (“FLSA”) and state wage and hour laws seeking a finding of employee status, the recovery of unpaid overtime, amounts deducted, liquidated damages, treble damages (under some state laws), and attorneys’ fees;

(c) Corporate campaigns by unions seeking to organize IC workers, which are often coupled with multiple misclassification challenges or lawsuits, or unions attempting to intervene in litigation or settlements to exert pressure;

(d) Investigations and assessments/fines by federal and state taxing authorities, including the IRS, state Departments of Revenue, and other entities for unpaid payroll taxes, and unemployment compensation contributions if employee status found;

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\(^2\) In particular, in 2018, the California Supreme Court issued the much-awaited *Dynamex* decision, which is discussed more fully below, adopting the ABC test for claims pursued under the various California wage orders.
(e) Class action or individual lawsuits under other employment laws, such as Title VII, ADEA, ADA, FMLA, ERISA, etc., alleging misclassification and entitlement to the benefits/protentions typically afforded to employees; and

(f) Class actions or individual lawsuits under other state law theories, such as unjust enrichment, fraud, rescission, and improper wage deductions.

II. LITIGATION TRENDS, LEGISLATIVE INITIATIVES, AND MASS ARBITRATIONS

A. Federal Court Litigation

Independent contractor misclassification litigation also continues to increase, both on an individual and, more prevalently, class or collective action basis. This litigation typically includes claims for overtime under the FLSA and state equivalents, violations of state wage/hour or wage/deduction statutes, unjust enrichment, fraud, and others. The annual statistics released by the Administrative Office of the U.S. Courts are illustrative. These confirm that FLSA collective action filings once again represent the largest category of employment-related class action filings in 2018. During the most recent twelve-month period, FLSA lawsuits accounted for 7,643 out of 17,780 (43%) of the labor and employment related lawsuits filed in federal court.

As illustrated in the cases below, as the case law develops, the question of whether a worker is an employee or IC is becoming harder to answer, making the outcome for companies using ICs much less predictable.

1. Recent Federal Court Cases on IC Status

Recently, the Sixth Circuit Court Appeals in Jammal v. Am. Family Ins. Co., Civ. No. 17-4125 (6th Cir. January 29, 2019) reversed a 2017 decision by a district court finding that thousands of former and current insurance agents were employees of the company—not ICs. The class of approximately 7,200 agents alleged that American Family Insurance misclassified them as ICs to allegedly avoid providing health and retirement benefits as required under ERISA. However, the agents in Jammal: (1) signed IC agreements; (2) filed taxes as ICs; (3) deducted business expenses; (4) were paid on commission; (5) hired assistants; and (6) were not provided with any vacation or paid time off, among other factors.

The district court applied the Darden test—a variation of the right to control test discussed above—and determined that this class of plaintiffs were employees. The plaintiffs alleged that they were referred to as employees in company training manuals and had received extensive training. The Sixth Circuit reversed, determining that the district court incorrectly assigned too much weight to the level of control and supervision over the work performed. The Court stated that “[b]ecause ERISA cases focus on the financial benefits that a company should have provided, the financial structure of the company-agent relationship guides the inquiry.” Id. at 13. Accordingly, the Sixth Circuit assigned more weight to factors pertaining to that financial structure—particularly the parties’ signed IC agreement. Ultimately, the Sixth Circuit determined “that the entire mix of Darden factors favored independent-contractor status.” Id.

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3 The risks of benefits claims, however, can be greatly minimized by the use of appropriate “carve-out” language for independent contractors in a company’s benefits plans. More specifically, benefits plans should, when defining employee, specifically exclude (for example) any individuals: (1) not on the company’s normal payroll; or (2) who are or have been for the period in question treated as an independent contractor, whether or not later reclassified for the same period as an employee by a state, federal or local administrative agency or tribunal or court.
The Sixth Circuit’s application of the Darden test in Jammal illustrates one method of applying an IC test—assigning a different weight to each factor in accordance with the legislative purpose behind the law at issue (e.g. ERISA). The Sixth Circuit took a similar approach in Acosta v. Off Duty Police Services, Inc., Nos. 17-5995/6071 (6th Cir. Feb. 12, 2019), where the Court held that all six factors of the economic realities test must be considered based on the “broadly remedial” purpose of the FLSA. Id. at p. 5. In Acosta, the DOL initiated an FLSA lawsuit alleging that workers of a private security firm, Off-Duty Police Services (ODPS), were employees entitled to overtime compensation. These workers were divided into two groups—one group was composed of sworn police officers and the other was of “non-sworn” workers who did not have any law enforcement background. In applying an economic realities test, the district court found that the non-sworn workers were employees. But with respect to the group of sworn police officers, the district court heavily focused on the fact that ODPS was not the only source of income for the sworn officers and, as such, concluded that these officers were ICs because they “simply were not economically dependent on ODPS.” Id. at 11.

On appeal, the Sixth Circuit held that the district court erred by focusing more on certain factors, while not affording appropriate weight to the other factors of the economic reality test. Id. at 8-11. For instance, the district court in Acosta placed a lot of weight on the “permanence factor” while naming the sworn officers’ investment in specialized equipment a “non-factor.” Id. at 8-11. However, the Sixth Circuit held that, “in light of the FLSA’s ‘strikingly broad’ definition of ‘employee,’” a court must weigh the “full range of factors.” Id. at 16. The Court then applied the six-factor test and concluded with respect to the first five factors that: (1) the services offered by PDPS’s workers were integral to the company; (2) the services did not require the skill or training of a licensed police officer; (3) there was limited investment in specialized equipment; (4) the length and consistency of the relationship between ODPS and the works suggested permanence; and (5) there was no opportunity for profit because the workers earned set wages to perform low-skilled jobs for fixed periods of time. After weighing all six factors, the Sixth Circuit determined that an employment relationship existed between ODPS and both sworn officers and non-sworn workers, and thus, reversed the district court’s decision.

The industry at issue can also impact this IC determination, as seen in the Fifth Circuit Court of Appeals’ recent decision in Parrish v. Premier Directional Drilling, L.P., No. 17-51089 (5th Cir. Feb. 28, 2019). In Parrish, the company, Premier, specialized in directional drilling for oil, which can lead to efficient oil extraction. To perform this drilling, Premier used “directional-driller-consultants (DD)” and “measurement-while-drilling consultants” (MWD). Notably, some DDs were classified by Premier as employees, while others were classified as ICs. The plaintiffs in this case were DDs. Both jobs had essentially the same duties. In fact, Premier’s vice president testified that “the only difference between an [IC DD] and an employee [DD]…is their ability to turn down work…and negotiate their pay.” Id. at 3. The IC DDs filed an FLSA collective action for unpaid overtime against Premier.

The district court in Parrish concluded that the plaintiffs were employees: “[w]hile there are certainly facts supporting the classification of plaintiffs as ICs, the fact that employee DDs and IC DDs were treated the same, and supervised in the same manner, with no appreciable differences other than how they were compensated, factor[ed] most heavily in the court’s analysis here.” Id. at 6. On appeal, the Fifth Circuit reversed. In particular, the Fifth Circuit found that there were several differences between employees DDs and the plaintiffs—namely the ability of IC DDs to turn down projects and the manner in which they requested time off. Given these differences (among others), the fact that some DDs were classified as employees did not persuade the Court to find that IC DDs were necessarily employees as well.
Instead, the Fifth Circuit examined and weighed each of the five *Silk* factors. In looking at the first factor—"the degree of control exercised by the alleged employer"—the Fifth Circuit noted that this control factor favored IC status because the plaintiffs were free to accept or reject any project and controlled their own work. Specifically, Premier did not dictate how plaintiffs competed their directional drilling calculations and did not have assigned shifts in a given project. Although the Court noted that IC DDs were required to undergo training and drug testing, thereby indicating an exercise of control, the Court found that these facts were "not dispositive in this action because of the nature of the employment." *Id.* at 14-15 (emphasis added). With respect to the second factor—"the relative investment of the worker and the alleged employer"—the Court found it favored employee status because the Premier invested more money than the individual plaintiffs. But the Fifth Circuit "accorded this factor little weight, in light of the nature of the industry and the work involved." *Id.* (emphasis added) at 15. Regarding the third factor—"the degree to which the worker's opportunity for profit or loss is determined by the alleged employer," the Fifth Circuit highlighted Premier's argument regarding one of the plaintiffs' goat farm, which offset $190,000 in profits from Premier. The Fifth Circuit ruled that it could consider any losses sustained by plaintiffs' non-Premier work, such as the goat farm, as part of the overall analysis of how dependent plaintiffs were on Premier. In weighing the fourth factor—"the skill and initiative required in performing the job"—the Fifth Circuit found that it weighed in favor of IC status. The Court noted that the IC DDs were "highly skilled personnel" when considering "their complicated work." *Id.* at 21. Finally, the Fifth Circuit held that the last factor—"the permanence of the relationship"—favored IC status since only a few of the plaintiffs had worked for Premier for more than ten months, and their advanced skillset made them marketable to other companies. After weighing all these factors, the Fifth circuit vacated the judgment of the district court, and rendered judgment for Premier.

Importantly, while the Fifth Circuit in *Parrish* found that the company could classify highly skilled workers with the same job titles as both employees and ICs under the FLSA, they were careful to emphasize the meaningful differences in the nature of the relationship between both groups and the company when making this distinction. If these meaningful differences are not built into the relationship in an appropriate manner, courts and other federal and state agencies could easily find the practice of "dual classification" for the same position as supporting employee status.

2. **FAAAAA Preemption**

Another evolving area of litigation in the IC space is that involving Federal Aviation Administration Authorization Act ("FAAAA") preemption in ABC test cases. The FAAAA's express preemption provision provides that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1) (emphasis added).

A circuit split has developed between the First, Third, and Seventh circuits on this issue. The Ninth Circuit will also likely address the issue soon, because FAAAA preemption has been raised in multiple cases there. The First Circuit determined that the FAAAA preempted prong B of the Massachusetts ABC test as it applied to the IC drivers in question. The Third and Seventh Circuits, however, have gone the other way. For example, in *Costello v. BeavEx, Inc.*, No. 15-1110, 2016 WL 212797 (7th Cir. Jan. 19, 2016), the Seventh Circuit found no FAAAA

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4 In analyzing this issue, the Fifth Circuit referenced and relied on the tax returns as probative evidence. As the production of tax returns is often a hotly-litigated topic in IC misclassification litigation, this decision can certainly be helpful on this point moving forward.
preemption of Illinois’ ABC test, although it was nearly identical to the version of the test which the First Circuit found preempted.\(^5\) The Third Circuit in Bedoya v. American Eagle Express, Inc., 914 F.3d 812 (3rd Cir. 2019) found no FAAAA preemption of New Jersey’s ABC test, concluding the test does not “single out” carriers, but rather applies to all businesses.\(^6\)

Following California’s adoption of the ABC test in April 2018, which is discussed in detail below, FAAAA preemption has been raised in multiple California district court cases as well. Although the Ninth Circuit held in 2014 that the FAAAA did not preempt the earlier Borello standard, see Dilts v. Penkse, 757 F.3d 1078 (9th Cir. 2014), district courts within the Ninth Circuit are just beginning to address whether the FAAAA preempts the ABC test’s second prong. For example, the Central District of California held that the FAAAA preempted the application of the second prong of the ABC test because the test “relates to a motor carrier’s services in more than a ‘tenuous’ manner.” See Alvarez et al v. XPO Logistics Cartage LLC et al, 2:18-cv-03736, 2018 WL 6271965 (C.D. Cal. Nov. 15, 2018). In another pending case, the California Trucking Association is seeking declaratory relief, claiming the ABC test is preempted by the FAAAA. See Cal. Trucking Ass’n v. Becerra et al., No. 3:18-cv-02458 (S.D. Cal. 2019).

B. Prominent State Court Litigation in 2018 and Legislative Efforts to Address the Same

In the long-awaited Dynamex decision, while dealing a blow to companies that use ICs in California, the Supreme Court of California adopted the ABC test to determine employee or independent contractor status under the state’s wage orders. See Dynamex Ops. West v. Superior Court of L.A., 4 Cal. 5th 903, 416 P.3d 1 (2018). The ABC test replaces the Borello test, which was articulated in the 1989 ruling, S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341 (1989). Unlike the conjunctive ABC test, the Borello test is a multifactor test, which emphasizes a company’s right to control workers and considers several secondary factors. In other words, the Borello test presents a more fluid standard, leaving companies with different arguments when defending IC status.

1. Direct Implications of Dynamex

Dynamex is inarguably an employee friendly test, as the ABC test begins with a presumption that workers are employees and places the burden on employers to prove all three necessary factors to prove IC status. Although the ABC test is extremely demanding for California’s employers and risks how many have structured their business models, the Dynamex decision still leaves two possible avenues open for establishing IC status.

First, as discussed above, companies in the transportation industry will – and have already begun to – argue that the FAAAA preempts prong B of California’s ABC’s test established by Dynamex. As discussed above, the Central District of California has already held that the FAAAA preempted the application of the second prong of the ABC test in Alvarez, 2018 WL 6271965. And, the California Trucking Association is claiming the ABC test is

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\(^5\) Pointing out the existence of a Circuit split on this issue, BeavEx, Inc. petitioned the Supreme Court of the United States for certiorari. However, the Supreme Court declined to hear the issue, leaving uncertainty as to whether the ABC test used in other jurisdictions is subject to FAAAA preemption.

\(^6\) Unlike Massachusetts or Illinois’ ABC tests, New Jersey’s ABC test is a product of common law. The test is also slightly less rigid than the tests in Massachusetts and Illinois, because the second factor of New Jersey’s ABC test includes an alternative method for establishing IC status if the business can prove that the worker provides services outside the company’s “places of business.” American Eagle Express Inc. has petitioned the Supreme Court for review.
preempted by the FAAAA. See Cal. Trucking Ass’n, No. 3:18-cv-02458. Interestingly, the California Supreme Court expressly adopted Massachusetts’s ABC test in *Dynamex*. As noted above, the First Circuit has already held that the FAAAA preempts prong B of that test.

However, even if prong B of California’s ABC test is not ultimately preempted by the FAAAA, the California Supreme Court defined the “usual course” of business under prong B slightly differently than other states. According to *Dynamex*, “[w]orkers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus *who would ordinarily be viewed by others* as working in the hiring entity’s business and not as working, instead, in the worker’s own independent business.” While many other jurisdictions look to how the company defines its business or whether the worker’s services are necessary to the company, the “ordinarily viewed” standard allows courts to consider what is “ordinary” across the company’s industry.

2. Decisions That Will Define the Scope of *Dynamex*

A California Court of Appeal significantly limited the scope of the *Dynamex* decision just six months after it was decided, holding that the ABC test applies only to Wage Order claims. See *Garcia v. Border Transp. Grp., LLC*, 28 Cal.App.5th 558 (2018). The case began in 2015, prior to the *Dynamex* decision, when a taxi driver alleging misclassification brought multiple causes of action—some under the Industrial Welfare Commission (IWC) Wage Orders and others under various state labor statutes.

The trial court granted defendant summary judgment on the issue of whether the driver-plaintiff was an IC under the *Borello* test. However, while plaintiff’s appeal was pending, the California Supreme Court decided *Dynamex*. In deciding whether the trial court properly ruled plaintiff was an IC, the California Court of Appeal held that the ABC test set forth in *Dynamex* applied only to claims arising under the IWC Wage Orders, including claims for unpaid wages, failure to pay minimum wage, failure to provide meal and rest periods, failure to furnish itemized wage statements, and derivative claims for unfair competition. Refusing to apply the ABC test “categorically,” the court reasoned, “*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California’s labor protections.”

However, whether *Dynamex* will apply to misclassification cases retroactively is still uncertain. Although the California Supreme Court heard supplemental arguments on this issue, the court left it up to lower courts to determine whether *Dynamex* has retroactive effect. Now, the Ninth Circuit is poised to determine *Dynamex*’s retroactive effect in *Raef Lawson v. Grubhub, Inc.* No. 18-15386 (9th Cir. 2018).

In *Lawson v. Grubhub Holdings, Inc.*, an on-demand good delivery company prevailed in a misclassification bench trial in the Northern District of California in February 2018. See 302 F.Supp.3d 1071 (2018). Applying the *Borello* test, Judge Jacqueline Scott Corley concluded that GrubHub did not control the details of how the plaintiff-driver accomplished his work. Although GrubHub exercised some control over drivers, such as determining the driver’s rate of pay, which blocks of time to make available for the driver, and the geographical boundaries of the delivery zones, GrubHub did not control what vehicle the driver used, what the drivers wore during deliveries, and did not offer any training or orientation for the driver. In addition, the Judge analyzed a series of “secondary factors” under California state law and determined these additional factors further weighed in favor of GrubHub. However, following the *Dynamex* decision in April 2018, plaintiff argued that the new ABC test should apply to his claims.
retroactively, rather than the previously-employed *Borello* test. After the Northern District of California Magistrate Judge declined to vacate the ruling that plaintiff was an IC, plaintiff appealed the question of retroactivity to the Ninth Circuit.\(^7\)

In addition to these cases, which will define the scope of *Dynamex* and the ABC test under California law, *Dynamex* is likely to trigger a multitude of misclassification lawsuits, including class and collective actions, across industries.

### 3. Proposed Legislation to Codify or Overturn *Dynamex*

Unsurprisingly, there has already been legislation proposed to either codify or overturn the *Dynamex* ruling. Legislation was introduced to codify *Dynamex* in the California legislature on December 3, 2018, the first day to introduce bills for the 2019-2020 legislative session. The same day, state legislators introduced legislation to overturn the *Dynamex* ruling. This legislation essentially proposes to codify the multifactor *Borello* test, which applied before the California Supreme Court adopted the ABC test and hinged on the right to control.

Given the composition of the California legislature, the proposal to codify the *Dynamex* decision will probably have a better chance of succeeding in the current legislature. Although *Dynamex* has already been detrimental for California employers, codifying the ABC test through statute would be worse. *Dynamex* left unanswered questions that lower courts can potentially decide in favor of employers. As noted above, the *Garcia* court already held that the ABC test applies only to Wage Order claims, and as such, any other misclassification claims will continue to be analyzed under the more lenient *Borello* test. However, if the legislature codifies the ABC test into statute, the legislature could answer many of these questions itself in favor of employees.

### C. Class Action Waivers and Proposed Legislation to Nullify *Epic Systems*

Another major development in the IC space, and increasingly-used strategy used to minimize litigation in this area, involves class action waivers in arbitration agreements. Class action waivers are commonplace in IC agreements, settlement agreements, distributorship agreements, and other contracts common to the relationship between companies and ICs. Thus, while not directly related to the classification issue, the U.S. Supreme Court’s decision in *Epic Systems Corp. v. Lewis* 138 S.Ct. 1632 (2018) on whether class actions waivers in arbitration agreements are lawful under the National Labor Relations Act (NLRA) was expected to drastically impact the way in which misclassification suits were litigated. Fortunately for employers, in a 5-4 majority opinion, the Supreme Court held that class action waivers in arbitration agreements did not violate the NLRA, and thus, were enforceable.

#### 1. The *Epic Systems* Decision

In January 2012, the National Labor Relations Board (NLRB) ruled in *D.R. Horton*, 357 NLRB No. 184 (2012) that employers cannot use class action waivers in arbitration agreements with employees covered by the NLRA. The Board determined that such waivers deprive employees of their “substantive” rights to proceed collectively under Section 7 of the NLRA. Most federal courts (including the Fifth Circuit that later overturned the Board’s decision in *D.R. Horton*) disagreed with the Board’s reasoning because of Supreme Court precedent under the Federal Arbitration Act (FAA) approving such class action waivers. The Board reasoned that the

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\(^7\) Although Grubhub characterizes *Dynamex* as an unexpected, “tectonic shift in California law,” plaintiff argues that every court to address the issue so far has applied *Dynamex* retroactively.
Supreme Court precedent was inapplicable because those prior cases did not involve the NLRA. Over the years, the NLRB’s decision in *D.R. Horton* resulted in a federal circuit split over whether these waivers were enforceable.

On Jan. 13, 2017, the U.S. Supreme Court granted *certiorari* in three cases—*Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, and *National Labor Relations Board v. Murphy Oil USA, Inc.*—that provided the means for the Court to decide whether arbitration agreements with class and collective action waivers are enforceable under the FAA, irrespective of the NLRA.

In a 5-4 majority opinion authored by Justice Gorsuch, the Court first reviewed the FAA’s “liberal federal policy favoring arbitration agreements” and the requirement that courts “rigorously . . . enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.” *Epic Sys. Corp. v. Lewis*, 584 U.S. __, No. 16-285 at * 5 (May 21, 2018). The Court then addressed and rejected each of the NLRB’s and the individual employees’ arguments. First, the Court held that the FAA’s “saving clause”—which provides that arbitration agreements are presumptively enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract”—does not “offer[] . . . refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Id.* at 5-8. Second, the Court rejected the argument that the FAA and the FAA conflict and that, because the NLRA (1935) was enacted after the FAA (1925), it should control. The NLRB and the individual employees argued that the NLRA constituted a “clear and manifest congressional command to displace the [FAA].” *Id.* at 15. The Court explained that there is a “‘strong presumption’ that repeals by implication are ‘disfavored.’” *Id.* Therefore, “the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act.” *Id.* Lastly, the Court declined to give *Chevron* deference to the NLRB’s interpretation of the NLRA in *D.R. Horton*, Inc. The Court observed that *D.R. Horton, Inc.* was an outlier in Board precedent, as it “for the first time in the 77 years since the NLRA’s adoption [] asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours.” *Id.* at 19-21.

In light of the *Epic Systems* decision, companies who are facing class or collective actions in federal or state courts may compel individual arbitrations if the ICs previously entered into agreements waiving their rights to participate in class or collective actions. Companies that are thinking of including class action waivers in current arbitration or IC agreements should weigh the pros and cons to using such waivers carefully and, if possible, in consultation with legal counsel. If the decision is made to roll out such agreements, they must be drafted very carefully. There are several legally-required carveouts and other provisions that must be included in a good arbitration agreement to withstand legal challenges. Further, given the uptick in unconscionability challenges, use of capitalized, bold and/or underlined font to emphasize key provisions, along with a well-thought-out roll-out strategy, is highly recommended.

2. **The Application of the *Epic Systems* holding to Independent Contactors**

Three months after the *Epic Systems* decision, the Sixth Circuit addressed whether the impact of this decision would apply to arbitration agreements with putative ICs who contended
that they were actually employees. *See McGrew v. VCG Holding Corp.* Case No 17-5474 (6th Cir. Aug. 26, 2018). In *McGrew*, the plaintiffs were "exotic dancers" working at a gentlemen's club. The club treated these dancers as ICs—consistent with the industry practice. Nevertheless, the dancers alleged that they were employees entitled to overtime compensation under the FLSA. Because the dancers had signed arbitration agreements, however, the club moved to dismiss the case and compel arbitration. The Sixth Circuit granted the motion, and refused the plaintiffs' request for conditional certification.

On appeal, the plaintiffs raised four issues, including whether: (1) the individual arbitration agreements conflicted with the NLRA's collective-action guarantees; (2) the individual arbitration agreements conflicted with the FLSA's collective-action guarantees; (3) the arbitrator or the district court should initially decide whether the plaintiffs were employees (who are covered by the NLRA and FLSA); (4) the district court abused its discretion by enforcing individual arbitration before facilitating notice to other potential class members pursuant to Section 216(b) of the FLSA.

The Sixth Circuit delayed deciding this case because the Supreme Court’s then-pending decision in *Epic Systems* would resolve the first issue, and the Sixth Circuit's then-pending decision in *Gaffers v. Kelly Servs., Inc.*, No. 16-2210 (6th Cir. 2018) would resolve the second issue. Based on the holdings in *Epic Systems* and *Gaffers*, the Sixth Circuit Court in *McGrew* applied the same reasoning in the IC context and found that individual arbitration agreements do not conflict with either the NLRA's and FLSA's collective-action guarantees. See 138 S. Ct. at 1623–32. As a result, the Court was not required to "resolve what would have been the third issue in this case if *Epic Systems* and *Gaffers* had gone the other way." Id. at 2. With respect to the fourth issue, the Court held that whether or how to facilitate notice, is within the discretion of the district court. Id. at 171. Moreover, the Court in *McGrew* noted that, after *Epic Systems* and *Gaffers*, "there will be no FLSA collective action against the Defendants about which the district court could facilitate notice." Id.

3. Proposed Legislation to Overturn *Epic Systems*

Because the Court’s decision in *Epic Systems* rested on statutory, rather than constitutional grounds, Congress could effectively reverse the Supreme Court’s decision by enacting new legislation. Indeed, there have been recent Congressional efforts to nullify the impact of the *Epic Systems* decision.8

On October 30, 2018, Representatives Bobby Scott (D-Va.) and Jerrold Nadler (D-N.Y) introduced the Restoring Justice for Workers Act, H.R. 7109, a bill aimed at overturning *Epic Systems* by ending the use of "forced" arbitration clauses and protecting the ability of workers to pursue work-related claims in court. Under this bill, "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute." In addition, this bill would prohibit employers from requiring employees to waive their right to engage in joint, class, or collective legal action. The measure would also prohibit an employer from retaliating or threatening to retaliate against an employee “for refusing to enter into an agreement that provides for arbitration of an employment dispute.” Ultimately, however, H.R. 7109 was not enacted.

In light of the #MeToo Movement, mandatory arbitration agreements are being particularly scrutinized in the context of sexual harassment complaints. Mandatory arbitration agreements are being increasingly scrutinized due to concerns about confidentiality and the potential for employees to be precluded from discussing the outcome of arbitration with others. In response, some states and cities have enacted legislation aimed at restricting mandatory arbitration agreements. For example, in California, the Fair Employment and Housing Act prohibits employers from requiring employees to sign an arbitration agreement as a condition of employment, except in certain circumstances. Similarly, in New York, the New York City Human Rights Law prohibits employers from requiring employees to sign an arbitration agreement as a condition of employment, except in certain circumstances.

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8 The NLRB is now also taking the position that confidentiality provisions in arbitration agreements that prohibit the claimant from discussing the outcome of arbitration violate the NLRA.
agreements are viewed as contributing to the ongoing problem of sexual harassment in the workplace, due to the lack of transparency and confidentiality that characterize the investigation, proceedings, and any resolution reached. In December 2017, Senators Lindsey Graham (R–S.C.) and Kirsten Gillibrand (D–N.Y.) introduced the Ending Forced Arbitration of Sexual Harassment Act, a bipartisan bill that would prohibit clauses in employment agreements requiring mandatory arbitration to resolve claims of sexual harassment or other discrimination. However, the Senate and House versions of that bill were never voted out of their respective committees. In February 2019, Congressional Democrats announced a package of bills that would ban forced arbitration of disputes over employment, consumer, civil rights, and antitrust issues. This package includes another version of the Ending Forced Arbitration of Sexual Harassment Act, introduced again by Senator Gillibrand. Although the bills have some bipartisan support, the likelihood that the bills will pass remains uncertain.

D. New Prime, Inc. v. Oliveira: A Potential Limit to Epic Systems

The U.S. Supreme Court’s decision in New Prime v. Oliveira, No. 17-340 (Jan. 15, 2019) has added uncertainty to arbitration agreements in the transportation industry by holding that the Federal Arbitration Act (FAA) § 1 exception covers both employees and independent contractors of a trucking company. Section 1 excludes from the FAA’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

1. The Facts

The plaintiff was engaged by New Prime Inc., an interstate trucking company, as an independent contractor driver. The plaintiff filed a class action lawsuit seeking unpaid wages despite signing an arbitration agreement requiring that any disputes be brought in arbitration. New Prime moved to compel arbitration and argued that any questions related to the enforceability of the parties’ agreement were for an arbitrator to decide. In response, the plaintiff argued that the arbitration agreement was unenforceable because it fell within the “contract of employment” exemption under Section 1 of the FAA. The district court denied New Prime’s motion to compel arbitration, holding that the question of the agreement’s arbitrability was for the court, and not the arbitrator, to decide. The district court also concluded that the phrase “contracts of employment” did not include IC agreements.

New Prime Inc. appealed that ruling to the First Circuit, which agreed that determining whether the FAA applies is a threshold question that a court decides, including whether the Section 1 exclusion applies. The First Circuit disagreed, however, with the district court and reasoned that “contracts of employment” could apply to agreements between companies and ICs. Significantly, New Prime Inc. did not dispute—at the trial court level or on appeal—that the plaintiff was a transportation worker “engaged in foreign or interstate commerce.”

The Supreme Court of the United States subsequently granted certiorari.

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9 Some states, like New York, have enacted similar legislation. To the extent the FAA applies, however, a good argument exists that such legislation is preempted.
2. Courts Decide Whether the Transportation Worker Exclusion Applies

The Supreme Court agreed with the lower courts in holding that a judge—not an arbitrator—decides whether the FAA applies, including the related issue of the transportation worker exclusion. Justice Gorsuch, who authored the majority opinion, observed:

Given the statute's terms and sequencing, we agree with the First Circuit that a court should decide for itself whether §1’s “contracts of employment” exclusion applies before ordering arbitration. After all, to invoke its statutory powers under §§3 and 4 to stay litigation and compel arbitration according to a contract’s terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§1 and 2. The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the [FAA] authorizes a court to stay litigation and send the parties to an arbitral forum.

Id. at 4.

3. “Contracts of Employment” Include Independent Contractor Agreements

The Supreme Court also agreed with the First Circuit and held that the phrase “contracts of employment,” as used in the FAA, includes contracts with ICs, as well as agreements between employers and employees. Prior to this decision, the Section 1 exemption only applied to only “transportation workers” without making it clear what group of workers were covered therein. In reaching this conclusion, the Court discussed as to what “contracts of employment” would have meant when the FAA was enacted by Congress. As Justice Gorsuch observed:

At that time, a “contract of employment” usually meant nothing more than an agreement to perform work. As a result, most people then would have understood §1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work.

Id. at 7.

4. Lingering Questions After New Prime

Employers may be left with more questions than answers after the New Prime decision. For instance, the decision is not clear as to who falls within the transportation worker exclusion. In order for Section 1 to apply, the worker must be “engaged in foreign or interstate commerce,” but the Supreme Court did not address or interpret that phrase. In New Prime, the parties admitted that the plaintiff worked in interstate commerce, so it was not an issue in the case.

There are also concerns that the Section 1 exemption, as interpreted by the Supreme Court in New Prime, could be a tool to unravel arbitration agreements with class waivers in companies that transport, carry or deliver goods or commodities. However, based on Supreme Court precedent, Section 1’s exclusion is “afforded a narrow construction” because the “plain meaning of the words 'engaged in commerce' is narrower than the more open-ended
formulations ‘affecting commerce’ and ‘involving commerce’ that are found in other statutes. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118 (2001).10

The New Prime decision also does not address the enforceability of arbitration agreements under state laws, as well as the potential impact of choice-of-law provisions. In this respect, the New Prime decision stands out from the Supreme Court’s recent cases. Until the decision in New Prime, the Supreme Court’s decisions regarding arbitration had the effect of strengthening the FAA. However, the court’s opinion in New Prime cuts the other way by expanding Section 1’s exception to the FAA. As a result, the New Prime opinion may force transportation companies to rely on state arbitration or state contract law to determine the enforceability of its arbitration agreements.

E. Mass Arbitrations: The Epic Systems Aftermath

Though employers generally rejoiced in the U.S. Supreme Court’s decision in Epic Systems, the celebration was short-lived for some. As a backlash to the decision, large companies such as Uber and Chipotle received an onslaught of individual arbitration claims. Some law firms have initiated individual arbitration proceedings by the thousands, thereby significantly increasing legal costs for employers that could total tens of millions of dollars. For example, since August 2018, 12,501 drivers filed misclassification claims for arbitration against Uber. See Bloomberg BNA Daily Labor Report, February 11, 2019. Based on the required $1,500 filing fee alone, the cost for Uber to initiate these arbitration claims could total approximately $18 million!

Uber is not the only target of this mass arbitration tactic. According to BNA Bloomberg’s Daily Report, as of February 2019, there are 2,814 arbitration claims pending against Chipotle and 3,420 claims against Lyft. See Bloomberg BNA Daily Labor Report, February 11, 2019. By engaging in this mass arbitration tactic, employees are attempting to force the company to settle instead of paying significantly more in arbitration costs. As a result of this tactic, some employers have grown reluctant to include class action waiver in agreements. Other employers have responded to this tactic by delaying the arbitration proceedings. For example, motions to compel have been filed in federal court against Uber after it failed to pay the majority of the filing fees to imitate the arbitration process. Yet others have considered alternative approaches—like including stand-a-lone class action waivers and jury trial waivers without an arbitration agreement.

However, given the level of expertise and capital that is required to engage in a campaign of mass arbitration filings, mass arbitrations are more likely an effective and useful strategy in situations where a related class or collective action is already in progress. For example, in a collective action lawsuit against Chipotle, the court dismissed around 2,800 individuals from a class of 10,000 opt-in employees because those individuals had signed class action waivers. However, since those employees who were dismissed had their claims already vetted, it was easier for attorneys to initiate individual arbitration proceedings on behalf of these individuals. Otherwise, these single arbitration claims would not be lucrative enough to justify spending significant resources in coordinating mass arbitration.

10 Some cases have held that drivers who do not cross state lines in the course of their duties delivering products are not “engaged in commerce” under this exemption, while other cases have gone the other way, finding that merely transporting products that remain in the stream of interstate commerce is sufficient. We expect this to be an area that will be hotly litigated over the next few years, with cases coming down on both sides.
F. National Labor Relations Board Activity

The NLRB has also seen drastic changes under the Trump administration, which could easily trickle down into the IC misclassification enforcement area. So far, President Trump has appointed two new members to the five-person Board, and could possibly appoint a third in the not-too-distant future. Marvin Kaplan, a former chief counsel to the Occupational Safety and Health Review Commission, was appointed in June 2017 and became Chairman in December 2017. William Emanuel, a former management-side employment attorney in private practice, was appointed in September 2017. President Trump also nominated a new NLRB general counsel, Peter Robb, who was sworn in in November 2017. The NLRB has since been busy overturning several key Obama-era decisions, including controversial decisions relating to joint employer determinations and micro-unit bargaining. President Trump nominated management labor lawyer, John Ring, to replace retired Chairman, Phil Miscimarra. Ring was approved by the Senate HELP committee on March 14, 2018, and like many other Trump appointees, still waiting on confirmation by the full Senate.

1. NLRB’s Efforts to Find IC Misclassification as Independent ULP

On August 26, 2016 the NLRB’s general counsel released a legal memorandum explaining his theory that an employer committed an unfair labor practice (“ULP”) by misclassifying drivers as ICs. The ULP theory involving worker misclassification has not previously been tested before the NLRB or the courts, but the memorandum shows that is the approach the general counsel will likely follow in other independent contractor disputes. The NLRB’s Division of Advice wrote that by misinforming drivers they were ICs, the employer interfered with the drivers’ rights under section 8(a)(1) of the Act to organize or engage in concerted activity for their mutual aid or protection. The memorandum said the appropriate remedy was to require the employer to stop informing the drivers they were ICs and to rescind any agreements that purported to deny them employee status. Following through with this directive, the NLRB has begun filing complaints against employers alleging this issue— that misclassifying alleged employees as ICs interferes with their rights to support unions or act together for their mutual aid or protection.

NLRB General Counsel Peter Robb rescinded this advice memorandum, among many others, in December 2017. This development signaled that the NLRB is likely to limit the Board’s authority to find violations for IC misclassification. And in February 2018, the NLRB invited briefing and comment in a pending NLRB case on the issue of under “what circumstances, if any, should the Board deem an employer’s act of misclassifying statutory employees as independent contractors a violation” of the Act. Employers will want to keep an eye out as the Board continues to explore and expound upon this area of law. Velox Express, Inc. Case 15-CA-184006

2. SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338

Unlike states adopting the ABC test, the NLRB has recently issued some pro-company decisions, lending hope to the ability to defend IC models in this context.

In a previous NLRB ruling, the Board ruled that drivers for a shipping company were employees under the NLRA, holding that “entrepreneurial activity represents merely ‘one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business.” The D.C. Circuit Court of Appeals vacated, relying heavily on the fact that drivers had significant entrepreneurial
opportunity for gain or loss as a factor indicating the drivers were in fact properly classified as ICs—whether or not those opportunities were actually exercised.

Now, in SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338, the Board rejected its own previous analysis, instead reverting to the common law test that was in place prior to that decision. See SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338, Case 16-RC-010963 (Jan. 25, 2019). In SuperShuttle, drivers, who provided transportation to and from two airports in the Dallas-Fort Worth area under a franchise model, sought union representation. In holding the drivers were ICs, the Board reinstated the common law right to control test that applied prior to its earlier decision and specifically emphasized the importance of entrepreneurial opportunity. According to the Board, entrepreneurial opportunity is a principle like employer control, which should be used “to evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain.”

G. **Independent Contractor Settlements**

Settlements associated with misclassification claims are also significant. Recently, Swift Transportation, Co. Inc. agreed to settle a nearly-decade long misclassification suit involving about 20,000 truck drivers. See Virginia Van Dusen et al. v. Swift Transp. Co. Inc. et al., No. 2:10-cv-00899 (D. Ariz. Apr. 27, 2010). Swift has agreed to pay up to an estimated $100 million to settle the drivers’ claims. Although the settlement is still subject to approval by the Arizona federal court, Swift and the plaintiff-drivers have filed joint motions requesting the court to certify the proposed class and collective action and give preliminary approval for the settlement. Uber has also agreed to settle a California misclassification class action for $20 million. See O’Connor v. Uber, No. 13-cv-03826 (N.D. Cal Aug. 16, 2013). Although the suit initially had over 385,000 drivers after a judge granted class certification, an appeals court later held that Uber’s arbitration agreement was largely valid and enforceable, which ultimately reduced the class to just over 13,000.

H. **Misclassification Issues and The Gig Economy**

Perhaps the companies that have been hit the hardest in the latest wave of misclassification litigation are companies in the so-called “gig economy” business, such as drivers for ride-share companies or food-delivery services. In recent years, the gig economy has been embroiled in legal battles over misclassification issues. Given the innovative business models, traditional IC tests/models appear to be outdated in this context. For that reason, Labor Secretary Alexander Acosta has stated that the DOL is exploring the idea of changing regulations governing gig workers and other independent contractors—in light of rapid change of the workforce.

The wage and hour litigation surrounding the gig economy has left many employers confused as to whether their workers have been classified properly as employees or ICs. This confusion perhaps is the reason that the DOL is expected to soon issue an opinion letter on worker classification—specifically, how existing labor laws and regulations apply to the gig economy. Under the Obama administration, the practice of releasing opinion letters was revoked. So for eight years, employers were left without any DOL guidance as to classification issues in a modern economy. As the discussion above establishes, cases have gone both ways in gig economy cases, urging some to advocate for a “third classification category,” as discussed further below.
III. WHAT DOES THE FUTURE HOLD: “INDEPENDENT WORKER” CLASSIFICATION AS A HYBRID OF EMPLOYEE AND INDEPENDENT CONTRACTOR?

Because of the proliferation of attacks on IC classification, the desire of many “online gig economy” workers to have the flexibility and independence that comes with the IC classification, and the complexities and inconsistencies in court rulings and state and federal laws governing classification, there has been a fair amount of discussion about coming up with a new classification that has some attributes of both “employee” status and “independent contractor” status.

Professors Seth D. Harris of Cornell University (former Deputy Secretary of Labor) and Alan B. Krueger of Princeton University issued a 35 page discussion paper in December of 2015 for the Hamilton Project, entitled: “A Proposal for Twenty-First-Century Work: The ‘Independent Worker’.” The authors state that their proposal seeks to structure benefits to make independent worker status neutral when compared to employee status, as well as to enhance the efficiency of operation of the labor market. By extending many of the legal benefits and protections found in employment relationships to independent workers, their proposal “would protect and extend the social compact between workers and employers, and reduce the legal uncertainty and legal costs that currently beset many independent relationships.”

So, how would these independent workers be treated under existing labor and employment laws? The authors suggest a model comprised of a few different components, including (for example): (1) allowing the ICs to organize and bargain collectively, without being covered by the NLRA; (2) allowing the intermediaries (the companies who use the independent workers in their businesses, e.g., Uber, Lyft) to pool their independent workers for the purpose of providing benefits to the independent workers; (3) expanding civil rights and nondiscrimination laws to include protection of independent workers; (4) requiring intermediaries to withhold income tax and FICA from the paychecks of independent workers; (5) allowing intermediaries to opt to provide expansive workers compensation insurance policies to the independent workers with which they work without transforming those relationships into employment; and (6) requiring intermediaries to pay a contribution equal to 5% of independent workers’ earnings (net of commissions) to support health insurance subsidies in the exchanges.

The proposal has met with mixed reviews. It remains to be seen whether this novel idea will gain traction in Congress or in the state legislatures.

IV. OPTIONS FOR MINIMIZING RISKS OF LIABILITY

While the prevalence of IC litigation continues, there are a number of steps companies can take to minimize their risks of such challenges and strengthen the nature of the relationship with their ICs, all of which are discussed below.

A. Recommended Factors and Considerations to Strengthen Defensibility of IC Relationship

It is impossible to determine with certainty how any court or agency may rule when assessing the enforceability/defensibility of any one IC model. However, there are numerous steps any company using ICs can and should take to enhance the enforceability of their IC models and minimize their risks of any misclassification liability.

Specifically, we recommend that the following factors/business considerations be built into any IC model, to the extent possible, to minimize the risks of misclassification liability:
(a) Only contract with individuals who are incorporated into a separate legal entity and require proof of good standing for such entity;

(b) Where applicable, ensure contractors have multiple routes or territories, which will necessarily mean they also employ several helpers or employees for whom they control all terms and conditions of employment;

(c) Ensure the contractor’s relationship with the company is not established for a high degree of permanence by establishing an expiration date in the contract not to exceed one year at the longest;

(d) Avoid termination at-will language in contract;

(e) Allow the contractor to hire employees to assist him/her with the services and/or perform the services in his/her place without prior approval of the company;

(f) Allow the contractor to negotiate contract terms (e.g., rates);

(g) Require payment by the job—not time worked—and avoid paying any set salary;

(h) Allow the contractor to work elsewhere, have his/her own clients, and advertise his/her own services to others through the use of his/her own business cards or other advertising materials;

(i) Allow the contractor to control the economic aspects of his/her job by, for example:
   
   (i) requiring significant investment in all equipment necessary to perform the job and no reimbursement of operating expenses or company-provided subsidies, privileges, goods, services or facilities at a discount or free (i.e., such as providing an office or office equipment for the contractor to use); and
   
   (ii) providing opportunity for profit or loss based on managerial skill by allowing the contractor to make his/her services available to the market, accept or refuse work for the company at his/her discretion, and hire employees to perform work with him/her or in his/her place.

(j) Avoid any semblance of control over “manner and means” in which services are performed, such as:
   
   (i) specific work hours or mandated work at company offices;
   
   (ii) designated break/lunch periods or specific techniques;
   
   (iii) training programs or grooming standards;
   
   (iv) non-compete provisions; and
   
   (vii) uniforms, or use of business cards with the company’s logo.

(k) No use of conventional discipline for contractors (breach of contract instead);
Allow the contractor to own or obtain an equity interest in the business that can be sold to others without prior company approval for profit or loss;

Do not offer ICs employee benefits or vacation; and

Do not include contractors in employee meetings or employee training sessions.

It is imperative that these and other factors/business considerations be incorporated into a carefully-drafted IC agreement to increase the chances of the IC model being upheld.

B. Other Preventative Steps to Minimize Risk of Misclassification Litigation

While a strong IC agreement with all of the bells and whistles (discussed above) is very important to defending an IC misclassification challenge, it is perhaps equally as important that the model is adhered to in practice. This is because actual practice is the typical focus of any IC misclassification inquiry. And, actual practice in the field will inevitably be the focus of any misclassification litigation. To ensure actual practice comports with the general independent contractor model you have established, we recommend several proactive steps, discussed more fully below.

1. Audit of Policies Used With ICs

First, conducting regular audits of the policies used in the field with independent contractors, to ensure problematic documents are not being generated and relied on, is critical to assisting in the defense of an IC model. In any misclassification challenge, plaintiffs' lawyers undoubtedly first look for whether policies exerting significant control over independent contractors or otherwise establishing multiple indicia of employment status on their face exist. This is because, with such an unlawful policy, obtaining class or collective action certification becomes much easier. Further, plaintiffs' lawyers also look at whether significant employment documentation, such as termination checklists, performance evaluations, corrective action plans and the like, are uniformly used with independent contractors in practice. This, too, can make obtaining class or collective action certification much easier.

To avoid providing Plaintiffs' lawyers with the low-hanging fruit, it is critical to conduct regular audits in the field to ensure these types of problematic document trails are not being generated and relied on in the ordinary course. We, of course, recommend that any such audits be conducted by or at the explicit request of counsel to protect it under the attorney-client privilege, to the extent possible. This audit should include asking for and reviewing a sampling of communications used with independent contractors, policies applicable to independent contractors, and any other forms used with independent contractors. These documents should be reviewed to ensure: (1) employment-related terminology is not being used (i.e. hire or fire, discipline), (2) employment policies and procedures that are inconsistent with IC status, such as progressive disciplinary policies, are not being used; (3) other documents typically provided to employees, like employee handbooks, are not being provided to ICs; and (4) IC files, to the extent you maintain them, are kept separately from employee files. If any issues are discovered during the audit, it is much easier to clean them up, with the assistance of counsel, in advance of any litigation.
2. Audit of Current Practices With ICs

Carefully assessing the current management practices with regard to ICs is also critical. Again, we highly recommend that this audit be either conducted by counsel or at the explicit direction of counsel to try to protect this from discovery under the attorney-client privilege to the greatest extent possible. Such an audit should focus on what practices management is employing with independent contractors and how much control is being exercised in practice. The extent and nature of communications with independent contractors can also be problematic. Importantly, merely ensuring compliance with the end results is fully consistent with independent contractor status. However, when management gets involved in how the independent contractor performs the manner, method and means of the job by controlling daily or other details, this will be problematic in a misclassification challenge.

3. Management Training

Finally, ensuring your management team truly understands the difference between independent contractors and employees is crucial. This is particularly true because your front-line management team will likely be the key witnesses in any misclassification challenge. An effective management training program should include several components, including: (1) proper terminology for use with ICs; (2) the difference between employees and ICs in terms of policy application, daily management; and (3) the components of the contract. The importance of training management on the contract itself cannot be overemphasized enough.

C. Other Options for Minimizing Risks of Liability

In addition to the considerations discussed above, there are several other legal options companies can utilize to minimize the risk of IC misclassification liability. Some of these options include: (a) obtaining an opinion letter on IC status from counsel; (b) requesting an SS-8 determination from the IRS or an opinion letter from the Wage and Hour Division on the proper status of such individuals; or (c) implementing an arbitration agreement with a class action waiver. All such options should be carefully discussed and planned with counsel, as each one may carry certain risk depending on the circumstances and may—or may not—be advisable accordingly.
The Independent Contractor Classification Gamble: Long Shot or Sure Thing?

Presenters
Greg Guidry (New Orleans/Lafayette)
Margaret Santen Hanrahan (Charlotte)

Moderator
Kevin P. Hishta (Atlanta)

Agenda
- General Background
- Litigation Trends
- Class Action Waivers – Epic Systems and Proposed Legislation
- New Prime: Potential Limit to Epic Systems
- Mass Arbitrations – Epic Systems aftermath
- NLRB Activity
- Settlements and Hybrid Classification
- Options for Minimizing Liability
General Background

- Tests used to determine IC status
  - Varies depending on statute or other law
  - Interpretation can vary depending on jurisdiction/industry

- Risks associated with IC models
  - Federal and state DOL investigations
  - Individual and class/collective action lawsuits
  - Corporate campaigns
  - Investigations/fines
  - IRS audits

Litigation Trends

- Recent federal court cases on IC model and take-aways
  - *American Family Insurance*
  - *Acosta*
  - *Parrish*

- FAAAAA preemption challenges

- Prominent state court litigation (*Dynamex*)
  - Implications for companies in CA
  - Proposed legislation
  - Litigation strategies, potential defenses, and planning considerations
Class Action Waivers and Potential Limitations

- **Epic Systems**
  - Holding and application to ICs
  - Practical considerations
  - The aftermath: proposed legislation

- **New Prime**
  - Holding and impact on ICs
  - Practical ramifications/arguments
  - Next wave of litigation

Mass Arbitrations: Post- *Epic Systems* Endemic

- Aggressive plaintiffs’ counsel filing thousands of individual arbitrations as pressure tactic
  - *Chipotle, Lyft, Uber*
  - Significant monetary implications for companies with obligation to pay for all costs associated with arbitration
  - Tactic for forced settlement

- Practical considerations
  - Re-evaluation of arbitration strategy
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- Cases and trends
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- Possible rule make on IC classification

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  - Swift and Uber
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- Challenges to approval – judicial scrutiny of fairness
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Hybrid Classification

- Possibility of “hybrid” classification
  - Gig economy workers don’t cleanly fit in either category
  - Components of the same
  - Likelihood of success

Best Practices to Minimize Liability

- Build appropriate contract provisions and business considerations into the IC model
- Other preventative steps
  - Audits
  - Management training
  - Opinion letters/SS-8
  - Arbitration agreements/stand-alone class action waivers
Questions and Final Comments

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