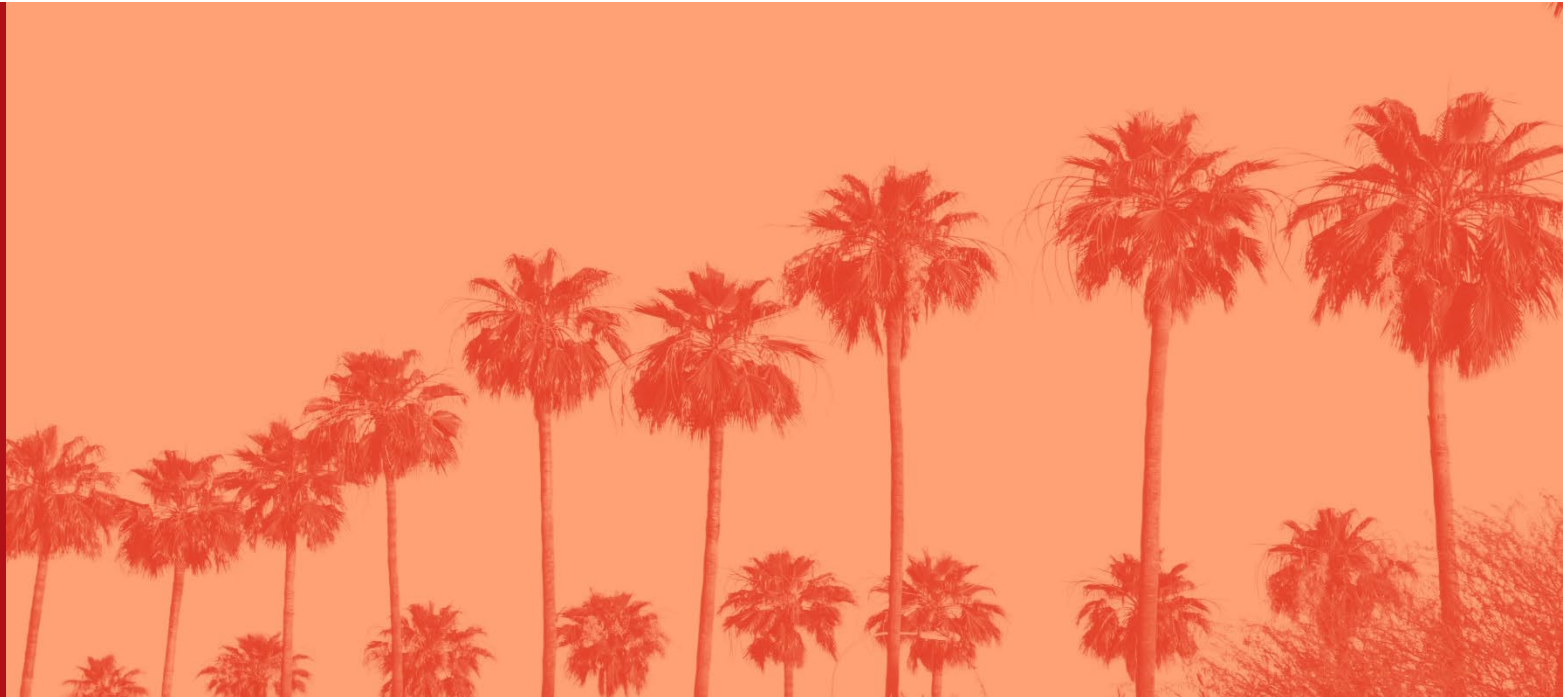


LOOKING AHEAD

- > John Polson – Fisher Phillips, Irvine
- > Jim Fessenden - Fisher Phillips, San Diego



2019 FISHER PHILLIPS INSIDE COUNSEL CONFERENCE

MARCH 6 - 8 | SCOTTSDALE, AZ

Contractors, Joint Employers And Everything In Between

A Fourth Wave in Employment Law

- > First wave: the rise of unions
- > Second wave: Title VII and its progeny
- > Third wave: wage and hour litigation, especially class action litigation
- > Fourth wave: spreading employment liability to as many entities as possible

The Modern Workplace Mashup

- > The people you treat as **employees** .
- > The people you treat as **IC's** who may be employees.
- > The people who **work for your vendors** , as employees of the vendor.

The Modern Workplace Mashup

- > Unions and legislatures see “contingent” workforces as an enemy.
- > Former Obama Administration DOL Wage & Hour Division head David Weil has fought against “ **fissured workplaces** ”
- > Broad term used to describe contracting, subcontracting, temporary staffing, and similar arrangements.



Who Cares?

- > IRS
- > U.S. Department of Labor
- > NLRB
- > State Tax Agencies
- > State Unemployment Tax Agencies
- > Workers' Compensation Insurers

Who Else *Really* Cares?

- > Big Labor and Unions – potential dues -paying members
- > Plaintiffs' and Class Action Attorneys

Wage & Hour Litigation

- > Class actions generate huge penalties which reach into the seven figures for even relatively small employers.
- > Wage and hour class actions represent the single largest group of class action cases filed.
- > Large statute of limitations and potential back pay:
 - > Federal: 2-3 years
 - > State: 3-4 years (depending on state).
- > Automatic attorneys' fees can be substantial.

Risks of Getting it W r o n g

- > Minimum wage, overtime and other unpaid wages.
- > Penalties and fines.
- > Unpaid benefits.
- > Back taxes and Social Security contributions.
- > State unemployment audits.
- > Worker's compensation coverage.
- > Litigation costs and attorneys' fees.

Independent Contractors

Independent Contractor Tests

- > **Economic Realities Test** – *Bartels* Multi-Factor Test
 - > Employees are economically dependent on the business.
- > **Common Law Employment Test** – *Darden* Multi-Factor Test
 - > *Employees are under the control of the employer.*
- > **The New ABC Test** – *Dynamex* – Three Mandatory Elements
 - > Inflexible test excluding many IC arrangements that would be permissible under *Bartels* or *Darden*.

The Dynamex Shot Heard Around the World

New ABC Test for Classifying Independent Contractors:

- > Under the new “ABC” test, a worker is considered a hiring entity establishes all of three prongs.

The letters 'A', 'B', and 'C' are rendered in a large, 3D, blocky font. The 'A' is red, the 'B' is yellow, and the 'C' is blue. They are positioned horizontally and slightly overlap.

ABC Test

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

Independent Contractor Inquiry

- > How dependent is the worker on the putative employer's assignment of work?
- > How strong is the connection between the worker's work and the putative employer's business?
- > As a practical matter, who determines the worker's schedule?
- > Does the worker have other clients?
- > Is the worker practically prevented from working for other clients?
- > Is the worker contractually prevented from working for other clients, and in reality does the worker perform services for other clients?

Independent Contractor Inquiry (continued)

- > How many hours per week is the worker performing services for the putative employer? And for how many weeks per year?
- > What specialized or unique knowledge does the worker have?
- > What specialized or unique equipment or tools does the worker have?
- > Where is the work performed?

Best Practices – Independent Contractors

- > Ensure contractors exist as registered business entities.
- > Conduct internal audits of all classified as 1099s.
- > Ensure that independent contractors have executed independent contractor agreements even though it is far from controlling.
- > Encourage independent contractors to perform services for others, including competitors.
- > Ensure that managers – especially line -level managers – are well versed in what they can and cannot communicate to contractors.

Best Practices – Independent Contractors (continued)

- > Ensure that payment does not resemble hourly payment of wages for work performed, as opposed to business -oriented billing procedures.
- > Consider a renewable fixed term or limited scope of work for the agreement with the contractor, as opposed to an at -will arrangement.
- > Do not allow contractor to utilize your facilities and equipment without paying for such usage, if possible.
- > If an internal audit identifies misclassified workers, carefully consider the process used to convert them to employees.

Joint Employment

Joint Employment

- > “Joint employment” is the ever -expanding theory of liability.
- > There are now two versions of joint employment:
 - > Common law;
 - > Statutory.

“Common Law” Joint Employment

- > FLSA Tests. Most courts apply some version of the economic realities test:
- 1) The nature and degree of **control of the workers** ;
 - 2) The **degree of supervision** , direct or indirect, of the work;
 - 3) The **power to determine** pay or methods of pay;
 - 4) The **right, directly or indirectly, to hire, fire, or modify the employment conditions** of the workers; and

“Common Law” Joint Employment

Title VII. The Title VII tests tend to be more invasive:

- (1) the **skill** required of the employee;
- (2) the **source of tools** ;
- (3) the **location** of the work performed;
- (4) the **duration of the relationship** between the parties;
- (5) whether the hiring party has **the right to assign additional projects** ;
- (6) the extent of the hired party’s **discretion over when and how long to work** ;
- (7) the **method of payment** ;
- (8) the hired party’s **role in hiring** and paying assistants;
- (9) whether the work is part of **the regular business** of the hiring party;
- (10) whether the hiring party is in business;
- (11) the provision of employee benefits;
- (12) the **tax treatment** of the hired party.

Joint Employment

- > The tests sometimes boil down to:
 1. How much control does the putative joint employer have, especially with hiring, firing, discipline, and assignments?
 2. How economically dependent is one employer on the putative joint employer?

Joint Employment - Statutory

- > These tests become less relevant when we start to examine *statutory joint employment*

Joint Employment - Statutory

- > Section 2810.3:
- > A “**Client Employer**” (your company) is liable for unpaid wages owed to employees of “Labor Contractors.”
- > A “**Labor Contractor**” is virtually any company (vendor) that performs work in the “**usual course of business**” to the Client Employer.

Joint Employment

- > June 2018 – State Labor Commissioner fined **restaurant chain** \$4.57 million for unpaid wages for 559 janitorial workers who were supplied through a cleaning company and their subcontractor under 2810.3.
- > State found the restaurant was a “joint employer” of the janitorial workers hired through the contractor.
- > Restaurant’s night managers “approved” the cleaning crew’s work.

Joint Employment - Statutory

> Section 2810:

Prohibits companies from entering contracts with vendors providing farm labor, garment, janitorial, security guard, or warehouse contractor services if it knows or should know the contract does not provide funds sufficient to allow the vendor to comply with all laws.

Joint Employment – Considerations

- > How dependent is a vendor on its client (your company)?
- > Is the business model as a whole dependent on vendors?
- > How much interaction will your vendor's employees have with your employees? And what kind of interactions?
- > Who will provide directives to employees of a vendor?
- > Will the employees of the vendor hold themselves out to be employees of the customer (your company)?

Joint Employment – Considerations (continued)

- > Where will the work be performed?
- > What equipment will be used to complete the work?
- > Does the customer perform the same work as the entity it will hire?
- > Does the customer have the ability to tell the vendor to stop using or start using specific workers?

Joint Employment – Best Practices

With your vendors:

- > Minimize interactions. Your employees should not approve or direct work performed by vendors' employees.
- > Remove yourself as much as possible from hiring, firing and discipline decisions.
- > Your employees should perform work that is distinct from vendors' work.

Joint Employment – Best Practices

With your vendors:

- > Establish a point person with whom all communications are directed.
- > Do not evaluate vendors' employees directly.
- > Do not provide training to vendors' employees.

Joint Employment – Best Practices (continued)

Your vendor agreement:

- > Strong indemnity language;
- > Require vendor to comply with legal requirements (including employment obligations);
- > Do not prohibit vendors from providing services to competitors;
- > Confirm lack of control.

Joint Employment – Some Good News

- > At least in California, the ABC test does not apply in joint employment scenarios.
 - > *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289
- > There might still be a way out *even if* you are a joint employer.

Joint Employment – Some Good News

“..even if a joint-employment relationship exists, **one joint employer is not automatically liable for the actions of the other**. Liability may be imposed for a co-employer’s discriminatory conduct only if the defendant employer knew or should have known about the other employer’s conduct and failed to undertake prompt corrective measures within its control .”

U.S. Equal Empl. Opportunity Commn. v. Glob. Horizons, Inc.,
915 F.3d 631, 641 (9th Cir. 2019)

Governmental Action

Positive Federal Action - DOL

- > DOL issued guidance under the Obama administration on both independent contractor and joint employer standards.
- > Very employee -friendly.
- > Trump Administration rescinded previous guidance.
- > **DOL has announced plans for a new regulation on “joint employer,” but the proposed rule has not yet been published.**



Positive Federal Action - DOL

- > The DOL on its joint employment rules, February 28, 2019:

“The Department believes that changes in the 21st century workplace are not reflected in its current regulatory framework.”

Positive Federal Action - NLRB

> Independent Contractor Issues:

- > Recent *SuperShuttle DFW* case – Board test gives equal weight to right-to-control and the role of workers' entrepreneurship.
- > Rather than previous “economic dependence” test.

> Joint Employer Saga:

- > 2015 *Browning-Ferris* decision (only have to show *potential* right to control.
- > 2017 *Hy-Brand* case – but was vacated based on conflict of interest allegations.
- > September 2018 – NLRB announces proposed rulemaking (still pending).
- > December 2018 – D.C. Circuit upholds unworkable *Browning-Ferris* test.

But Let's Not Forget...

- > Any positive federal developments may be short lived.
- > 2020 is just around the corner.
- > *“What would a President Warren do?”*



FINAL QUESTIONS

**Fisher
Phillips**

Inside
Counsel
Conference
2019





Inside
Counsel
Conference
2019

THANK YOU

FOR JOINING US

John Polson
jpolson@fisherphillips.com
(949) 798-2130
Irvine, CA

Jim Fessenden
jfessenden@fisherphillips.com
(858) 597-9600
San Diego, CA