



A New Wave in Workplace Law

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Surprise! Meet Your New Employees . . . *The People You Thought Worked for Someone Else or Themselves*

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Not So Independent Contractors

- The skyrocketing use of ICs in lieu of employees has raised a number of public policy concerns.
 - Studies indicate between 26% and 35% of the U.S. workforce is engaged in some sort of independent work.
 - Many services are cheaper for consumers as result, while the government collects less revenue and absorbs the social costs.
- Concerns led to intensifying scrutiny of traditional IC standards, which pre-date widespread outsourcing and the gig economy.
- *Dynamex* put a national spotlight on the issue and advanced the ABC test alternative to traditional IC tests.

Not So Independent Contractors

The now infamous ABC Test:

- A. The worker is free from the control and direction of the hirer, both under the contract and the performance; 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.

Not So Independent Contractors

- California poured gas on the flames by enacting AB5, following unusually public horse-trading with various interest groups.
- AB5 expanded the use of the ABC test to a much broader set of labor and employment topics, while providing exemptions to many industries.
- Likeminded states are pursuing AB5 styled legislation and/or increased enforcement utilizing similar concepts (e.g., NJ, NY, WI, OR, MI).
- Business friendly states are heading in the other direction – case in point Florida and Tennessee.

Not So Independent Contractors

- Things are about to get really chaotic:
 - A Federal Court issued an injunction blocking ABC for Truckers.
 - Meanwhile, gig companies failed to get an injunction blocking ABC for them.
 - Gig companies respond with ballot initiatives – taking it to the people.
 - This spawned media campaigns asserting anti-IC laws are anti-family.
 - U.S. House passed PRO Act to nationalize the ABC test.
 - Meanwhile, USDOL issued opinion letter helping ride share services.
 - San Diego Judge ordered Instacart to reclassify grocery delivery drivers.
 - NJ Ramps up misclassification laws and puts ABC on agenda for 2020, after issuing a \$400 million assessment against Uber using ABC.

Agencies Dialing-Back Joint Employer Status

- Federal agencies are aggressively moving to reshape joint employer tests applicable to Federal labor and employment laws.
- USDOL issued new joint employer regulations (eff. 3/16/20) implementing a four factor balancing test focused on whether a hiring entity:
 - Hires or fires employees of another business;
 - Supervises and controls the schedule or other conditions of such employees to a substantial degree;
 - Determines the rate and method of payment; and/or
 - Maintains the employment records.

Agencies Dialing-Back Joint Employer Status

- USDOL explained the four factor test in a way that is very beneficial to employers:
 - An “unused” right of control is not enough.
 - Economic dependence (i.e. economic realities) is irrelevant.
 - Franchisor/franchisee status is irrelevant.
 - Legal compliance requirements and performance standards are irrelevant.
 - Providing standard HR forms is irrelevant.
 - Offering association health plans or retirement plans is irrelevant.

Agencies Dialing-Back Joint Employer Status

- NLRB recently (this week) followed suit, with a simpler, and possibly even more pro-employer approach (eff. 4/27/20):
 - A business will only be considered a joint employer if it shares or codetermines the essential terms and conditions of employment.
 - There must be “substantial direct and immediate” control of the essential terms and conditions.
 - To be “substantial,” it must have a regular or continuous consequential effect on an essential term or condition.

Agencies Dialing-Back Joint Employer Status

- EEOC says that they are next up on this issue, promising to issue a new interpretation of joint employer status under the EEO laws.
 - It is not clear how the EEOC will approach the issue, but it seems like it will also seek to narrow joint employer status.
 - However, prior EEOC interpretations on these issues did not necessarily follow the same pattern as DOL and NLRB.

Joint Employer Liability In Practice

- Creates a basis to hold non-employer entities and individuals liable for workplace related obligations owed to another company's employees
- The idea has many applications including
 - Temporary staffing and labor contracting
 - Franchising
 - Subcontracting of certain portions of your business operations
 - Employee leasing
 - The use of Professional Employer Organizations (PEO)

Joint Employer Liability In Practice

- This is an old idea but the situations in which it applies is being expanded rapidly throughout the United States
- Originally, the idea developed from the use of subcontracted labor or staffing arrangements as a way to address who is responsible for workplace injuries
 - Many statutes in states across the country use terms such as primary and secondary employer, general and special employer, or loaning and borrowing employer
 - Colorado, Florida, Idaho, Louisiana, North Carolina are examples
 - All create basis of liability using some iteration of the “right to control”

The Evolution of Joint Employer Liability

- “. . . to protect workers and law abiding employers from employers and contractors that knowingly enter into contracts and agreements that are financially inadequate to permit compliance with applicable laws . . . particularly in the underground economy.”
- “. . . many warehouses use temporary agencies as intermediaries to funnel low-wage workers into the logistics sector. Temporary warehouse workers frequently work side by side with direct-hire employees, but are paid less, work less hours, and suffer the additional economic benefit of job insecurity.”
- These are quotes from legislative analyses and history, unions, and workplace advocacy groups.
- Expansion is designed to protect workers’ rights related to workplace injuries, workplace health and safety, general employment, and wage and hour rights.

The Evolution of Joint Employer Liability – California “Leads the Charge” (but not in a good way for employers)

- *Martinez v. Combs* (2010) – set the standard for who can be held liable as an employer for purposes of California’s wage and hour laws.
 - Exercises control over the wages, hours, or working conditions of the employee; or
 - Suffers or permits the employee to work; or
 - Engages the employee, creating a common law employment relationship.
- Government Code section 12928 – creates a rebuttable presumption of employer status for any entity that issues the W-2.

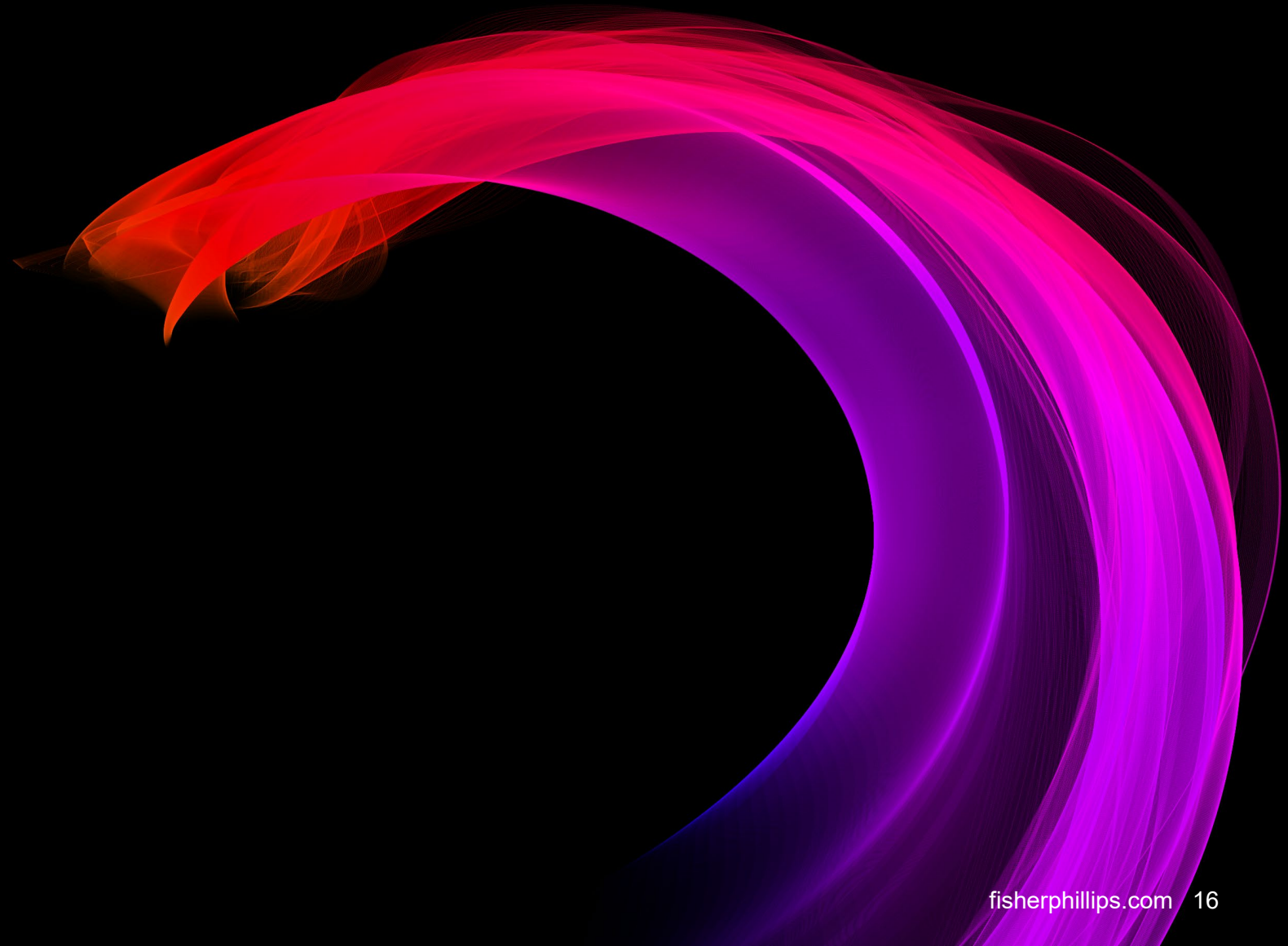
The Evolution of Joint Employer Liability – California “Leads the Charge” (but not in a good way for employers)

- Labor Code section 2810
 - “Know of should have known” standard related to contracts and agreements for labor or services in certain industries
 - Provides a private right of action, including PAGA and class action risks
 - Provides for government investigative powers and enforcement actions

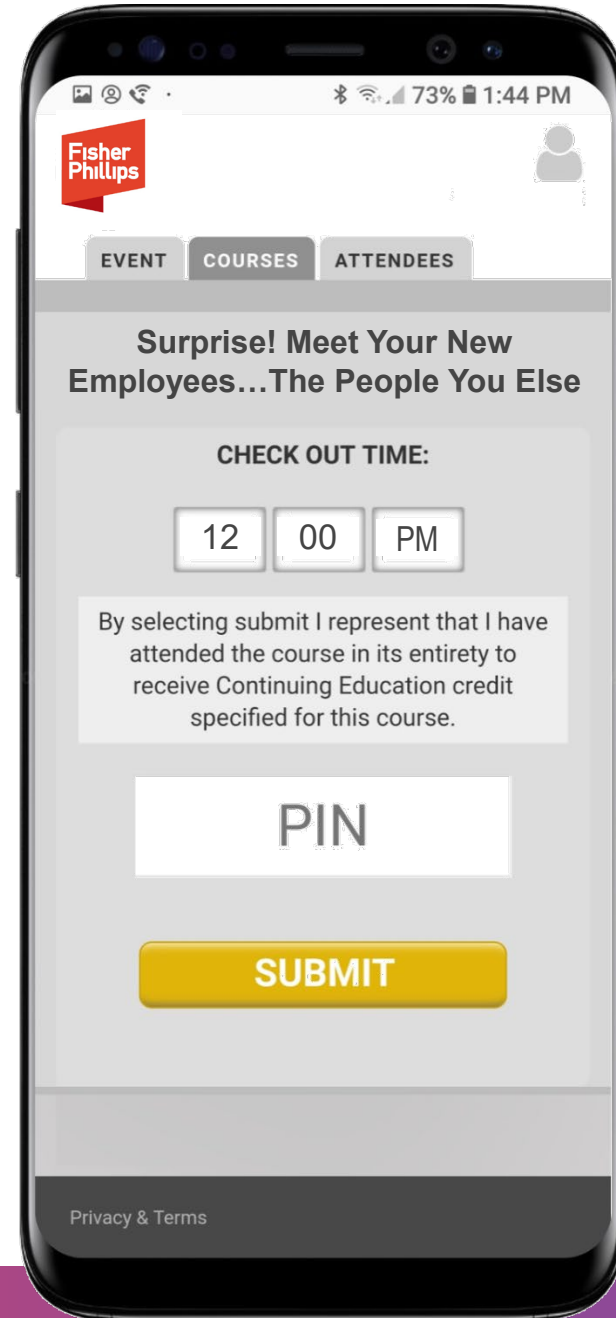
The Evolution of Joint Employer Liability – California “Leads the Charge” (but not in a good way for employers)

- Labor Code section 2810.3
 - Creates strict liability for companies using temporary or staff labor for
 - Payment of wages (defined to include minimum, regular, OT, DT, vacation and PTO and meal and rest break obligations)
 - Failure to secure workers’ compensation insurance
 - The obligation to provide a safe and healthy work environment.

Questions?



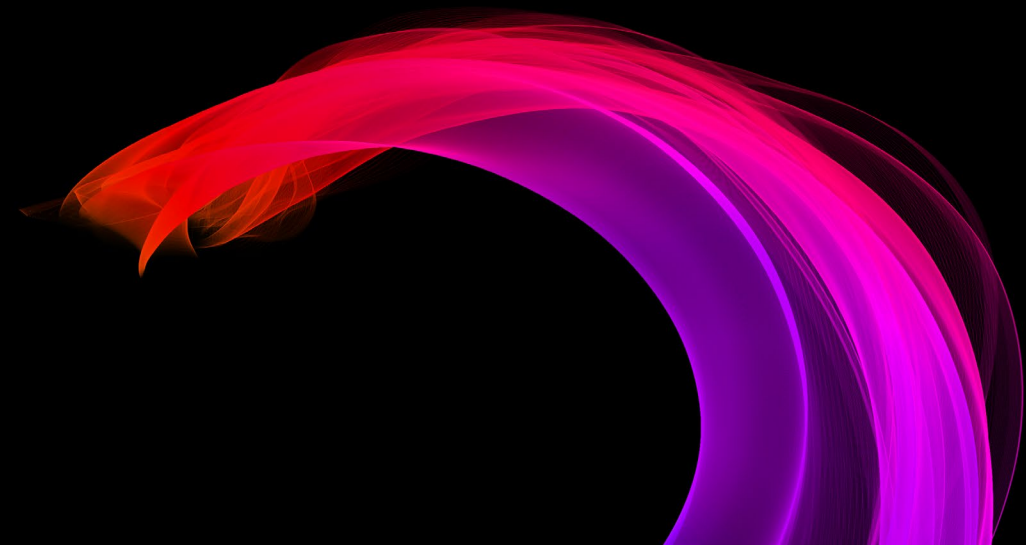
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Thank you

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