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CLASS ACTION TRENDS REPORT

Are *you* my employer?

WeHire LLC is a labor supplier for Inventory Logistics, which operates 40 sprawling warehouse and distribution centers across the country for e-Emporium, a national online retailer—Inventory Logistics' sole client. Ramping up for e-Emporium's holiday season rush, Inventory Logistics recently contracted to hire a large contingent of temporary staff. "This is crunch time," the company's procurement chief told his WeHire account manager. Moreover, he was adamant: "We are absolutely going to need reliable people—no no-shows, late-shows or early-leavers. I don't want to hear 'I can't come in today—my kid's home from school.' If we get backed up during November-December, we're going to hear about it."

Informed of this directive, a WeHire recruitment manager instructed her staff to screen out female interviewees who had children for the e-Emporium warehouse jobs. (Male applicants were not asked about their parental status.) "No offense," one applicant was told, "but moms with young kids take too much time off around the holidays, which is the busiest season for our client."

One day, e-Emporium's vice president for human resources received an angry call from a woman who had been rejected for a temp job at the Dallas distribution center. "I cannot BELIEVE you would refuse to hire mothers! What kind of company is this? I will never buy a thing from your website again. You do know that's illegal, right? You better hope I don't call my lawyer!" The caller slammed down the phone before the VP could inquire further. (How did this woman get through to her direct line, anyhow? she wondered.) She reached out to e-Emporium's operations chief for help investigating the situation.

Finally, in a conference call with Inventory Logistics and e-Emporium officials, WeHire's president shared what he had uncovered. "Listen, if anything comes out of this, lawsuit-wise, we'll take the heat," said the contrite company head. "If only it were that easy, e-Emporium's HR VP replied. "Just saying e-Emporium won't be liable doesn't mean a thing." With this, she ended the call and headed off to speak to e-Emporium's general counsel.

Will e-Emporium find itself on the receiving end of a discriminatory failure-to-hire class-action complaint?

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A WORD FROM DAVID, ERIC & STEPHANIE

If you are a reader of the *Class Action Trends Report*, you take legal compliance seriously. You know the risks that come with noncompliance. Perhaps you've implemented a robust compliance program. You may conduct periodic audits or provide extensive training in the requirements of the law. You take great pains to ensure that employees are treated with respect and compensated fairly and in accordance with the law.

Can you say the same about your business partners? Are you satisfied that the staffing agencies, subcontractors, and other third-party service providers that your company does business with are equally vigilant? It's an important question, because the company increasingly runs the risk of being sued by the employees of those entities as their "joint employer"—and potentially liable for violations of the law by those entities.

Class action plaintiffs invariably want to pursue the "deepest pockets" they can find to maximize their potential recovery, and to that end, they look at their direct employer's business relationships with other, larger entities. The problem is a vexing one because putative joint employers have little meaningful ability to prevent or mitigate violations of the law by third parties, yet they can find themselves defendants in class litigation nonetheless, and facing the risk of significant exposure.

In this issue, we explore the challenges to companies posed by the joint-employer theory of liability—challenges made more difficult by legal tests for "joint-employment" that seem to be as varied as they are impermanent. What factors determine whether a joint employment relationship exists? What unique considerations arise when defending joint-employer class actions? How can companies structure and manage their contractor relationships to minimize potential liability?

We hope the guidance provided in this issue can help to ensure your organization's rigorous efforts to maintain compliance and minimize legal risk won't be undermined by the company you keep.

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About the *Class Action Trends Report*

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

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ARE *YOU* MY EMPLOYER? **continued from page 1**

An evolving workplace

Dramatic changes in the way businesses operate in recent decades have led to a sharp increase in the "contingent" workforce. Faced with ever-growing financial pressures and relentless market demands, some companies have narrowed their focus to their core functions and increasingly have outsourced other operational needs, contracting with enterprising third-party companies that have filled the gaps with specialized services. Organizations also have found greater efficiencies in realigning corporate structures, spinning off certain functions, markets, or services into independent entities. Yet, while organizations strive for leaner payrolls, they also need to deliver products to market more quickly and affordably than ever before, prompting businesses to rely on outsourced labor to supplement their own staff as production needs require.

[A] change in business model presents new and different compliance challenges and business risks. Among them, the prospect of being held accountable as a "joint employer"...

Dr. David Weil, former Administrator of the U.S. Department of Labor's Wage and Hour Division during the Obama administration, had made much of this trend, coining the phrase "fissured workplace" to refer to industries that have broken up, organically, into smaller operational parts. As Dr. Weil observed, "large corporations have shed their role as direct employers of the people responsible for their products, in favor of outsourcing work to small companies that compete fiercely with one another." In Weil's view, the practice means that more than one entity stands to benefit from the labor of the workers involved, and that the workers are more economically vulnerable due to the segmented nature of the organizational models under which they are employed. Operating under this theory, the DOL focused its enforcement efforts on protecting employees in these industries.

This viewpoint, however, is outdated and fails to recognize the reality of the modern economy. The monolithic American company, with an expansive workforce of full-time, long-tenured employees, is an endangered species. Employers in today's competitive marketplace frequently have no other choice but to adopt a more flexible model. However, a change in business model presents new and different compliance challenges and business risks. Among them, the prospect of being held accountable as a "joint employer" for a business partner's violations of the law, yet with limited ability to prevent such liability.

Joint employers

When two (or more) independent entities exercise a sufficient degree of control over a group of employees or the terms of their employment, each of those entities may be deemed a joint employer. Any entity that the law views as a joint employer may be held liable for any legal violations alleged by the employees over whom they exercise control.

In 2016, seeking to turn his "fissured workplace" theory into policy, Dr. Weil issued a directive describing two forms of joint employment:

> Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee.
>
> Vertical joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work. This other employer, who typically contracts with the intermediary employer to receive the benefit of the employee's labor, would be the potential joint employer.

Dr. Weil also signaled that the DOL would construe joint employment "as broad[ly] as possible" when

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enforcing the Fair Labor Standards Act (FLSA) and other laws.

Although the Trump DOL has since withdrawn this guidance, the definitions offer a useful illustration of the circumstances in which joint-employment allegations may arise and offer a model for enforcement by the courts. Our *e*-Emporium hypothetical above, for instance, illustrates an ostensible vertical joint-employment scenario.

What's the risk? By way of example, if a joint-employer relationship exists:

- A rental car company that uses the services of an outside agency to staff customer service call centers may be held liable under the FLSA if the staffing agency fails to pay overtime to those employees.
- A corporation that utilizes a property management company to run its corporate campus may be liable, along with the management company and its security services contractor, if the campus security guards are denied meal periods required under state wage laws.
- A national fast-food franchisor may face exposure in a systemic disability discrimination lawsuit brought by the Equal Employment Opportunity Commission (EEOC) if a franchisee adheres to a strict "100-percent healed" policy.
- A construction contractor may face fines from a state enforcement agency for a subcontractor's breach of a project labor agreement.
- A hotel chain and one if its franchisees may be held to account for immigration violations committed by the franchisee's custodial services vendor that employed undocumented workers.
- An e-commerce giant may find itself having to settle a massive hiring discrimination claim caused by a staffing agency recruiter's poor judgment, notwithstanding the business partner's off-the-cuff professed willingness to "take the fall."

Who's at risk? What types of business entities and relationships are prone to a finding of joint-employer status?

- Companies that hire contingent workers employed by a labor supplier or staffing agency
- Franchisors of a franchisee's employees
- The general contractor of a subcontractor's employees
- The parent company of a subsidiary's employees
- A professional employer organization (PEO) that provides payroll services and similar functions for client companies

At bottom, plaintiffs and government agencies assert joint-employer liability theories in a proverbial search for "deep pockets." In their quest to maximize potential recovery—especially when the direct employer is a small business—they look to snare the employer's larger business partners (and their assets).

What's the test? Employers facing the joint-employment risk have a particular challenge because the rules differ depending upon the statute or jurisdiction in play. Joint-employment relationships are defined by a jumble of legal tests. Courts use a "right-to-control" test (under federal discrimination statutes), an "economic realities" test (commonly for wage-hour violations), and hybrid tests to find an entity liable for a direct employer's violations of the law, even though that entity is not the traditional W-2 employer. Adding to the confusion, the definition of "employer" set forth in a given statute may be interpreted differently by courts in different states. Plainly, handling joint-employment risks is not a simple matter of applying straightforward law.

Also problematic: the tendency of the applicable test(s) to change with the shifting political winds. Under the current administration, those winds are at the back of companies

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Why it matters

Joint-employer status is of critical importance for numerous other reasons—most notably, for determining whether an organization is susceptible to a union representation election under the National Labor Relations Act, or to liability for unfair labor practices—but our focus here is on the danger of being unwittingly swept up into class employment litigation as a joint employer.

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looking to leverage these contemporary business models, yet the climate remains uncertain and subject to change. Beneath it all is the reality that the law in this area is failing to keep up with the realities of the modern workplace. In this environment, compliance is a minefield. (For more on the various legal tests and their status, see "A patchwork of tests" on pg. 11.)

Amid the patchwork of tests and the regulatory churn, however, the essential variable is this: The greater the ability of an entity to exercise control over (for our purposes) a class of employees and the employees' terms and conditions of employment, the greater the likelihood that the entity will be deemed the joint employer of those employees.

Of course, companies must exercise *some* oversight of their labor contractors and contingent workforce. While a wholly "hands off" strategy might be optimal for purposes of risk avoidance, it's likely unrealistic from a business perspective. There's the rub: What is the right balance between control and risk avoidance? This provides yet another reason why joint-employer liability presents a daunting compliance challenge.

What factors are considered? Courts consider a number of factors when evaluating an allegation that a joint-employment relationship exists. Some factors carry considerable weight and ultimately may prove dispositive, while other factors hold less sway but, taken together, may tip the scale in determining whether a joint-employment relationship exists.

Often, the express terms of the contract or agreement between the direct employer and putative secondary employer allocate precisely which entity will have the right to exercise control over the employees in question. Nevertheless, the contractual terms are not wholly determinative. Courts also analyze the actual circumstances of the relationship between the entities, and between the employees. Here are some relevant factors:

- Which entity pays the employees in question
- Which entity trains the employees in the functions of the position
- The extent to which the alleged joint employer's managers assign the employees work, supervise their day-to-day actions, and micro-manage how the job gets done
- The extent to which the alleged joint employer, in practice, can hire, fire, impose discipline, or approve overtime
- Which entity maintains the employees' personnel and payroll records, or the extent to which the alleged joint employer is entitled to review those records
- The extent to which the alleged joint employer benefits from the employees' work
- Whether the alleged joint employer reserved the right to terminate its agreement with the direct employer (and, by extension, its employees) for violations of the contract or law
- Whether the employees are expected to adhere to the alleged joint employer's handbook policies and other work rules
- Whether the employees perform the same job duties as the alleged joint employer's own staff
- Whether the employees work on-site at the alleged joint employer's facility, use its equipment or tools, etc.
- Whether the alleged joint employer had knowledge of the allegedly unlawful practice

Case in point: Security guards assigned by their security contractor employer to work at wireless service stores were allowed to pursue wage claims against the wireless chain. A federal appeals court reversed a grant of

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Right to control vs. *exerting* control

A key point of contention, as the joint-employer standard continues to be bandied about in a political tug-of-war, is whether it is enough for an employer to have the right to exert such control or whether the employer must actually exercise that control for joint-employer liability to attach.

The definition of "joint employer" is currently the subject of rulemaking by the National Labor Relations Board and U.S. Department of Labor. Congress has also entered the fray in recent years, looking to enact a legislative resolution to the dispute.

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summary judgment in the chain's favor after concluding that a jury could reasonably conclude that the national chain was their joint employer under the FLSA. According to the court, there were enough alleged facts to indicate that the wireless service chain exercised "functional control" over the guards under the Second Circuit Court of Appeal's "*Zheng*" test:

- The wireless service chain was the security contractor's largest client—in fact, essentially its only client. The security firm had the "theoretical ability" to service other customers, but as a practical matter, it depended entirely on the wireless chain's business.
- The security guards worked almost exclusively at the wireless stores. Some of the guards were assigned to stores on a virtually permanent basis, working at them for years on end.
- The wireless chain's premises and equipment were used for the guards' work.
- The wireless chain originated "orders" that the security contractor would then distribute to the guards, instructing them, for example, that they could detain suspected shoplifters only with a store manager's approval.
- The guards' day-to-day work was supervised primarily by the wireless stores' managers, not the security firm. They took breaks at times and places designated by store management.
- Some guards testified that they were expected to greet customers and otherwise assist store managers. Their duties also included letting employees into stores in the morning and escorting them out in the evenings, suggesting they performed "a discrete line-job that was integral to [the chain's] business."
- Although the security company set the guards' schedules, the wireless chain modified the guards' hours, at least on occasion.
- While security contractors differed in terms of certain work requirements and wage rates, responsibility under the wireless chain's security contracts could theoretically pass from one security contractor to another without material changes.

A few facts weighed against a joint-employer finding, the appeals court noted. For example, some stores didn't have security guards, undermining the notion that they played an integral role in the business. Moreover, the guards arguably possessed "specialized skills" distinct from those of ordinary retail employees. To be clear, the appeals court was inclined to agree with the district court that the evidence, on balance, weighed against a joint-employment finding. However, the appeals court was resolute that there was enough evidence of a joint-employer relationship from which the security guards might convince a jury otherwise.

The franchise model. The franchise industry comprises a large portion of potential joint employers. National franchisors use the model to expand their market footprint while providing opportunities to entrepreneurs who wish to operate a small business under a tried-and-true brand. As the franchise model has grown, franchisee employees now routinely pursue the often deeper pockets of the corporate franchisor, and in many instances an intermediary operator of local sub-franchises, as joint employers.

Franchisors must walk a fine line between protecting product and service standards while refraining from exercising excessive control over franchisee employees' day-to-day activities.

Franchisors go to great lengths to protect their "brand," a franchise's most valuable asset. To that end, they invariably require franchisees to meet specific performance standards, and mandate practices and procedures that will ensure a uniform customer experience at all businesses operating under the franchise name. This puts franchisors at heightened risk of exposure under a joint-employer theory. Franchisors must walk a fine line between protecting product and service standards while refraining from exercising excessive control over franchisee employees' day-to-day activities. It's one thing to *recommend* human resources policies or to require the franchisee to use its proprietary inventory tracking software or even its payroll system, for example; it's quite another to *mandate* policies and practices so as to directly impact franchisee employees' terms and conditions of employment.

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Case in point. A federal court refused to dismiss sexual harassment claims against a national fast-food chain brought by an employee of one of its franchisees. In addition to the franchisee (her direct employer), the plaintiff named three corporate entities as defendants. The court applied the factors used by the Third Circuit to determine whether a joint-employer relationship exists: "(1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) day-to-day supervision of employees, including employee discipline; and (3) control of employee records, including payroll, insurance, taxes, and the like." In this case, the court observed:

- The employee was required to sign the franchisor's conduct policy, which identified activities that it deemed outside of "acceptable" business practices. She also had to sign policies outlining franchisor rules and regulations and, she alleged, a document establishing an employment relationship with the corporate franchisor.
- The employee had to undergo a series of computerized training courses authored by the franchisor.
- The franchise agreement provided that the franchisee must operate the restaurant "in strict conformity" with the franchisor's "methods, standards, and specifications," as the franchisor would prescribe "from time to time" in writing, or in its franchise manual.
- The franchisor was entitled to conduct inspections of the franchisee and to provide "continuing advisory assistance" regarding the "operation, merchandising, and promotion" of the franchisee's restaurant.
- The franchisor provided the franchisee with reporting forms for use in operating the business. The franchisor had the right to examine the franchisee's books, tax returns, and records (which could mean the franchisor exerted control over employee records).

The court acknowledged that the plaintiff ultimately may be unable to establish a joint-employer relationship, yet, based on the terms of the franchise agreement and the factual allegations regarding the amount of control exercised by the franchisor, it could not rule out the

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Employees or independent contractors?

In many joint-employer cases, a related but analytically distinct issue arises: whether the workers in question are "employees" at all.

Just as contemporary economic and cultural forces have transformed the corporate landscape, they have disrupted traditional expectations of long-term, full-time employment with a single company. As the "gig economy" has emerged, jobs have become more transactional and entrepreneurial in nature, and the ranks of "independent contractors" have swelled. So too, have claims that workers have been misclassified as such.

Allegations of independent contractor misclassification dovetail frequently with joint-employer claims. Here's a common scenario: A cable company contracts with a cable installation contractor to provide installation services. That contractor brings on installation technicians, designating them as independent contractors. The installation technicians sue both companies for overtime, prompting a battle over whether the technicians are in fact "employees" entitled to overtime, and whether the cable company may be liable as a joint employer of its installation subcontractor.

As with joint-employer liability, the related question of independent contractor misclassification is one of the most contentious issues in employment law today. We'll address the topic in detail in the next issue of the *Class Action Trends Report*.

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possibility of a joint-employer relationship. As a result, the franchisor remained exposed to the risk of liability as a defendant.

Other theories of joint liability. Not all plaintiffs rely on a "pure" joint-employment theory. Some plaintiffs (or rather, plaintiffs with more creative lawyers) assert an "agency" theory of liability, contending that the targeted entity has an agency relationship with their primary employer. These plaintiffs assert that liability could attach to the larger company because another entity (typically the direct employer) had represented itself as an agent of the other. The fast-food franchisee employee, above, had argued that the franchisor's reserved power to impose broad discretionary control over the franchisee plausibly created agency liability.

Joint-employment analyses are fact-intensive and plaintiffs routinely are afforded a chance to flesh out their facts through discovery.

In other instances, plaintiffs searching for deep pockets assert a "single-employer" theory. Instead of a joint-employer relationship, the plaintiffs claim that the direct employer and secondary "employer" are so inter-related as to be a single enterprise rather than distinct entities. The parent company of a subsidiary's employees, or entities that are related through common corporate ownership, may be subject to liability under this theory ("horizontal joint employment," Dr. Weil would say). In such cases, courts consider the entities' respective corporate structures, the extent to which there is shared leadership at the executive level, and whether the entities' finances, real estate, equipment and payroll overlap as well.

Defending against joint-employment allegations

Does *e*-Emporium have cause for concern? Will a potential discrimination lawsuit include the company as a defendant? It's certainly likely, given the e-commerce giant's position at the top of the liability food chain in this scenario. Were a class action complaint filed, the plaintiffs might name as defendants WeHire LLC, which committed the allegedly discriminatory act; Inventory Logistics, which arguably directed WeHire to discriminate; and *e*-Emporium, on whose ultimate behalf the entities will be alleged to have acted.

e-Emporium will need to decide at the outset, along with the co-defendants, whether the putative "joint employers" are going to cooperate in the defense of the action and leave any disputes amongst themselves until after the communal fight with the plaintiffs is over. In most cases, such a strategy is optimal as it permits a united defense codified by a formal joint defense agreement. It also avoids incurring duplicative legal fees and potential conflict issues for the attorneys representing the respective defendants.

The first job of the defense team will be to refute any notion of a joint-employment relationship, with either its warehouse and distribution operator or with that company's labor supplier. Again, "right of control" is key and, at first glance, it appears *e*-Emporium has a strong defense that it had virtually no control over the hiring decisions in question. The company should first seek to dismiss the claims against it outright with an early motion to dismiss. The company may succeed on that motion if the complaint provides nothing more than conclusory allegations asserting the existence of a joint-employment relationship.

However, obtaining dismissal of complex, multi-defendant litigations at the pleadings stage is often difficult. Joint-employment analyses are fact-intensive and plaintiffs routinely are afforded a chance to flesh out their facts through discovery. Here, it doesn't appear the e-commerce company has a contract with WeHire, or that it directed the staffing agency or warehouse operator to hire. Of course, a formal contract (or lack thereof) is not controlling; the circumstances as a whole are considered. Perhaps *e*-Emporium's vendor contract with Inventory Logistics expressly mandates that the warehouse operator supplement its staff during the busy season, and sets forth hiring criteria

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that were in turn provided to the staffing agency. A few more favorable facts on the ground for the plaintiffs could lend support to a joint-employer claim and could mean that *e*-Emporium will have to further defend the tenuous case, at considerable cost to the company.

For the defense, there are a few procedural points worth noting:

- In the joint-employer context, class plaintiffs may fail to name all the corporate defendants in their initial complaint. Often a putative "joint employer" is added in a motion to amend, after deposition testimony or other discovery uncovers details suggesting that the entity exercises some control over the employees in question. However, if a plaintiff waits too long to seek leave to add the prospective joint employer, the prospective defendant can credibly argue that granting such leave would be prejudicial.
- Plaintiffs may name an entity as a joint-employer defendant for strategic reasons—in hopes of litigating their case in the forum where that entity is based, for example, or alternatively, to destroy diversity jurisdiction and thus ensure their case remains in state court. In addition to refuting joint employment on the facts, defendants in such cases must call out such tactical motives when challenging a joint-employer claim.
- Class plaintiffs may be asserting that a joint-employment relationship exists in an effort to broaden the class—to add individuals employed directly by the alleged joint employer so as to increase potential exposure, in hopes of negotiating a more lucrative settlement. Evidence showing the disparities between the alleged joint employer's workforce and the plaintiffs—*e.g.*, different job duties, terms and conditions, and supervisors—can both help to refute a joint-employment relationship and demonstrate that the proposed class lacks commonality or is not similarly situated.

Organizations can take steps to reduce the prospect of joint-employer liability before *they become unwitting defendants in a class action suit involving a business partner.*

Preventive measures

Organizations can take steps to reduce the prospect of joint-employer liability *before* they become unwitting defendants in a class action suit involving a business partner. Carefully structuring the relationship with those entities up front, and adopting a "hands-off" approach to their employees, can help minimize legal exposure. Here are a few proactive strategies:

- **Choose the right partners.** Most reputable staffing agencies and labor contractors know how critical it is to their clients to avoid a joint-employment relationship and understand that mitigating this risk is an essential component of the business partnership. To that end, they are experienced and cooperative in structuring the relationship and administering the staffing agreement accordingly.
- **The contract is key.** A carefully drafted vendor contract with the staffing agency (or other entity), expressly outlining the relationship between the parties and the employees in question, is the first line of defense. (For more guidance on drafting such contracts, see "Prevention pointer" on pg. 16.)
- **Consider a waiver.** Particularly when undertaking a longer-term staffing arrangement, require contract workers to sign a waiver stating they are employees of the staffing agency and do not have an employment relationship with your organization—and waiving any claim to wages (or employee benefits) from your company.
- **Arbitration agreements are key.** Require the staffing-agency or other third-party employees or independent contractors to sign arbitration agreements with class action waivers.
- **Leave HR to the vendor.** Organizations utilize staffing agencies in part so they can hand off the administrative burdens of human resource management. Maximize that value proposition and simultaneously reduce risk by letting the outside agency perform the routine HR functions of hiring, firing, paying, scheduling, and recordkeeping.
- **Require an on-site manager.** For large-scale or long-term labor contract agreements, require

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the agency to provide on-site supervision, to minimize the need for your own managers to provide front-line direction.

- **Make them a stand-alone team.** When feasible, assign contingent workers to discrete jobs not typically performed by full-time staff. The more that agency employees are interspersed with the regular workforce, performing the same functions, the greater the prospects for both a joint-employment finding and a larger plaintiff class.
- **Train front-line managers.** Managers and supervisors must be properly trained to refrain from micromanaging the on-site contingent workforce. Oversight of contingent workers is materially different than managing subordinate employees. It can be a challenge for conscientious front-line leaders to adopt a "hands-off" approach but it's imperative they keep in mind that the more direct control they exercise over non-employee staff, the more likely those workers will be deemed employees of the company, with all the potential liability that entails.
- **Make it about the contract.** If productivity or performance concerns arise with agency employees, raise the issue with the vendor, wherever possible, ideally framing the matter as a contract performance problem rather than an employee discipline issue.
- **Know when intervention is necessary.** The need to minimize direct control must be balanced by the countervailing need to ensure that all on-site individuals are safe and that intellectual property is protected. If a contingent worker poses a risk, organizations must act promptly, coordinating the appropriate response with the legal department and the outside agency, both to alleviate any safety and security concerns and to avoid potential liability for such third-party conduct.
- **Keep an eye on procurement.** While sophisticated HR professionals are intuitively aware of the compliance risks, the potential liabilities might not be on the radar of your procurement team. If procurement is responsible for contracting with staffing agencies and other vendors, coordination with HR and legal is essential to ensure that these departments not only are aware of the contract, but that the contract is written and administered in a matter that minimizes legal exposure.
- **Recommend, don't mandate.** While it's permissible to demand a franchisee or contractor maintain product and service standards in order to protect the brand, mandating specific employment-related policies and procedures invites risk. While use of the franchisor's boilerplate policies may be beneficial to the franchisee, it should be clear that following such policies and practices are optional.
- **Watch for evolving law.** As noted, the law of joint-employment relationships is changing rapidly. It's critical to stay apprised of emerging developments, both at the federal agencies and in state legislatures and agencies as well. ■

The need to minimize direct control must be balanced by the countervailing need to ensure that all on-site individuals are safe and that intellectual property is protected.

A patchwork of tests

How is joint-employer status determined? It depends. The analysis can vary by statute, by jurisdiction, and by cause of action. It's a frustrating patchwork of tests:

Right-to-control test. When a discrimination claim is filed against a putative joint employer, for example, a common-law "right-to-control" test of employer status applies. Joint employment is also analyzed under this standard when claims arise under the ERISA. The common-law test varies by jurisdiction, but generally, the multi-factor analysis asks whether the putative employer has the right to control the means and manner in which an employee's work is done. Courts look at the putative employer's control over hiring and firing, compensation and training, and supervision over the employees' day-to-day activities, including where the work is performed, what tools or "instrumentalities" of work are used, and who owns them, and the length of time the contractual relationship is in place.

Economic realities test. In wage-hour cases brought under the FLSA, the "economic realities" of the relationship between employees and the putative joint employer determine whether there is an employment relationship between them. Courts evaluate the extent to which the putative employer can "suffer or permit" the employees to work, considering the degree of control it has over their work conditions and method or rate of pay, where and how the work gets done, and the permanence of the putative employer's relationship with the employees in question. Other key factors are the amount of skill required in performing the job duties (if little training is needed, this suggests more economic dependence on the putative employer), and how integral the employees' work is to the company's core business. Who handles payroll, taxes, and other administrative functions? These variables also come into play.

A little of each. Several jurisdictions use a "hybrid" test when resolving certain claims, considering elements of both the common-law and economic realities tests. These tests vary by jurisdiction and statute. For example, the Fourth Circuit evaluates a non-exhaustive list of nine factors, the most important of which are hiring and firing authority, the extent of day-to-day supervision, and the amount of control the putative employer exercises over the employees in question. The Eleventh Circuit has 11 (non-exclusive) factors, with the most important being the right to control the means and manner of work.

Shifting standards

Adding to the challenge: the legal tests for joint employment under federal law and regulations are currently in flux.

In August 2015, the National Labor Relations Board (NLRB) put the joint employer issue front and center

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An integrated enterprise?

In addition to a joint-employer claim, employees also seek to hold entities liable under an analytically distinct "single employer" or "integrated enterprise" theory, alleging that two defendants are not independent entities but rather one entity, fully liable for violations of the law. This theory applies when plaintiffs hope to combine the entities' workforces in order to meet a statutory threshold for coverage (the 15-employee threshold for coverage under Title VII, for example), or when attempting to establish a "mass layoff" under the Worker Adjustment and Retraining (WARN) Act.

When this approach is used, courts focus primarily on the relationship between the two companies, rather than on the relationship to the plaintiff employees. These tests vary too, but courts usually consider: (1) whether the entities are under common ownership and financial control; (2) whether they share common management (including C-level leadership and directors); (3) the interrelation of operations between them; and (4) the extent to which there is centralized control of labor relations and personnel. Evidence can include shared office space, shared websites or email addresses, common letterhead, and the like.

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when it delivered a controversial decision establishing a broad definition of "joint employment" under the National Labor Relations Act (NLRA). In *Browning-Ferris Industries of California, Inc*., a sharply divided Obama NLRB altered the framework that had been in place since 1984 for determining whether an entity was an "employer" of a given group of workers under the Act, for purposes of union organizing, collective bargaining, and potential liability for "unfair labor practices." Previously, it wasn't enough for an entity to *have* authority to control the terms and conditions of employment—companies utilizing staffing agency services often include a provision reserving this right in their vendor contracts—but the entity had to actually *exercise* that authority. It would have to exercise direct and immediate control over the workers' terms and conditions of employment. However, under the new standard set forth in *Browning-Ferris*, an entity that merely possessed or reserved the authority to exercise control, or exercised control indirectly through an intermediary, was a joint employer under the NLRA.

At first blush, the NLRB's definition of joint employment would not appear to matter outside the realm of traditional labor law or impact class employment litigation. However, *Browning-Ferris* signaled a broader movement among the federal agencies to use joint-employment principles to pursue "deeper pockets" in their enforcement efforts. Indeed, the EEOC quickly registered its support for the NLRB's new, "flexible" standard, filing an amicus brief in support of the NLRB as it defended its decision at the federal appeals court. In enforcement guidance, the EEOC indicated it would take a similarly expansive view of joint employment for purposes of Title VII liability. Moreover, speculation soon emerged that the Occupational Safety and Health Administration (OSHA), an arm of the DOL, had coordinated with the NLRB in establishing the new test, and that OSHA investigators around the same time had begun looking into companies' relationships with their labor suppliers and other vendors.

Browning-Ferris *signaled a broader movement among the federal agencies to use joint-employment principles to pursue "deeper pockets" in their enforcement efforts.*

The *Browning-Ferris* decision sparked an immediate firestorm, drawing sharp rebuke from the business community. Companies now had to revisit their vendor contracts, and cede even reserved control over the contingent workers in their midst, or face greater potential exposure for labor law violations committed by their business partners. Meanwhile, though, the political winds were shifting, and the Trump election marked a drastic pendulum swing at the agencies. Wasting little time, a more business-friendly NLRB in December 2017 reversed course, issuing *Hy-Brand Industrial Contractors, Ltd*., another divided decision, vacating *Browning-Ferris* and restoring the traditional joint-employment standard. The relief was short-lived, however. The Board in February 2018 withdrew the *Hy-Brand* ruling after the agency's inspector general concluded that one of the newly installed Board members should have recused himself from any role in that decision. In the wake of these highly unusual circumstances, businesses were left to grapple with the uncertainty. *Browning-Ferris* would remain in place for now.

For its part, the Labor Department, under the auspices of its Wage and Hour Administrator, adopted an even broader view in a January 2016 directive, which outlined how joint employment would be construed under the FLSA and Migrant and Seasonal Agricultural Worker Protection Act (MSPA). According to the DOL, any entity that might "suffer or permit" a person to work was that person's employer—a sweeping construction that pulled lots of "deep pockets" within the agency's enforcement grasp. Here too, though, the Trump administration would undo the draconian excesses of its predecessor: Labor Secretary R. Alexander Acosta, in June 2017, withdrew this informal guidance, stating the agency would instead adhere to its longstanding regulations and controlling case law.

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A rulemaking solution

Cognizant of the whiplash suffered by the regulated community and the compliance challenges of operating a business amid such ongoing regulatory uncertainty, both the NLRB and DOL are looking to forge a more permanent, codified solution to the joint-employment conundrum. It was big news when the NLRB announced it would undertake formal rulemaking to define joint employment under the NLRA. Prior to the Obama administration, the agency seldom promulgated rules; Board law typically evolves through case adjudication. In fact, Congressional Democrats pushed back on the prospect of a formal joint-employer rule before the Board even announced its intentions. Undeterred, the NLRB already has issued its proposed regulation—offering a definition of joint employment which hews closely to the standard set forth *in Hy-Brand* (which itself conformed to longstanding principles of joint employment under the Act). The Board has invited public comment on the rule as proposed, and a final rule will follow. It's a safe bet the NLRB regulation, once finalized, will in fact restore the definition of joint employment under the NLRA to its longstanding, common-sense meaning.

In its autumn regulatory agenda, the DOL has indicated that it, too, will seek to "clarify the contours of the joint employment relationship" under the FLSA. And while the NLRB apparently hopes to etch in stone a joint-employment standard long applied by the agency, the DOL has promised to consider changes to its rule first issued 60 years ago, in a manner that better meets the needs of a changing "21st century workplace." The goal, the DOL says, is "to provide clarity to the regulated community and thereby enhance compliance," and perhaps, "to provide more uniform standards nationwide." Such a development would surely help the business community navigate this increasingly rough terrain.

A uniform, cross-jurisdictional, permanent joint-employer standard would offer much-needed certainty for companies.

Legislation in the wings

A legislative fix would bring even greater stability, and Congressional Republicans introduced such a measure on the heels of *Browning-Ferris*. The Save Local Business Act (H.R. 3441) would narrow the definition of "joint employer" under both the NLRA and FLSA. An entity would have to have "actual, direct, and immediate" control over workers—"and not in a limited and routine manner"—to be liable as a joint employer. The putative joint employer would have to exercise "significant control over the essential terms and conditions of employment (including hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, and administering employee discipline)."

A uniform, cross-jurisdictional, permanent joint-employer standard would offer much-needed certainty for companies seeking to ensure they are on solid legal ground while navigating a rapidly evolving economic landscape. H.R. 3441 cleared the House in November 2018. ■

Only in California

As with so many other labor and employment matters, employers operating in California face heightened risks with respect to joint employment. The state's worker-protective bent translates to regulatory and statutory provisions that aim to hold as many potential "employers" as possible liable for alleged violations.

California law holds client employers jointly liable for infractions of state wage and hour laws committed by their labor subcontractors. Companies that use labor subcontractors share civil liability with the subcontractor for payment of wages or for failure to secure workers' compensation coverage for workers servicing the client company. Client employers are prohibited from shifting legal duties, or worker-related liabilities, to labor contractors that supply the workers. Moreover, an entity may not enter into a labor contract if it knows or has reason to know that the contract does not include sufficient funds to enable the labor contractor to comply with the laws and regulations governing the labor or services. (The California legislature this year advanced legislation that would have extended such joint liability to instances of worker harassment—a hot-button issue in the #metoo era—but Governor Jerry Brown vetoed the measure.)

California's Division of Labor Standards Enforcement aggressively pursues both client companies and contractors when seeking to recover for breaches of California's wage-hour laws, including prevailing wage requirements and other violations. In one recent case, for example, a general contractor paid more than $1.1 million to resolve a prevailing wage assessment for violations committed by its drywall and framing subcontractor following an enforcement action by the California labor commissioner.

The greater danger, however, in terms of the scope of potential exposure, is class litigation. The following is an example of how joint employment plays out in a suit brought by private plaintiffs.

Who do the warehouse workers work for?

In 2011, warehouse workers who loaded and unloaded boxes from shipping containers filed a class action suit contending they regularly worked double shifts without meal and rest breaks or overtime pay, and often for less than minimum wage. Many of the plaintiffs—some 1,800 contract "temp" workers—had worked at the warehouses for years. They were directly employed by two labor subcontractors that had entered into service contracts with a logistics company to provide labor at three California warehouses.

The service contract purported to shift all responsibility for legal compliance to the labor subcontractors as the workers' "sole" employer. However, the contract also dictated nearly every material term of employment, requiring detailed pre-employment screening and training for each worker; ongoing supervision; accurate recording of hours worked; periodic performance evaluations; and strict adherence to the logistics company's performance standards. The logistics company also reserved the right to request that any worker be removed from the job.

The "deep pocket" in this scenario, however, was the worldwide retail giant that owned the warehouses in question. The facilities had been operated by various warehouse contractors for the retailer since 2001. The logistics company was the latest; it had a contract with the retailer to oversee the three facilities, which comprised the retailer's largest distribution center in the western United States. The retailer was the logistics company's sole client (though the labor subcontractors serviced other clients besides the logistics company).

They work for the retailer. The workers initially filed suit against the labor subcontractors and logistics company as joint employers. However, after discovery, they found evidence to support adding the retailer itself as a defendant. "As a matter of economic reality," the retailer controlled their employment, the workers alleged. It "controls the operation of these warehouses from top to bottom, and keeps a watchful eye on everything that happens there," plaintiffs' counsel contended.

The defendants opposed the workers' motion to amend the complaint to add the retailer, arguing that plaintiffs had acted in bad faith by waiting so long. Based on public statements by plaintiffs' counsel, the workers had their sights set on the retailer all along, urged the defendants. Finding no unreasonable delay, however, the court granted the plaintiffs' motion. Subsequently, the court rejected the

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retailer's motion for summary judgment, concluding there was ample evidence the retailer was a joint employer of the workers at its California warehouses. The court noted:

- Under the terms of the service contract with the logistics company, the retailer approved overall staffing levels at the warehouse, including the number of temporary workers, which meant it exercised control over the hiring and firing of the workers in question.
- The retailer required the same number of workers from each subcontractor to report to the warehouses each day, regardless of the volume of merchandise being moved through the facilities on any given day.
- The retailer had up to a dozen of its own managers on-site, overseeing the workers' daily job functions and enforcing the company's own guidelines, standards, and operating procedures.
- The retailer established "operating metrics" for its warehouses, including productivity standards, measured in cases loaded or unloaded per man-hour. The retailer instructed the logistics company to continue to pay its subcontractors on a per-container basis.
- The retailer's own personnel closely monitored those productivity levels and notified the logistics company when they fell below expectations. Managers and supervisors from the logistics company pressured its subcontractors' workers to work faster in order to meet the retailer's productivity standards.
- The retailer offered recommendations on how to boost productivity and expected the logistics company to follow them. Among the recommendations were detailed guidelines that affected the workers' schedules, such as when breaks and shifts should begin, and a direction to shift all the workers to an alternate four-day, 10-hour schedule—thereby asserting control over the workers' schedules and employment conditions.
- The retailer mandated the inclusion of background screening requirements in the contracts between the logistics company and labor subcontractors. The contract identified 16 screening measures that the subcontractors had to implement for their workers at the warehouse. The retailer also required that the workers receive training on U.S. Department of Transportation regulations and additional loading guidelines.
- The retailer conducted detailed audits of operations at the warehouse and directed the logistics company to speak directly with the subcontractors' workers if they were not following the retailer's procedures. In at least one instance, the retailer instructed the logistics company "to promptly address deficiencies by way of a written action plan submitted to [the retailer] and immediate corrective action."
- The retailer approved the logistics company's operating budget (and pressured the company to minimize its costs). To that end, the logistics company had to submit an organizational chart that identified the ratio of supervisors to line workers in each area of the warehouse. The chart also identified the subcontractors' workers and the average number of hours worked per employee, so that the retailer could evaluate whether they were working sufficient hours to avoid overstaffing.
- The logistics company had to seek the retailer's approval before changing the total amount that it paid to its subcontractors, which meant the retailer played a hand in setting the workers' pay rate. One of the retailer's officials stated in an email that he was "very focused on the use of incentive based temp agencies." In another email, one of its managers instructed warehouse managers that they must work toward reducing the number of "temp agency people in our buildings." After that email, the logistics company hired on the subcontractors' workers as its direct employees.

In the court's view, this evidence gave rise to an inference that, despite the "multiple contractual layers" separating the retailer from the warehouse workers, the retailer was a joint employer, and was both aware of (or had reason to be aware of) and liable for wage violations that occurred at its warehouses. The decision marked the first time a retailer would face trial for the actions of its warehouse contractors.

They work for the logistics company. The district court denied the logistics company's summary judgment motion as well. The logistics company determined the number of cases that the workers had to load each hour. It directed the subcontractors to pay their workers on an "incentive" basis rather than on an hourly rate. It demanded the labor subcontractors conduct background checks and drug tests. Its supervisors directly assigned work to the subcontractors' workers, and were involved in the discharge of several workers by directing the subcontractor to remove them from

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Prevention pointer

By Christopher J. Stevens

The most effective means of reducing joint-employer exposure is a well-drafted contract that clearly evidences your organization's intent *not* to co-employ the employees of the staffing agency, labor supplier, or professional employer organization whose services your organization has retained.

What terms should the contract include?

- A clear statement that the parties do not intend to establish a co-employment relationship;
- A detailed description of the duties the staffing agency or contractor is being hired to perform;
- An express clause articulating that the outside agency has control and direction over the terms and conditions of employment for their employees who are placed at your organization, including hiring and firing decisions;
- Clear boundaries identifying the scope of front-line oversight, or a requirement that such oversight is to be provided on-site by the agency;
- A clause reserving the right to remove any individual from the facility or jobsite, including employees of third-party vendors, for safety reasons or personal misconduct;
- A provision requiring the third-party employer to comply with all applicable federal, state, and local employment laws and ensuring the employer maintains workers' compensation coverage and employment practices liability insurance;
- An indemnification clause wherein the intended employer agrees to indemnify the potential joint employer for any damages or attorneys' fees in costs incurred in defending against claims from employees of the intended employer;
- Durational provisions identifying specific end-terms (but allowing for the contract to be renewable); and
- The right to revise the contract as needed to comply with the law (allowing an opportunity to revisit the contract terms if the legal standards governing joint employment are revised).

What terms should the contract *exclude*? Specific wage requirements, overtime mandates, or other terms of employment between the labor supplier and its employees. Again, the aim is to identify the specific duties and responsibilities to be performed by the third-party provider under the contract—not to dictate the manner in which the provider's workforce will complete those functions.

Consult with counsel. Ensure that your legal department or outside employment counsel review all staffing agreements with outside agencies to ensure that the contracts are legally compliant and protect your organization from potential exposure.

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the warehouse. It also maintained personnel and timekeeping records on the workers.

These allegations were sufficient to create a genuine dispute of material fact as to whether the logistics company had the power to indirectly hire and fire the warehouse workers, controlled their work schedules and employment conditions (both directly and indirectly), and determined their rate and method of payment. Finding enough evidence to advance a joint employment claim, the court also granted preliminary certification to the class.

They work for the labor subcontractors. By that stage in the litigation, the direct employers—the labor subcontractors—already had settled the warehouse workers' claims against them. Notably, both the retailer and logistics company tried to challenge those settlements, but the court held that neither had standing to do so, even though they were named defendants in the case.

A $21 million deal. In the end, the retailer and logistics company reached a settlement with the warehouse workers. Under the terms of the deal, the logistics company agreed to pay $21 million in unpaid wages, interest, and penalties for alleged wage and hour violations covering a ten-year period. Would the retailer contribute to that payout behind the scenes? That was unclear. However, both companies did secure releases relieving them of further liability in the case. ■

Other class action developments

Important developments in class litigation since our last issue:

Circuit court decisions

FCRA claims persist post-*Spokeo*. The U.S. Supreme Court, in its 2016 decision in *Spokeo, Inc. v. Robins*, held that "bare procedural violations" of the Fair Credit Reporting Act (FCRA) would not be sufficient to confer standing for litigants suing for breaches of the statute's technical requirements. However, as two recent circuit court decisions make clear, the High Court's holding would not put an end to class FCRA litigation.

The Third Circuit reversed dismissal of a FCRA suit brought by three individuals who were rejected for jobs with a municipal transit authority after the public employer discovered their prior drug-related convictions. The employer failed to provide them with copies of the background check reports before deciding not to hire them, an action the district court found to be only a "bare procedural violation" rather than a concrete injury in fact. Therefore, the court dismissed their putative class action suit for lack of Article III standing. The Third Circuit reversed, concluding the rejected applicants had standing to assert FCRA claims. Congress granted the consumer (or job applicant) a right to receive a copy of his report before adverse action is taken, and provided for statutory damages plus attorneys' fees for willful noncompliance, which the applicants alleged here. Taking an adverse employment action without providing the required consumer report is "the very harm that Congress sought to prevent, arising from prototypical conduct proscribed" by the FCRA.

Similarly, the Seventh Circuit revived a FCRA class action brought by a job applicant whose employment offer was revoked following a background check that revealed "non-conviction" information in her criminal history. The employer rescinded the offer without first providing her a copy of the report and allowing her to review it and respond to the adverse information. A federal court concluded that the plaintiff lacked Article III standing because she failed to plead facts that connected the revoked job offer with the employer's failure to turn over a copy of the background report. Reversing, the appeals court explained that the whole purpose of the FCRA was for job applicants like the plaintiff to be able to review the information generated in a background check and present their side of the story.

However, in both cases, the appeals courts affirmed the dismissal of separate claims based on the employer's failure to provide them with notice of their FCRA rights. This lapse, "divorced from any concrete harm," is the type of "bare procedural violation" that was not enough to confer standing, per *Spokeo*.

So too, security check suits, post-*Integrity Staffing*. Similarly, the Supreme Court's ruling in *Integrity Staffing Solutions v. Busk* was not a death knell for suits brought by litigants seeking pay for the time spent waiting to undergo security checks before leaving work. The Court held that such claims were not cognizable under federal law (such "postliminary activities" were not compensable under the federal Portal-to-Portal Act), but it left the state-law claims unresolved. The Sixth Circuit recently addressed security screening claims brought by warehouse workers under Arizona and Nevada law and, concluding that neither state's wage statute incorporated the Portal-to-Portal Act, found that *Integrity Staffing* did not foreclose such claims. Rather, the appeals court concluded that time spent undergoing mandatory security screenings constitutes "work" under both Nevada and Arizona law, and further held the respective state legislatures did not exempt such work from being "compensable" under their state wage-hour statutes (as Congress had done with the Portal-to-Portal Act). The Sixth Circuit therefore reversed the dismissal of class claims brought under Nevada law. However, the Arizona plaintiffs did not allege a workweek in which they failed to receive minimum wage, as required by that state's law, so it refused to revive the Arizona claims on the merits.

Who decides the class arbitration question? Finding that the availability of class or collective arbitration is a threshold question of arbitrability, the Seventh Circuit ruled that a district court must evaluate an employee's contract with her employer to determine whether the agreement permitted class or collective arbitration. Whether the

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availability of class or collective arbitration is a gateway issue of arbitrability was an open question in the Seventh Circuit. However, the courts of appeal that have reached the question, including the Fourth, Eighth, Ninth, and Eleventh Circuits, have held that the availability of class arbitration is a question of arbitrability. The Seventh Circuit agreed with its sister circuits. Moreover, the district court erred when it invalidated a waiver clause in the parties' arbitration agreement because the Supreme Court's ruling in *Epic Systems Corp. v. Lewis* upheld the validity of such waivers. Therefore, the appeals court vacated the lower court order enforcing the arbitration award. On remand, the district court, rather than the arbitrator, is to conduct the threshold inquiry into whether the parties' agreement authorizes class or collective arbitration, the appeals court instructed.

[A] unanimous Ninth Circuit panel clarified that where a party may recover its attorney's fees by statute or contract, the district court must include future fees as well as those already incurred in assessing whether a case meets the amount-in-controversy threshold ...

In addition, in a matter of first impression before the Eleventh Circuit, and an issue left open by the Supreme Court, the appeals court has ruled that who decides whether an action can be litigated as a class in arbitration is an issue of "arbitrability" and those are all to be decided by the court in the absence of terms of the arbitration agreement that evince a "clear and unmistakable intent" to overcome that default presumption. The plaintiffs in this (non-employment) case sought to compel class arbitration against a company providing fee-for-service amenities in prisons, alleging violation of Florida's consumer protection laws. The defendants filed a motion to preclude class arbitration and to force the plaintiffs to litigate individually in arbitration. The district court granted the motion, explaining that in the absence of a clear intent by the parties in their agreement saying otherwise, the question of whether a matter can proceed as a class action in arbitration is a matter for the court to decide. However, the Eleventh Circuit reversed the lower court's decision because "the language these parties used in their contract expressed their clear intent to overcome the default presumption and to arbitrate gateway questions of arbitrability, including the availability of class arbitration." The case is a good reminder to review your arbitration agreements to ensure that your intent is clearly stated so the court does not decide for you.

Ninth Circuit issues key procedural rulings. The Ninth Circuit held that a federal court in California erroneously granted an employee's motion to remand her state-law wage-hour class action, which had been removed by her fast-food franchisee employer, based on the employer's stipulation that "at least two-thirds" of the putative class members had last known addresses in California. To remand a class action that has been removed pursuant to the Class Action Fairness Act (CAFA), a plaintiff must prove that more than two-thirds of the putative class members were citizens of the state at the time of removal. The district court had foisted the employer's proposed stipulation on the employee even though she had rejected it (she wanted jurisdictional discovery instead), concluding that it would satisfy the requisite factual showing to meet the local controversy or home-state controversy exceptions to federal CAFA jurisdiction. But the stipulation had left no wiggle room to account for class members who might have since moved out of state, or who were not U.S. citizens (and thus not California citizens). As such, the stipulation did not provide sufficient factual support for remand. The appeals court vacated the order of remand to state court. However, it also instructed the district court to give the employee another opportunity to seek jurisdictional discovery and to file a renewed motion.

In addition, a unanimous Ninth Circuit panel clarified that where a party may recover its attorney's fees by statute or contract, the district court must include future fees as well as those already incurred in assessing whether a case meets the amount-in-controversy threshold under the CAFA. The lower court had ruled that, for purposes of CAFA jurisdiction, the only attorney's fees that count toward the amount in controversy would be those "incurred as of the date of removal." While an appeal was pending, though, the Ninth Circuit issued a decision which held that "the amount in controversy is not limited to damages incurred prior to removal..." but rather "is determined by the complaint operative at the time of removal and encompasses all

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relief a court may grant on that complaint if the plaintiff is victorious." Although the appeals court had noted in its prior decision that the amount in controversy could include damages, costs of compliance with injunctions, and attorneys' fees awarded under contract of fee-shifting statutes, it had not addressed specifically whether attorneys' fees incurred after removal were properly included in the calculation. The court addressed that open question here. "We have long held . . . that attorneys' fees awarded under fee-shifting statutes or contracts are part of the amount in controversy" and "include all relief to which the plaintiff is entitled if the action succeeds," it wrote. "We may not depart from this reasoning to hold that one category of relief—future attorneys' fees—are excluded from the amount in controversy as a matter of law."

The appeals court adopted a standard requiring that plaintiffs show they "share a similar issue of law or fact material to the disposition of the FLSA claims."

Also, in a sweeping opinion examining FLSA collective actions in the context of decertification, the Ninth Circuit held that opt-in police officer plaintiffs could appeal the decertification and dismissal of an overtime collective action against a police department even though the original plaintiffs in the two decertified actions (involving roughly 2,500 officers) had reached a settlement with the city and the district court entered a final judgment. The opt-in officers were actual parties to the collective actions, and the decertification and dismissal disposed of their statutory right to proceed collectively, the appeals court held—disagreeing directly with the Third Circuit's approach in similar litigation. (The Eleventh Circuit has taken an approach similar to the Ninth Circuit.) The court reasoned that the city had confused finality, which is a condition of appealability, with an adverse disposition on the merits, which is not. Another matter of first impression in the circuit was how to evaluate a decertification motion, whether the district court was correct in considering decertification when it did, and on what record. The appeals court held that the district court erred in its interpretation of the "similarly situated" requirement and the standard it applied in evaluating decertification. The lower court had used an *ad hoc* test that focused on differences rather than similarities among the party plaintiffs, and improperly treated difference as disqualifying, rather than an approach that treats the requisite kind of similarity as the basis for allowing partially distinct cases to proceed together. The appeals court adopted a standard requiring that plaintiffs show they "share a similar issue of law or fact material to the disposition of the FLSA claims." In the end, though, the collective actions were properly decertified, because the officers had not shown they were similarly situated—they had not created a triable question of fact regarding the existence of a pervasive, unwritten, department-wide policy discouraging the reporting of overtime in amounts of less than one hour.

A blow to gig economy class actions. In a major setback to litigation challenging the expanding gig economy business model—multiple class actions brought by rideshare drivers who contended they were misclassified as independent contractors—a Ninth Circuit panel ruled that the appellate court's earlier decision reversing a district court's refusal to compel arbitration in one case meant that the lower court's orders denying the rideshare company's motion to compel and granting class certification in *other* cases must also be reversed. The ruling effectively dissolved a 160,000-member class suit against the rideshare company. The appeals court also reversed as moot an order controlling class communications in one case pursuant to Rule 23(d).

NFL players' claims not preempted. Federal law did not preclude state-law negligence claims brought by retired football players against the National Football League (NFL). The former players brought class action claims alleging that the NFL violated state and federal laws governing prescription drugs and encouraged the use of pain-masking medications (for which they seldom had written prescriptions) in order to keep players on the field and team revenues high. The district court dismissed their negligence claims as preempted by federal labor law—namely, Section 301 of the Labor Management Relations Act (LMRA). However, the Ninth Circuit found the NFL had a duty to avoid the unreasonable risk of harm when distributing controlled substances—a duty that was completely independent of the collective bargaining agreement (CBA) between the league and

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players' association. As such, contract interpretation was not necessary to determine that distributing controlled substances gives rise to a duty of care. As pleaded, the players' claims neither arose from the CBAs nor required their interpretation, so the appeals court reversed and remanded the district court's ruling. However, it expressed no opinion regarding the merits of the players' claims.

Class certification decisions

"Community work" class certified. A federal magistrate in New York conditionally certified an FLSA collective in a wage suit brought by a fitness wear chain's employees contending they were required to do "community work" such as organizing fitness classes and other events and recruiting fitness instructors to serve as "brand ambassadors" and to perform administrative duties off the clock. They alleged they were subject to companywide policies or practices, such as allotting a certain number of staff hours per store (which, they alleged, were "never enough to complete all the work that employees had to do") that effectively deprived them of straight-pay and overtime pay. The retailer argued that the community work was optional and pointed to a clause in its employee handbook expressly stating as much. Any contention that the policy was not followed in practice would require a store-by-store—indeed, employee-by-employee—analysis, it argued, which would be unsuitable for statewide conditional certification. However, the employees' allegations of common control, and the ample documentary evidence supporting their allegations, were enough to make the modest factual showing that community work was very much required, and that employees in the proposed collective performed this mandatory work without pay, the court said. Moreover, although the plaintiff presented no evidence from any store other than her own, her allegations and affidavits were sufficient at this stage of a collective action to support her position that the company's de facto policies caused FLSA violations at other store locations throughout the state. Therefore, the court conditionally certified an FLSA collective of employees who worked in one of the company's 25 retail locations in New York State.

Pilots' USERRA class certified. A federal court in Illinois granted Rule 23 class certification to former pilots of two merged airlines who claimed they were deprived of sick time accrual, vacation time accrual, and pension benefit payments during military leave, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). It was undisputed the classes, made up of "hundreds of pilots," satisfied Rule 23 requirements—whether they were improperly deprived of sick and vacation time accrual or pension payments were issues common to the classes and those issues predominated. The parties sparred over class definitions, however. The plaintiffs proposed a single subclass of past and present pilots from April 1, 2005, to the present who did not accrue sick time while on periods of military leave. But the defendants argued that two subclasses were needed to account for the fact that different bargaining agreements were in effect at different times. The court sided with the plaintiffs, noting there was no argument made that the CBAs' terms would be relevant to determining whether the sick time policies violated the USERRA. Nor did the defense argue that reference to the CBAs was necessary to define the class.

COBRA class gets court nod. Claims by a fired hotel chain housekeeper that the COBRA notice she received was deficient were certified as a Rule 23 class by a federal court in Florida. The hotel chain admittedly sent the notice to some 15,000 other terminated employees over a four-year period. Nonetheless, it tried to defeat class certification, opposing the motion on every Rule 23 factor. It argued, for one, that the housekeeper's claims were not typical of the class because she did not understand English, does not use computers, and could not afford COBRA continuation coverage, and that resolution of the claims would require inquiry into the motivations of thousands of class members. However, whether a COBRA notice is adequate is based on an *objective* determination of whether the notice complies with the letter of the statute and is understandable by an average plan participant, stressed the court. Class members are ascertained by reference to objective criteria, and here the class was identified by the employer's own objective criteria: they were sent a COBRA notice through the company's own benefits portal. Nor was the court persuaded that the class definition was unworkable because it included individuals who experienced no impact; this issue went to damages, not whether the class was adequately defined and ascertainable.

Interns denied cert for settlement purposes. For the second time, a federal court in New York refused to conditionally certify an FLSA collective or proposed 1,000-member Rule 23 class for settlement purposes in

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what had been a seminal wage suit brought by unpaid college interns who claimed they were statutory employees and should have been compensated accordingly. The judge rejected the notion that the class certification hurdle was lower when a proposed settlement was involved, and declined to consider the merits of the $795,000 settlement, which would resolve claims under the FLSA and New York Labor Law (NYLL). On their second try, the court had urged the interns to provide supplemental submission on the issues of commonality and typicality and predominance. But the plaintiffs failed to present additional evidence they were similarly situated, leaving the court with nothing more to go on than a factual record that had already been found wanting. Nor had they addressed intervening Second Circuit decisions which had scuttled the DOL's "trainee" test (since scrapped by the agency) and reframed the criteria under which interns would be deemed statutory employees under the FLSA. The court acknowledged, in one of the last of a receding wave of intern cases, that the limitations period had run its course, meaning the failure to grant certification will foreclose the interns' wage claims and leave them empty-handed. "However, this unfortunate consequence cannot serve to excuse plaintiffs' failure to comply with the requirements of Section 216(b) and Rule 23," the court wrote.

Cert. denied in massive sex bias suit. A tech giant fended off a class action disparate treatment and disparate impact discrimination suit brought on behalf of a proposed class of more than 8,600 women nationwide who contended that female technical employees were paid less and promoted less frequently than their male counterparts. According to the employees, the employer's method of ranking engineering and IT employees led to arbitrary and inaccurate performance measurements that systematically disadvantaged women in pay and promotions. As part of the evaluation process, managers compared and standardized performance ratings across a cohort of colleagues in the same pay level. A companywide "stack ranking" system was then used, in which management ranked employees from best to worst. A higher-level manager then reviewed the rankings before finalizing them. However, the employees failed to show that promotion policies and practices were uniform across the company. The evaluation procedures were more of a framework than a constraint on managers' decision-making discretion, and the relevant decision-making remained at the individual manager, or at best, the team level. The four executive vice presidents identified as the final approvers of all pay and promotion decisions almost always accepted the recommendations of lower-level managers. Further, the declarations submitted showed that managers did not exercise their discretion in a uniform manner; the outcomes varied and were based on a number of different policies or practices. "As in *Dukes,* without some common direction, it is 'quite unbelievable' that all [ ] managers supervising over 8,600 putative class members 'would exercise their discretion in a common way,'" the court said.

Cert. denied due to inadequate counsel. A federal court in Illinois denied without prejudice a motion for class certification filed by female employees at two Chicago-area auto plants who alleged that male coworkers and supervisors routinely harassed and assaulted them. According to their complaint, female employees were subjected to sexually explicit graffiti and pornographic images displayed in common areas (or shown to them directly by male coworkers). Male employees send photos of their genitalia on mobile devices and text sexually explicit requests. Class members have been raped, forced to perform sex acts, grabbed and groped and forcibly kissed, and locked in rooms. Moreover, the employer was on notice of the sexually hostile work environment for decades and failed to correct it, they asserted. Indeed, several multi-plaintiff suits had been brought (including a prior class action) and the employer had even entered into a conciliation agreement in 1999 with the EEOC. However, sexual harassment and hostile treatment continued unabated as soon as the monitoring period was over. In 2017, the employer entered into a new EEOC conciliation agreement—and it moved for denial of class certification on that basis. The court rejected that argument, but it denied certification based on inadequacy of counsel. Lead counsel for the proposed class had represented a class in only one other federal class action, and that litigation resulted in disciplinary sanctions and malpractice claims against him. The court also outlined a number of substantive concerns about the motion for certification—such as potential conflicts of interest between proposed class members, a weak predominance showing, and a failure to address how liability could be established on a classwide basis—thus giving class counsel a heads-up on what needed to be fixed or addressed before it refiled.

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ADEA claimants aren't similarly situated. Two plaintiffs were denied their bid for conditional certification of their collective ADEA action alleging that an accounting firm engaged in "systemic and pervasive" discrimination against older applicants by maintaining hiring policies and practices that gave preference to younger applicants and deterring older individuals from applying. They sufficiently showed that they were victims of a single decision, policy, or plan; the court rejected (for now) the company's focus on minor differences between the experiences of the declarants and its argument that the economist's statistical evidence was subject to alternative interpretations. But they were not similarly situated to either "facially unqualified" or "deterred" applicants (who had *attempted* to apply to no avail), both of which categories were part of the larger collective action they sought to certify. The plaintiffs asserted that limiting the class to qualified applicants prevented them from attacking discrimination in the initial screening process itself. For instance, they argued that recruiters were allowed to exercise discretion in the application of the screening criteria and that pre-interview rejection rates were higher for older applicants. While their argument may have merit, they had to find another way to challenge discrimination in the initial screening, either through existing named plaintiffs (who were rejected at the initial screening stage for some jobs, although they were facially qualified), or a different named plaintiff. It was "hard to imagine" how unqualified applicants could ever be part of the class, the court pointed out, given that an ADEA plaintiff must show that he was qualified for the position. A federal court in California gave the plaintiffs 30 days to propose a proper class, however.

Decade-old trucker class decertified. A federal court in California has decertified a class of 11,000 truck drivers in their suit against a transportation logistics company under California wage laws. Their challenge to the employer's Activity-Based Pay (ABP) compensation system was filed in 2008, and the class was certified in 2009 based on the understanding that the ABP system applied uniformly to all "intermodal" drivers (who delivered freight to and from railways) and "dedicated contract services" drivers (who delivered to a specific customer on a regular basis). However, the varied plans used to pay the drivers did not meet Rule 23's predominance requirement—11,000 drivers were paid through approximately 190 different pay plans, and only some used the ABP piece-rate formula—and individual issues would overwhelm the common questions, the court ultimately found. Any variations in pay plans would affect not only wages owed (damages) but also liability, and the drivers did not propose a feasible way to identify members subject to the ABP plan without reviewing each driver's logs and payroll.

Other district court decisions

Additional class claimants must be covered. In a suit challenging an employer's "100% healed/100% fit for duty" return-to-work policy, a federal court in California held that when the EEOC pursues a class pattern-or-practice claim and chooses to identify "additional class members" who have suffered some form of disability discrimination, the allegations must plausibly show that those additional individuals are covered by the Americans with Disabilities Act (ADA). However, as to eight of the 13 identified class claimants, the EEOC failed to allege an impairment that affects a major life activity or to identify essential job functions. Therefore, the court dismissed the ADA claims as to those class members. However, the court also stated the EEOC could file an amended complaint that addresses and corrects the deficiencies with respect to those class members

Broad discovery allowed. Female employees of a federal government contractor alleged their employer had a policy and practice of intentional and disparate impact sex discrimination in performance evaluations, compensation, and promotions. A federal court in New Mexico held the employees were entitled to discovery of the employer's communications and files relating to sexual harassment, pregnancy discrimination, hostile work environment, and retaliation, even though their operative complaint did not assert those claims on a classwide basis. Notwithstanding that 2015 amendments to Rule 26(b) tightened relevancy standards, the court overruled objections to a magistrate's discovery order which found there might be relevant evidence in complaints filed by other female employees asserting the four specific types of sex discrimination identified that could inform or support the plaintiffs' claim that "there is a culture of gender discrimination" at the company "that is most prominently manifested in pay, promotions, and performance evaluations." Discovery of this information was also relevant to several affirmative

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defenses, the court noted. The high Rule 23(b) hurdle the plaintiffs had to clear to show commonality and possibly obtain class certification also supported granting discovery related to these claims.

Unassigned agency workers can't opt-in. A federal court in Texas dismissed the claims of several "added plaintiffs" in a discrimination class action against a hospital—African-American employees of a staffing agency who *would* have been assigned to perform food service work at the hospital had it not canceled contract negotiations with the agency because it failed to send Hispanic employees to work there. The agency had sent an African-American prep cook to work at the hospital and, after a few days, the cook was asked to leave, allegedly because the head chef only wanted to work with Hispanic employees. When the hospital asked the agency to provide another prep cook, the agency sent the same prep cook back to the hospital. Once again he was asked to leave and, later that same day, the hospital ended contract negotiations with the agency. The prep cook and staffing agency brought claims under Title VII, the Texas Commission on Human Rights Act (TCHRA) and Section 1981. The added plaintiffs joined the suit as African-American individuals the agency *would* have supplied to the hospital had it entered into the staffing contract. They asserted they were similarly situated to the prep cook as each was African-American, worked for the staffing agency, and would have been staffed to the hospital had it not been for the hospital's unlawful hiring policy. However, the added plaintiffs did not exhaust their administrative remedies, or qualify under the single-filing exception to the exhaustion requirement, for purposes of their Title VII and TCHRA claims. And they did not have the necessary contractual relationship with the hospital for purposes of their Section 1981 claims. (Unlike the prep cook, who briefly worked for the hospital, the staffing agency had not provided the added plaintiffs to the hospital, and merely planned to supply them as employees at some point in the future.)

The high Rule 23(b) hurdle the plaintiffs had to clear to show commonality and possibly obtain class certification also supported granting discovery related to these claims.

Prayer break pattern-or-practice suit. Allowing Muslim employees unscheduled prayer breaks would have been a reasonable accommodation of their religion and would not have posed an undue hardship to a meatpacking company, concluded a federal court in Colorado in a long-running pattern-or-practice religious accommodation case brought by the EEOC. However, the EEOC did not show that employees who were disciplined for unauthorized prayer breaks were suspended, fired, or otherwise experienced a detriment in the terms and conditions of employment, so its claim based on the employer's denial of the prayer accommodation failed. The EEOC claimed the employer engaged in a pattern or practice of disciplining and firing black Somali Muslim employees more often than other employees during Ramadan 2008. While the court found that the statistical evidence, combined with other circumstantial evidence (*e.g.,* targeting for discipline the Muslim employees' use of unscheduled breaks to pray), was enough to infer a pattern or practice of discriminatory discipline based on race and religion, it did not suffice for national origin. In the court's view, the weaker statistical correlation between discipline and Somali national origin was due to the employees' other protected characteristics. Judgment also was entered for the employer on the claim that it engaged in a pattern or practice of disparate discipline based on race, religion, and national origin because a walkout and work stoppage by the Muslim employees constituted a legitimate reason for the company's actions and the EEOC failed to show pretext. The retaliation claim also failed in this Phase I trial of the bifurcated case. (In Phase II, the EEOC may present its pattern-or-practice claim for hostile work environment and pursue individual damages. The separate claims of over 100 intervening plaintiffs would also be addressed in Phase II.)

Burger chain faces 18,000-member wage class. A national burger chain must defend claims it failed to pay wages, provide meal and rest breaks, or reimburse work expenses in a case involving a class of more than 18,000 current and former employees who worked in the chain's 68 restaurants in California. The plaintiffs offered sufficient classwide proof—in the form of unrebutted

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testimony from both class members and management—that the company uniformly implemented a policy of denying putative class members required meal and rest periods The employer urged that class certification was inappropriate because thousands of putative class members had signed arbitration agreements waiving their ability to bring certain class claims. However, the employer did not specify the circumstances under which those agreements were signed, and there was some evidence they might be unenforceable, which the court could not conclusively determine at this stage of the litigation. So the court certified an arbitration subclass of employees whose ability to join the class would rest on whether the arbitration agreements were binding (in which case they would be excluded). ■

On the radar

A few class action developments to watch for:

SCOTUS tackles arbitration (again). On October 3, the Supreme Court heard oral argument on the questions of whether the Federal Arbitration Act's Section 1 exemption is a question of arbitrability to be decided by an arbitrator or a court, and whether the same exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements. On October 29, the Justices heard arguments in a case that asks whether the FAA bars a state-law interpretation of an arbitration agreement to allow class arbitration when the agreement itself does not mention class arbitration. It was "important for the Court to reach the issue here because the reality is, if a case is sent to class arbitration, it almost certainly is going to settle," counsel for the employer in one of the cases told the Court during argument. "The Court has talked a lot about the coercive—the inexorable pressure to settle in courts in class litigation. Class litigation in arbitration is 100 times worse because of the very limited standard of review at the other end." The High Court's decisions in these cases will impact whether class litigants, particularly workers claiming independent contractor misclassification, can evade arbitration despite having contractually agreed to arbitrate—and force employers to make tough decisions about whether to settle or defend high-stakes class claims.

Is filing a class action protected, concerted activity? The National Labor Relations Board (NLRB) will reconsider whether filing a class action suit is a protected, concerted activity under the National Labor Relations Act. In April 2018, a three-member NLRB panel issued a decision which found an employer violated the Act when it fired an employee for filing a collective action wage suit against the company. A month later, the Supreme Court decided *Epic Systems Corp. v. Lewis*, which held that class action waivers in employment arbitration agreements do not violate federal law. In a 3-2 decision, the Board vacated its earlier ruling and order *sua sponte* in light of the High Court's holding and announced it would "reconsider the entire proceeding." The case had been pending review before the Fifth Circuit, which granted the employer's unopposed motion to dismiss the petition accordingly.

Biometric privacy before Illinois high court. In the Spring 2018 *Class Action Trends Report*, we highlighted the wave of biometric privacy class actions that has risen alongside the growing use by companies of employees' and consumers' biometric data, and the corresponding increase in state privacy laws regulating its use. Because Illinois' Biometric Information Privacy Act (BIPA) is among the most restrictive of these laws, the state has become the hotbed for these lawsuits. The Illinois Supreme Court recently heard oral arguments in a BIPA case involving a theme park that collected fingerprint data from season pass holders without their written consent. A state appeals court reversed a trial court's determination that the plaintiffs could sue even though they didn't suffer any actual harm from the legal breach. An Illinois court of appeals reversed, finding that the plaintiffs were not sufficiently aggrieved to have standing under the statute. Now the state's high court will tackle the issue. Although the underlying dispute was not employment-related, the decision will have broad implications for biometric privacy litigation, both within the employment context and beyond.

On the JL docket

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

December 13, 2018
The California Workplace Law Breakfast Series —San Diego (San Diego, CA)
2019 Construction Industry Employment Law Forecast (Webinar)

December 14, 2018
New York City Breakfast Series: Avoiding the Top 10 Wage and Hour Traps (Brooklyn Heights, NY)

2018 Atlanta Symposium: Surveying the Workplace Law Landscape (Atlanta, GA)

December 20, 2018
Here Comes 2019: Top 10 Ways to Stay Ahead of the Curve (Melville, NY)

January 17, 2019
Next Level Analysis: Top 10 Things to Know about Pay Equity and Data Analytics (Melville, NY)

January 24, 2019
Here Comes 2019: Top 10 Ways to Stay Ahead of the Curve (Riverhead, NY)

February 21, 2019
Safe and Sound: Top 10 Steps Toward Workplace Violence Prevention & OSHA Compliance (Melville, NY)

February 28, 2019
Next Level Analysis: Top 10 Things to Know About Pay Equity and Data Analytics (Riverhead, NY)

March 13-15, 2019
2019 Corporate Counsel Conference (Miami, FL)

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

Up next ...

In our next issue of the *Class Action Trends Report*, we explore a related issue currently dominating the labor and employment landscape: Who is an "employee"? The wave of litigation in recent years addressing independent contractor misclassification, "gig" economy workers, interns and other workers underscores the growing pains that arise as the meaning of "employment" is rapidly transformed by cultural, technological, and economic trends.