THE BKCG BULLETIN

FALL 2019 EDITION

BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

Out Of Order! BKCG Puts Disobedient Judgment Debtors In Jail

There is generally a clear separation between criminal and civil penalties in the law. In rare instances, however, the line between the two is crossed when a civil litigant deliberately fails to comply with a court order, and the opposing party proves such noncompliance beyond a reasonable doubt establishing contempt. Contempt of a court order is punishable by monetary sanctions, issue sanctions, and even dismissal of the contemnor's entire lawsuit. The quasi-criminal nature of the available penalties for contempt becomes more apparent when the sanctions, common in civil actions, are of no further use or application to a pending lawsuit and the only remaining penalty is the imposition of jail time against the contemnor.

BKCG recently traversed this intersection of civil and criminal law when it obtained an order of contempt resulting in jail time against the judgment debtors in an already adjudicated civil lawsuit. BKCG secured a $4.3 million judgment against Judgment Debtors Richard Van Loon and Dianne Van Loon for its client, Winchester-Wesselink, LLC (the "LLC") (see "BKCG Scores 'Gouda' Result At Trial", BKCG Bulletin, 2017 Winter Issue). In order to obtain information regarding the Van Loons' assets to satisfy the judgment, BKCG served the Van Loons with post-judgment discovery requests for documents regarding their financials. Among the very basic financial documents sought by the LLC were bank statements, real property deeds, and tax returns. The Van Loons eventually provided incomplete written responses to the written discovery requests without providing a single responsive document – documents undoubtedly in the possession of the Van Loons. BKCG then moved the court for an order compelling the Van Loons to provide proper responses and to produce the requested financial documents, which was granted by the court. In addition to ordering full compliance with the discovery requests within 30 days, the court also ordered the Van Loons to pay monetary sanctions to the LLC (in addition to the multi-million-dollar judgment already owed to

the LLC from the Van Loons). 30 days lapsed and the Van Loons still refused to respond to the discovery requests in direct violation of the court's order. The Van Loons' noncompliance resulted in a hearing set by the court on an Order to Show Cause Why the Van Loons' Should Not Be Held in Contempt. Because this is a quasi-criminal proceeding, the Court moved cautiously and deliberately. After a "mini-trial"– the court receiving evidence into the record and hearing oral argument – on May 17, 2019, the court adjudged each of the Van Loons in contempt. Since the case was over, and a huge judgment already loomed over the Van Loons, typical civil sanctions would serve no purpose. Accordingly, the court deemed the imposition of jail time to be appropriate against these judgment debtors. The court sentenced each of the Van Loons to a three-day sentence to be served at the Riverside County lock-up.

While BKCG continues to pursue all avenues of collection for its clients in this case, the Van Loons will surely think twice before thumbing their noses at a court order.

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BREAKING NEWS!

Effective Jan. 1, 2020, New Law Prohibits Employers From Requiring Employees To Arbitrate

On October 10, 2019, California Governor Gavin Newsom signed into law AB51 which drastically impacts utilizing arbitration agreements in the employment context. AB51 adds Section 432.6 to the Labor Code and, when it becomes effective on January 1, 2020, the new law will prohibit employers from requiring employees to sign an arbitration agreement as a condition of employment.

It is unclear how this law squares with federal law that provides arbitration agreements are "valid, irrevocable and enforceable" and, in fact, the California's new law provides that it is not "intended to invalidate a written agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. § 2)".

Importantly, the law allows for the enforcement of arbitration agreements entered into prior to January 1, 2020 so, if you have delayed having your employees execute arbitration agreements, a short window of time remains for you to require them to do so.

Please contact us should you need an arbitration agreement to address this situation. We will write further about this new law as the effective date approaches.

Congratulations to Alton Burkhalter

Alton was voted in as a new member of the American Board of Trial Advocates at the National Board Meeting in Washington, DC, on Saturday, October 12, 2019.

In This Issue

Drastic Changes In "Independent Contractor" Law

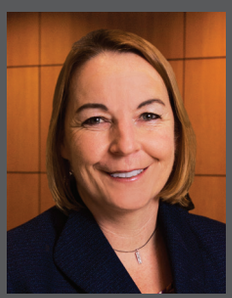
If you or your business work with independent contractors, there are some sweeping revisions to California law that you need to know about. As background, the decision to pay someone working for you as an independent contractor or as an employee could have extraordinary, legal implications. For example, as an employer you are required to monitor an employee's time spent working to ensure the employee receives required meal and rest breaks. An employer is required to compensate its non-exempt employees for overtime and to make certain withholdings from an employee's paycheck. None of that is required of individuals contracting with a business as independent contractors. That is why a business found to have "misclassified" an individual working for it as an independent contractor rather than an employee could face civil judgments, back taxes, administrative penalties and other liabilities.

As we have explained in previous articles, in the Spring of 2018, California's Supreme Court published *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903, a case that transformed overnight the use of independent contractors across California into an incredibly risky practice. Prior to *Dynamex*, determining whether an independent contractor should be treated as an employee required analysis under the "*Borello*" factors. Those factors (originating from *S.G. Borello & Sons v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341), required the decision-maker to weigh a variety of different factors, the most significant of which considered the amount of control the principal had over the manner and means of the work performed by the worker. Other factors, such as whether the worker used her or his own equipment and whether the services rendered required special skills, allowed businesses opposing a "misclassification" claim to make reasonable and nuanced arguments as to why the individual being scrutinized was not an employee.

However, the ability to rely upon the *Borello* factors in a legal argument over alleged "misclassification" was thrown into doubt by last year's decision in *Dynamex*. Namely, the Court in *Dynamex* determined that for certain "misclassification" claims, decision-makers needed to apply the "ABC" test, a restrictive three-prong test. Under the ABC test, a worker is classified as an employee unless there is a finding that (A) the worker is free from the control and discretion of the hirer in connection with performance of the work, and (B) the worker performs work that is outside the hirer's usual course of business, and (C) the worker is customarily engaged in an independently established trade, occupation, or business (i.e., has business cards, a business license, a separate work place, insurance etc.). *Dynamex*, 4 Cal. at 957, 963. The *Dynamex* decision provided examples of individuals who would necessarily need to be classified as employees – irrespective of whether those individuals wanted to be treated as independent contractors. For example, the *Dynamex* Court opined that cake decorators hired by a bakery were "more like employees than independent contractors." *Dynamex*, 4 Cal. at 959-60. Basically, under *Dynamex*, "a hiring entity must establish that the worker performs work outside the usual course of its business[]" in order for the business to treat the worker as an independent contractor. *Dynamex*, 4 Cal. at 961.

Dynamex's impact was evident almost immediately. In fact, this law firm saw a remarkable uptick of misclassification claims spurred on by the breadth of *Dynamex's* "ABC" test. For example, this firm saw highly-paid, highly-specialized professionals such as surgeons use *Dynamex* as leverage in litigation by claiming their prior status as an independent contractor (a relationship these individuals had negotiated, benefitted from and often memorialized in written independent contractor agreements) was illegitimate simply because they contracted with clinics where the "usual course of business" was medicine. In other words, the *Dynamex* decision which purported to protect those with less bargaining power was being weaponized by highly-compensated, highly-specialized professionals who threatened "misclassification" lawsuits simply to leverage their way out of contracts.

That brings us to where we are currently and the enactment of AB5, recent legislation signed into law by Governor Gavin Newsom on September 18, 2019 and effective January 1, 2020. Although most media and news attention has been paid to AB5's impact on "gig economy" workers (such as Uber drivers or Door Dash delivery drivers), AB5 has a more far reaching impact. Namely, AB5 carves out a fair number of professions providing that "misclassification" claims for those professions will be decided under the *Borello* factors, and not *Dynamex's* ABC test. For example, the claims of professionals such as physicians, lawyers, architects, and accountants will, once again, be analyzed under the *Borello* factors when those individuals are seeking to invalidate independent contractor agreements to which they are a party. The list of professions to which *Dynamex* no longer applies is extensive and varied, so you should consult an attorney to determine how AB5 impacts your business relationships. The bottom line, however, is that AB5 significantly decreases the lacks of certainty that followed in the wake of the *Dynamex* decision.



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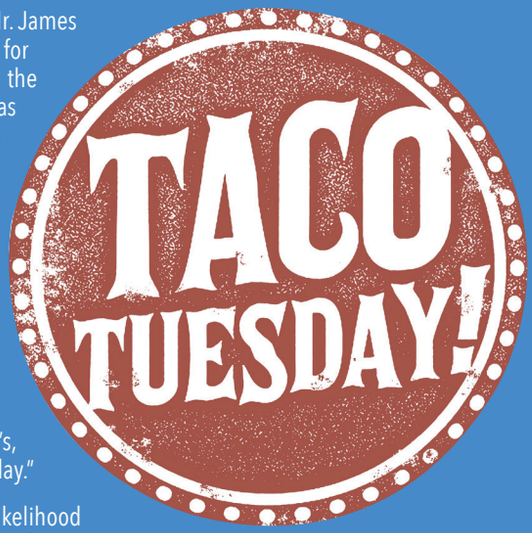
No Slam Dunk – Attempt To Trademark "Taco Tuesday" Rejected



Earlier in the year, LeBron James submitted an application to get a trademark for the phrase "Taco Tuesday." Mr. James has been posting Taco Tuesday posts on his social media channels where he showed his family enjoying – wait for it – tacos…on Tuesdays. On September 11, 2019, the U.S. Patent and Trademark Office ("USPTO") rejected the application filed by Mr. James to trademark the phrase. According to the USPTO's letter, the application was refused for two reasons: (1) the mark was too common of a term or expression; and (2) confusion with a currently registered mark.

In finding that the phrase "Taco Tuesday" was too common, the USPTO stated that "terms and expressions that merely convey an information message are not registerable." The more common a term or expression is used, the less likely it will be recognized as a trademark. For instance, attempts to trademark the phrases "Drive Safely" and "Proudly Made In USA" have been rejected as both phrases are commonly used in society. One encourages safety and the other encourages the purchase of domestic-made products. Expressions that simply convey an information message cannot be registered and have been rejected by the USPTO. Likewise, a phrase such as "Taco Tuesday" has been around and used for decades – if not longer – and simply conveys an information message. Ironically, the same USPTO office previously granted a Taco John's, a Wyoming Mexican fast food chain, a trademark for Taco Tuesday. Although this recent USPTO decision did not mention Taco John's, it seems to make it clear that Mr. James would have protection from liability by his use of the phrase "Taco Tuesday."

The USPTO decision provided a second reason for rejecting the application. According to the USPTO, there was a likelihood of confusion with "Techno Taco Tuesday," a mark that is currently registered. The Trademark Act bars registration of an applied for mark that is too similar to a mark that is already registered. The thinking is that the two marks would cause confusion for consumers.

Whether two marks are likely to cause confusion is determined on a case by case basis applying a number of factors. Two key considerations are: (1) similarities between the two marks / phrases; and (2) the relatedness of the compared goods and/or services. The USPTO previously allowed the registration of "Techno Taco Tuesday", a Las Vegas entertainment company that, according to its twitter feed, claims to be "Las Vegas' #1 Underground Techno part, with world-famous headliners and Vegas' best tacos!" According to the USPTO, the intended use of "Taco Tuesday" by Mr. James is too related and would likely be confusing with the "Techno Taco Tuesday" registration.

It is unclear whether Mr. James will take another shot at trying to own "Taco Tuesday" by appealing the USPTO's decision. Nevertheless, by declaring the phrase "Taco Tuesday" to be commonplace, the USPTO just opened the door to consumers seeing a lot more Taco Tuesdays.

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McDonald's Defeats Wage Claims Asserted By Employees Of CA Franchisee

Nevertheless, a group of employees hired by a Bay Area franchisee sought to hold McDonald's liable for CA labor code violations such as denial of overtime pay, meal and rest breaks and other benefits. The case represented substantial exposure for McDonald's, who franchises 1,165 stores, as well as all other franchisors operating in California.

The class action plaintiffs argued that McDonald's was considered a joint employer (along with the franchisee) because under California Wage Order 5-2001 an "employer" is one "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." The CA Supreme Court clarified this definition in 2010, providing three alternative definitions for what it means to "employ" someone: "(a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law relationship." Then, in 2014, the CA Supreme Court considered whether "a franchisor stands in an employment … relationship" with franchisee employees "for purposes of holding it vicariously liable for workplace injuries" caused by other employees. The Court declined to do so, holding that a franchisor "becomes potentially liable for actions of a franchisee's employees only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees."

The 9th Circuit analyzed McDonald's situation using all three criteria.

Control

While acknowledging that McDonald's exercised control over the means and manner of work performed at its franchises, the 9th Circuit found that such control was geared specifically toward control and maintenance of brand standards. This alone was insufficient because McDonald's did not retain a "general of control" over "day-to-day aspects" of work at the franchises. (continued on page 6)

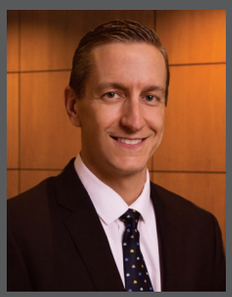
California Assembly Scores A Huge Assist For California Student Athletes With Fair Pay To Play Act

Dealing a significant blow to the fictional ideal of amateur athletics, the California State Assembly recently voted 73-0 to approve the Fair Pay to Play Act, which will make it possible for college athletes to accept endorsement money. When the new law goes into effect in 2023, it will be illegal for colleges and universities in California to take away an athlete's scholarship or eligibility as a punishment for that athlete profiting from his or her name, image or likeness.

The notion of college athletics as amateur sport, though, is as outdated and obsolete as the record player. The NCAA raked in over a billion dollars last year, with more than $800 million from television deals to broadcast these amateur events. And, the NCAA even commissioned a study in 2018, led by Condoleeza Rice, that concluded that college athletes should be allowed to receive endorsement money.

The longstanding debate over whether universities exploit their athletes, who earn their schools (and the NCAA) lots of money but receive none of the spoils, has been the subject matter of many court challenges over the years. Most famously, former UCLA star Ed O'Bannon sued the NCAA after he was featured in an NCAA video game without his permission, and he received a $40 million settlement from Electronic Arts, the game's publisher.

The bill was strongly opposed by the NCAA, whose very existence is dependent upon unpaid college athletes. NCAA president Mark Emmert even went so far as to vaguely threaten that California schools could be excluded from participating in future championship games if the bill was approved (leading some to wonder if such a ban has already in place for several years). Traditionalists from some of the California institutions also opposed the bill based on obsolete arguments that allowing college athletes to earn money from an endorsement deal somehow undermines the concept of collegiate athletics as "amateur sport."



Despite the institutional resistance to this change in how college athletes are perceived and compensated, this train is leaving the station and the NCAA would be wise to get on board. Other states have already recognized the competitive advantage that California universities will have if their student athletes can receive outside compensation – a North Carolina Congressperson has already proposed a federal law that would give students nationwide the same rights as the Fair Pay to Play Act.

If the NCAA voluntarily accepts these changes, it may be able to maintain some semblance of its current near-monopoly on college sports. If it unwisely decides to mount a protracted legal battle to preserve its rules prohibiting endorsements, the right lawsuit could have a far-reaching impact on many of the NCAA's broader rules generally limiting competition among schools to recruit and compensate student athletes.

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Reversal Of Fortunes: BKCG Corrects Improper Verdict On Appeal

BKCG attorneys Daniel J. Kessler and Joshua A. Waldman defended Ralphs Grocery Company at trial in Los Angeles Superior Court in an action filed by its former employee. This former employee alleged that Ralphs purportedly harassed him based on his race and defamed him by telling other Ralphs employees that Ralphs had terminated him for stealing. Although the employee did not dispute that he walked out of a Ralphs grocery store with products that he never paid for in a shopping cart that he covered with flattened cardboard, the employee claimed that he supposedly did so because the cashier had mistakenly failed to charge him for all of the product in his shopping cart and that Ralphs allegedly defamed him when its employees discussed his termination on the grounds of theft.

After weeks of trial, the jury concluded 12-0 that Ralphs did not harass this employee and BKCG obtained a final judgment in Ralphs' favor on the harassment claim. However, despite the existence of evidence that tended to show that the employee did intentionally steal product from Ralphs, nine jurors nonetheless concluded that Ralphs had defamed him and awarded the employee damages. However, the law entitled Ralphs to present a defense to the employee's defamation action based on a legal doctrine commonly referred to as the "common interest privilege", which often shields certain types of defendants, like employers, from defamation liability for disclosing the employer's grounds for its termination decisions. Unfortunately, because the employee's counsel deleted this critical defense from the verdict form the night before jury deliberations began and the Court overruled BKCG's repeated objections to re-insert the defense into the verdict form, the jury never had the opportunity to determine whether this "common interest privilege" protected Ralphs from liability in this case.

BKCG appealed this judgment against Ralphs on the grounds that the verdict was fatally defective because it failed to ask the jury to decide whether the common interest privilege applied and protected Ralphs from liability. Ultimately, the appellate court agreed with BKCG, holding that the omission of this common interest privilege defense from the verdict form was an error that prejudiced Ralphs. The appellate court reversed the judgment related to the employee's defamation claim and thereby eliminated the employee's verdict against Ralphs. As a result of this reversal, the case may be re-tried and if it is, BKCG is confident that a new jury -- using a proper verdict form -- will reach the correct verdict in Ralphs' favor.

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Time To Dust Off That Old Arbitration Agreement: California Supreme Court Casts Doubt On Arbitration Agreements Covering Wage Claims

On August 29, 2019, the California Supreme Court held in *OTO, L.L.C. v. Kho*, that a mandatory arbitration agreement may be unenforceable against employee wage claims if it requires the employee to forego the "Berman" hearing process and adhere to procedures that are more similar to civil litigation. Employers should revisit their arbitration agreements and consider carving out wage claims brought before the Labor Commissioner.

Plaintiff Ken Kho worked as a service technician for defendant One Toyota of Oakland ("OTO"). Three years into Kho's employment, a human resources "porter" approached him at his workstation and asked him to sign several documents, including an arbitration agreement (the "Agreement"). The Agreement required Kho (and OTO) to bring any employment-related claims in arbitration, foregoing the right to pursue such claims in any other forum. The Agreement specified arbitral procedures that largely mirrored those found in civil litigation, including full discovery and civil rules of pleading and evidence.

After separating from OTO, Kho filed a claim with the Labor Commissioner to recover allegedly unpaid wages. Kho's claim was set for a hearing under the statutory procedure applicable to wage claims (known as a "Berman" hearing), but OTO filed a petition to compel arbitration. When the hearing officer proceeded with the claim and awarded Kho over $158,000, OTO appealed to the Superior Court. The Superior Court vacated the award but declined to compel arbitration.

The Court of Appeal reversed, and the California Supreme Court granted review to determine whether a "litigation-like" arbitral procedure could be a lawful substitute for the more streamlined "Berman" process to which the employee would otherwise be entitled.

The Supreme Court reversed, finding that the Agreement was unconscionable and, thus, unenforceable. The Court found that there was an "extraordinarily high" degree of procedural unconscionability in this case, noting that OTO required Kho to sign the Agreement without a real chance to review it, that the Agreement itself was lengthy and full of legalese, and that there was nobody available to explain it to him.

The Court went on to analyze substantive unconscionability, focusing on the tradeoffs between the Berman hearing process and the Agreement's litigation-type procedures. While civil litigation is "carefully crafted to ensure fairness to both sides," the Court explained that "that carefully crafted process can be costly, complex, and time-consuming." The Berman process, on the other hand, is an "expedient, largely cost-free administrative procedure." From the majority's perspective, waiving Berman procedures in favor of civil litigation procedures erects barriers to some wage claimants' abilities to vindicate their statutory rights. "When imposed in a procedurally unconscionable fashion, such barriers to the vindication of rights may become unenforceable." While stressing that, "the waiver of Berman procedures does not, in itself, render an arbitration agreement unconscionable," the Court ultimately held that the Agreement in the case before it was unconscionable and unenforceable.

The most important takeaway for employers is that a provision in an arbitration agreement that requires an employee to forego a Berman hearing in favor of arbitration could render the agreement unenforceable. In line with substantial state and federal authority, employers often adopt civil litigation procedures in their arbitration agreements to avoid invalidation of the agreements on the ground that they do not provide sufficient procedural safeguards for employees to assert their rights. OTO flips this premise on its head, so that building in too many civil litigation procedures may actually backfire when an employee brings a wage claim.

The touchstone for arbitration of wage claims is that the process must be "accessible and affordable." Employers should now consider specifying alternative, streamlined arbitration procedures for wage claims, excepting Berman hearings from mandatory arbitration entirely, or requiring mandatory arbitration only of an appeal from a Berman hearing award.

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California's AB5 Bill Creates Major Headaches For Ride Sharing Companies

California's Assembly Bill 5 ("AB5"), which goes into effect January 1, 2020, restricts the circumstances in which workers can be classified as independent contractors. The law enshrines the "ABC" test which requires a worker to be classified as an employee unless (1) the worker is free from control and direction of the hiring entity; (2) the worker performs work that is outside the usual course of the hiring entity's business; and (3) the worker is customarily engaged in an independently established trade or business. If any of these conditions are met, the worker must be classified as an employee, which means virtually all workers now must be treated as employees.

Among other things, when workers are treated as employees instead of independent contractors, those employees are entitled to minimum wage, meal breaks, rest breaks and overtime for all hours worked over 8 in a day or 40 in a week. If an employer fails to pay out penalties for missed breaks or fails to pay overtime to a worker who should have been entitled to these protections, then the employer can be held liable by the State or by the workers themselves. (continued on page 6)

McDonald's Defeats Wage Claims Asserted By Employees Of CA Franchisee (continued from page 3)

Plaintiffs argued that McDonald's fit this definition of an employer because it induced the franchisee to use McDonald's software for scheduling, clocking in and out and calculating overtime. In doing so, Plaintiffs argued that McDonald's was aware that the franchisee was violating California's wage and hour laws. The 9th Circuit rejected this argument, distinguishing between knowledge of violations and control over the franchisee's employees. The Plaintiffs also argued that McDonald's required the franchisee's employees to wear standard uniforms and to keep them clean and neat. The Court was unpersuaded, noting that a comprehensive franchise system alone is insufficient to constitute the "control" needed to support vicarious liability.

Suffer or Permit

The 9th Circuit also declined to find that McDonald's "suffered or permitted" the Plaintiffs' employment. The Court held that McDonald's did not have power to control the hiring or firing of its franchisee's employees.

Common Law Definition of Employer

The 9th Circuit applied the common law definition of employment in CA ("whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired") and concluded that McDonald's was not an employer. Again, the 9th Circuit distinguished between the means and manner of work necessary to meet McDonald's quality control and brand standards as compared to their employer's control of hiring, direction, supervision, discipline, discharge, and day-to-day aspects of workplace behavior.

While McDonald's can breath easier for the time being, the fight over expanding employer liability will likely continue. For businesses that must interact with other firms utilizing employees, the best current advice is to insert provisions in the agreement specifying that the other firm must be exclusively responsible for hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior. The agreement should also require the firm to defend and indemnify the business for any claims made against by the firm's employees.

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California's AB5 Bill Creates Major Headaches For Ride Sharing Companies (continued from page 5)

This obviously causes a huge shift in the way workers are defined for many companies across California. One industry that may be particularly effected are companies that provide ride share services such as Uber and Lyft. These companies offer an app that allows people to sign up as drivers and begin driving customers who request a ride within the app.

Until now, drivers have been classified as independent contractors because they have been able to work whenever they want, drive anywhere they want, and are subject to few restrictions on how long they want to work. Uber and Lyft did not pay these drivers as employees – meaning they were not entitled to minimum wages, meal breaks, rest breaks, overtime, etc. If AB5 requires Uber and Lyft to classify these drivers as employees, it will likely cost these companies hundreds of millions of dollars per year and could force thousands of drivers out of work because they will no longer have the freedom to work when or where they want for as long as they want since Uber and Lyft will serve as their employers.

News reports suggest that Uber and Lyft will not go quietly. Both companies, along with food delivery app, DoorDash, have each pledged $30 million to back a California ballot initiative that would exempt these types of companies from AB-5 and not require that their workers be re-classified as employees. The ballot initiative would strike a compromise and provide additional protections for drivers, but it would not require these companies to meet all California wage and hour laws.

In addition, on September 12, Uber issued a press release stating that it believes that its drivers are not subject to the law and are properly classified as independent contractors because "the drivers' work is outside the usual course of Uber's business, which is serving as a technology platform for several different type of digital marketplaces." According to Uber, several previous rulings have agreed with this logic, but it remains to be seen how it will be treated in California under the new law.

The seismic shift caused by the adoption of AB5 will cause all businesses who rely on independent contractors to re-evaluate their classification of their workers. If you fit into this category, you must evaluate your workforce between now and December 31 to determine if you are properly classifying your workers.

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