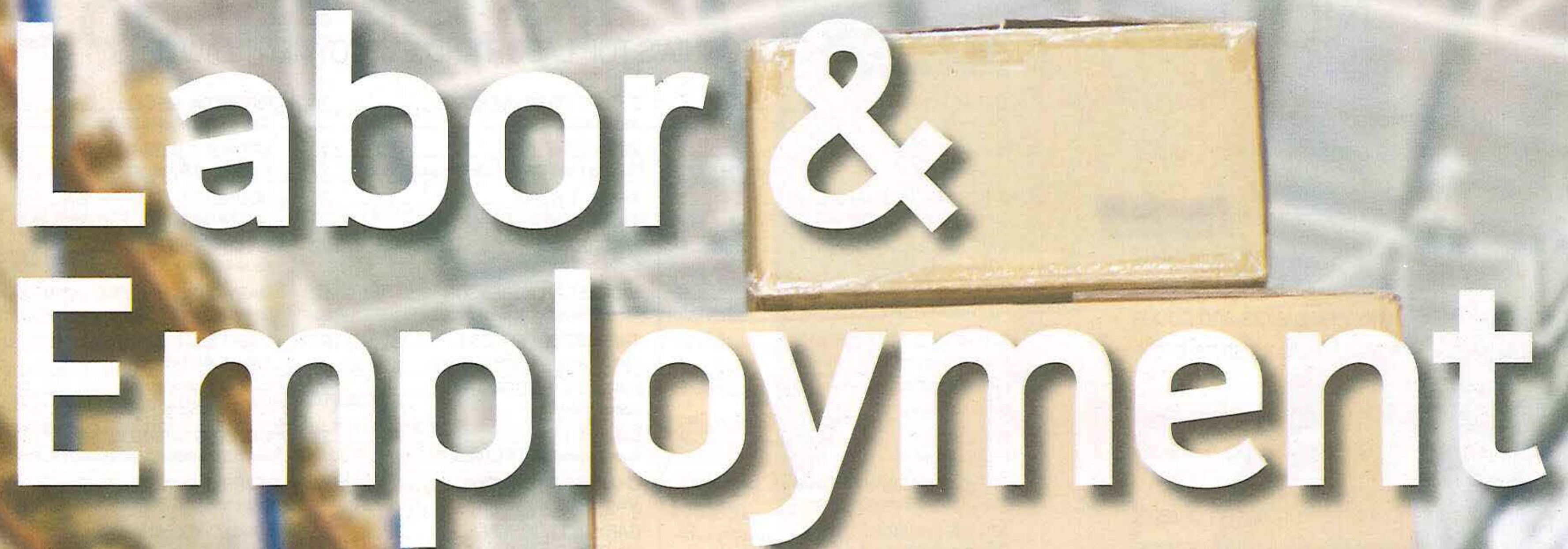
Supplement to the Los Angeles and San Francisco
Daily Journal
JUNE 3, 2015



Labor & Employment

Rising tide of joint employer lawsuits

Profiles of California's Top Labor and Employment Lawyers

EDITORS' NOTE

Who's an employer?

That is one of the most significant questions to emerge in the past year.

Whether in the context of franchised operations, independent contractors or staffing agencies, businesses across the country are puzzling over how regulators and courts will draw the line amid tectonic shifts in the global economy.

Should companies distance themselves from franchisees, or start paying more attention?

Some employers breathed a sigh of relief in August 2014 when the California Supreme Court said in a 4-3 ruling that Domino's Pizza isn't liable for alleged harassment of a franchise employee.

But — just days earlier — the National Labor Relations Board decided that McDonald's is jointly liable for the labor violations of its franchise operators.

Can courts force ride services to provide regular benefits or basic employment protections?

In March, a pair of rulings in the Northern District of California called into question the business models of Uber and Lyft, two highly successful ventures to emerge out of Silicon Valley. They and other sharing economy businesses have created legions of what might be called micro-entrepreneurs — independent contractors who are in control of their schedules but who, at the same time, are often on call around the clock, working piecemeal to earn a living wage.

For the lawyers on the Daily Journal's list of top practitioners in California, employment has been and will remain one of the busiest areas of the law. Their accomplishments continue to boost the state's influence over the rest of the country.

In reviewing hundreds of nominations from law firms, alternative dispute resolution providers and others, we sought to recognize work that is having a broad impact on the legal community, the nation and society. We honor the best of them in these pages.

LABOR & EMPLOYMENT

ATTORNEYS IN CALIFORNIA

PROFILES CALIFORNIA'S TOP LABOR AND EMPLOYMENT LAWYERS

LESLIE L. ABBOTT 4
Paul Hastings LLP

NANCY L. ABELL 5
Paul Hastings LLP

J. BERNARD ALEXANDER III 6
Alexander Krakow & Glick LLP

ERIC AMDURSKY 6
O'Melveny & Myers LLP

ELENA R. BACA 6
Paul Hastings LLP

CHARLES S. BIRENBAUM 8
Greenberg Traurig LLP

LAWRANCE BOHM 8
Bohm Law Group

PAUL CANE 9
Paul Hastings LLP

CATHE L. CARAWAY-HOWARD 10
The Employee Rights Group

APALLA CHOPRA 10
O'Melveny & Myers LLP

JESSE A. CRIPPS 10
Gibson, Dunn & Crutcher LLP

GLENN DANAS 11
Capstone Law APC

KELLY M. DERMODY 12
Lieff Cabraser Heimann & Bernstein LLP

DAVID M. DERUBERTIS 12
deRubertis Law Firm APC

KATHRYN BURKETT DICKSON 12
Dickson Geesman LLP

ALAN EXELROD 13
Rudy, Exelrod, Zieff & Lowe LLP

DAVID S. FAUSTMAN 14
Fox Rothschild LLP

LEE R. FELDMAN 14
Feldman Browne Olivares APC

ROD M. FLIEGEL 14
Littler Mendelson PC

CAROL M. GILLAM 15
The Gillam Law Firm APLC

STEPHEN H. HARRIS 15
Paul Hastings LLP

GENIE HARRISON 15
Genie Harrison Law Firm

MALCOLM A. HEINICKE 16
Munger, Tolles & Olson LLP

LYNNE C. HERMLE 16
Orrick, Herrington & Sutcliffe LLP

THOMAS E. HILL 16
Reed Smith LLP

CHRISTOPHER V. HO 18
Legal Aid Society-Employment Law Center

DEBRA HURST 18
Hurst & Hurst LLP

CYNTHIA JACKSON 18
Baker & McKenzie LLP

KEITH A. JACOBY 19
Littler Mendelson LLP

IVY KAGAN BIERMAN 8
Loeb & Loeb LLP

ADAM J. KARR 19
O'Melveny & Myers LLP

THOMAS R. KAUFMAN 19
Sheppard, Mullin, Richter & Hampton LLP

TRACEY A. KENNEDY 20
Sheppard, Mullin, Richter & Hampton LLP

F. CURT KIRSCHNER JR. 20
Jones Day

KEVIN KISH 20
Department of Fair Employment and Housing

KAREN J. KUBIN 21
Morrison & Foerster LLP

KRISTINA LAUNEY 22
Seyfarth Shaw LLP

MICHAEL A. LAURENSON 22
Gordon Rees Scully Mansukhani LLP

THERESE M. LAWLESS 22
Law Offices of Lawless & Lawless

HARVEY L. LEIDERMAN 23
Reed Smith LLP

DAVID A. LOWE 24
Rudy, Exelrod, Zieff & Lowe LLP

CHARLES T. MATHEWS 24
The Mathews Law Firm

GARY MCLAUGHLIN 24
Akin Gump Strauss Hauer & Feld LLP

DONNA D. MELBY 25
Paul Hastings LLP

RACHAEL E. MENY 26
Keker & Van Nest LLP

DONNA MEZIAS 26
Akin Gump Strauss Hauer & Feld LLP

BARBARA MILLER 26
Morgan, Lewis & Bockius LLP

ROBERT F. MILLMAN 28
Littler Mendelson PC

MONIQUE OLIVIER 28
Duckworth Peters Lebowitz Olivier LLP

ANTHONY J. ONCIDI 29
Proskauer Rose LLP

CHERYL D. ORR 30
Drinker Biddle & Reath LLP

ANGELO A. PAPARELLI 30
Seyfarth Shaw LLP

JESSICA PERRY 30
Orrick, Herrington & Sutcliffe

NORMAN H. PINE 31
Pine and Pine

DAVID J. REIS 31
Arnold & Porter LLP

JENNIFER REISCH 31
Equal Rights Advocates

CYNTHIA RICE 32
California Rural Legal Assistance Inc.

IRMA RODRIGUEZ MOISA 28
Atkinson, Andelson, Loya, Ruud & Romo PLC

MICHAEL RUBIN 32
Altschuler Berzon LLP

JAHAN C. SAGAFI 32
Outten & Golden LLP

LINDA MILLER SAVITT 33
Ballard Rosenberg Golper & Savitt LLP

C. JOE SAYAS JR. 33
The Law Offices of C. Joe Sayas Jr.

BRYAN SCHWARTZ 33
Bryan Schwartz Law

CLIFFORD D. ("SETH") SETHNESS 34
Morgan, Lewis & Bockius LLP

CARNEY R. SHEGERIAN 34
Shegerian & Associates, Inc.

GEOFFREY S. SHELDON 34
Liebert Cassidy Whitmore

ROBERT A. SIEGEL 35
O'Melveny & Myers LLP

ARTHUR F. SILBERGELD 36
Norton Rose Fulbright LLP

DOUGLAS N. SILVERSTEIN 36
Law Offices of Kesluk, Silverstein & Jacob

DAN STORMER 36
Hadsell Stormer & Renick LLP

MARY-CHRISTINE ("MC") SUNGAILA 37
Snell & Wilmer LLP

THERESA M. TRABER 38
Traber & Voorhees

SHARON R. VINICK 38
Levy Vinick Burrell Hyams LLP

VICTOR G. VIRAMONTES 38
Mexican American Legal Defense and Educational Fund

JEFFREY D. WOHL 39
Paul Hastings LLP

MARIKO YOSHIHARA 39
California Employment Lawyers Association

Daily Journal

WWW.DAILYJOURNAL.COM

PUBLISHER
Gerald L. Salzman

EDITOR
David Houston

SUPPLEMENT EDITOR
Jean Yung

ASSOCIATE EDITORS
Craig Anderson
Dominic Fracassa
Alexandra Schwappach

DESIGNER
Sepideh Nia

STAFF WRITERS
Hetert-Qebu Walters
Matthew Blake
Alison Frost

CORPORATE DISPLAY ADVERTISING DIRECTOR
Linda Hubbell

ACCOUNT MANAGERS
Len Auletto, Austin Holian
Audrey Miller, Monica Smith

ART DIRECTOR
Kathy Cullen

The Daily Journal is a member of the Newspaper Association of America, California Newspaper Publishers Association, National Newspaper Association and Associated Press

COVER STORY

Joint employer suits are on the ascent

By Matthew Blake DAILY JOURNAL STAFF WRITER

Curtis Johnson's job is to transport dead bodies and other human remains from where a person died to a funeral home.

Johnson sued his employer, Serenity Transportation Inc., for alleged labor law violations. He also tacked onto the suit his employer's employer, Service Corporation International, a multibillion dollar funeral services company that is headquartered outside of Houston and uses Serenity Transportation as a labor contractor.

With a revised complaint filed in April by Peter Rukin at Rukin Hyland Doria & Tindall LLP, Johnson's putative class action is part of a trend in which workers sue not just their immediate employer — often a subsidiary, subcontractor or staffing agency — but also a parent company or joint employer. *Johnson v. Serenity Transportation Inc. et al.*, RG14-728931 (Alameda Co. Super. Ct., filed April 9, 2015).

A newly enacted California law combined with recent court decisions suggests "there is going to be a lot more joint employer litigation in the future," according to R. Brian Dixon, co-chairman of the wage and hour practice group at Littler Mendelson PC, reshaping employment lawsuits and perhaps forcing major corporations to set up new legal and

CONTINUED ON PAGE 4

Shutterstock

CONTINUED FROM PAGE 3

operational barriers with their subsidiaries to escape litigation.

Just in the past year, class actions have settled favorably for plaintiffs alleging joint liability against Wal-Mart Stores Inc. and West Coast port terminal operator SSA Marine Inc.

Decisions on the horizon include whether McDonald's Corp. is responsible for wage and hour allegations against individual franchisees. *Ochoa et al. v. McDonald's Corp. et al.*, CV14-2098 (N.D. Cal., filed May 7, 2014).

Plaintiffs' lawyers like Rukin stated that joint employer complaints "are in response to the continued fissuring of responsibility and obligation" from employers, and confront, according to Theresa M. Traber of the Law Offices of Traber & Voorhees, "layers of insulation" employers erect to evade accountability.

Traber is the plaintiffs' lawyer in the Wal-Mart case.

Defense lawyers counter the complaints are a solution in search of a problem, a trendy issue whose prevalence is exaggerated by unions and pro-labor politicians as federal labor statistics show no spike in the number of California subcontracted jobs over the last several years.

AB 1897, creating automatic legal liability for the parent company of a labor contractor that commits wage and hour violations, resulted from fierce lobbying by unions like the International Brotherhood of Teamsters, noted Jeffrey M. Tanenbaum, a partner at Nixon Peabody LLP.

"Unions find it more difficult to organize temporary workers so they want to minimize or potentially eliminate their use," Tanenbaum said.

Barbara J. Miller, a partner at Morgan, Lewis & Bockius LLP, said AB1897 — enacted Jan. 1 — is part of Gov. Jerry Brown's administration being "particularly concerned about this idea of an underground workforce that is not getting paid minimum wage."

Another common complaint is that plaintiffs' lawyers are nakedly opportunistic in looking for deep-pocketed joint employers.

C. Joe Sayas, a plaintiffs' lawyer at The Law Office C. Joe Sayas, said he added parent company SSA Marine to a lawsuit settled in May regarding West Coast port truck drivers largely out of fear the initial defendant, trucking company Shippers Transport Express Inc., would go bankrupt.

The settlement included $11.4 million for the drivers, and their reclassification as employees from independent contractors — enabling the workers to join the Teamsters union. *Taylor et al. v. Shippers Transport Express et al.*, CV13-02092 (C.D. Cal., filed March 12, 2013).

Regardless, it is not just politicians, unions, and plaintiffs' lawyers who are receptive to the idea of joint employer liability. Both federal and state court judges made major recent rulings favorable to workers.

Winding down now is a class action against Wal-Mart, Schneider Logistics Inc. and Schneider subcontractors Impact Logistics Inc. and Premier Warehouse Ventures LLC filed on behalf of 2,397 workers at Wal-Mart's Riverside County distribution center warehouse. *Carillo et al. v. Schneider Logistics Inc. et al.*, CV11-8557 (C.D. Cal., filed Oct. 17, 2011).

U.S. District Judge Christina M. Snyder preliminarily approved in May a $21 million settlement in the case on top of prior settlements reached with Impact and Premier.

Crucially, the settlement came after Snyder denied summary judgment for Wal-Mart's motion that they were not responsible for the many labor law violations alleged by plaintiffs at the Mira Loma warehouse.

Key evidence against Wal-Mart included the fact that even though the company did not hire or fire the workers, it owned the distribution center and controlled the workforce enough that it provided performance metrics Schneider had to meet.

The Carrillo case "will open the door to more lawsuits" said Tanenbaum, as more workers and lawyers see the size of the settlement.

Meanwhile, a 2nd District Court of Appeal decision last year found that a corporation with no employees, The Ensign Group Inc., was responsible for any unpaid overtime wages at the corporation it owned that had employees, Cabrillo Rehabilitation and Care Center. *Castaneda v. The Ensign Group Inc. et al.*, 239 Cal. App. 1015 (Sep. 15, 2014).

Castaneda was the first state court case to find that "a parent company cannot avoid wage liability with respect to its wholly owned subsidiary," according to Bryan Schwartz of Bryan Schwartz Law.

While these decisions lay the groundwork for more complex joint liability cases involving, for instance, three layers of employers or unusual business models, AB1897 specifically makes it easy for plaintiffs' lawyers to show joint responsibility in wage and hour claims involving staffing companies.

"Certainly the possibility of more litigation from the legislation is easy to see," said Miller of Morgan Lewis. "The more interesting piece will be whether it actually impacts the relationships between companies and vendors and changes the behavior of companies who need a more flexible workforce."

Dixon of Littler Mendelson said companies would now pay more money "for sophisticated contractors" they can trust not to stiff workers, thanks to the legislation and recent court decisions.

"Employers don't want to deal with having more control," Dixon said. "The basic impetus of contracting something out is not just to save money but to outsource something the company doesn't have the time or expertise to manage."

One way employers might work around joint liability are indemnification provisions, according to Sandy Rappaport of Hanson Bridget LLP, as AB1897 does not prohibit a parent company from drawing up contracts indemnifying it from contractor misdeeds.

Plaintiffs' lawyer Traber also said that indemnification provisions are a tool parent companies may increasingly use.

No complaints are known to have been filed so far that specifically cite AB1897, though some lawyers predict after an educational period it could become the claim de jour of the plaintiffs' bar.

Referring to the now ubiquitous Private Attorney General Act of 2004, Rukin said. "PAGA also wasn't used a lot when it was first introduced."

matthew_blake@dailyjournal.com