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Employment Law Issues in a Global “Gig” Economy

Employment and Labor


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CHEAT SHEET

- ***Reduced cost.*** Businesses that use independent contractors can significantly reduce the cost of regulatory compliance and litigation risk brought about by employee-protection laws.
- ***Contractors or employees.*** The line between independent contractor and employee is often determined by the (1) employer's control over the worker, (2) the worker's opportunity for profit or loss, (3) investment in facilities, (4) permanence of relation, and (5) the skill and initiative displayed.
- ***Service agreements.*** Service agreements with independent contractors or outsourced workforces should include language that specifically delineates duties, deliverables, and roles within a limited duration and scope. Agreements should also contain an indemnity clause to address any potential employment violations.
- ***Outsourcing considerations.*** When considering outsourcing work to other countries, companies should fully vet the jurisdiction's employment (and termination) laws.

"Gigs," or temporary projects, are most often performed by contract workers, rather than employees, and represent a growing part of the economy. But because nearly all workplace protections apply only to "employees," businesses that use "independent contractors" — by definition, non-employees — can often significantly reduce the cost of regulatory compliance and limit exposure to litigation under employee-protection laws. Indeed, businesses have no legal responsibility to pay minimum wages to contractors, comply with overtime requirements, or even adhere to prohibitions against sexual harassment. From hiring consultants to drivers to warehouse workers, many companies have come to depend on a workforce comprised, at least in part, of independent contractors.

But this is not without risk. For example, Uber drivers were certified as a class seeking minimum wage and overtime pay under the US Fair Labor Standards Act (FLSA). The case settled for US$100 million. In another case, Tata Consultancy Services Ltd., an IT staffing firm, was slammed with a class action lawsuit after outsourcing jobs to Asia. The plaintiffs, all US citizens, alleged that they were discriminated against on the basis of their national origin. The court denied Tata's motion for summary judgment and partially certified the class, sending the case to trial. Other examples of employers being sued for improperly circumventing labor and employment laws abound. The potential that a company's independent contractors would be found by a court to actually be employees should be on every general counsel's radar, especially since recovery of attorneys' fees and costs or punitive damages is often allowed in misclassification cases.

This article provides practical guidance to employers and in-house counsel on how best to avoid liability when outsourcing globally. Part I provides a brief explanation of the legal differences between employees and independent contractors. Part II highlights some of the legal risks involved with the decision to move away from a traditional business model based exclusively on employment relationships (i.e., outsourcing to contractors). Part III provides best practices for other jurisdictions.

Part I: Understanding independent contractors

Employee versus independent contractor

Misclassifying a worker, as discussed with the Uber case, can lead to huge exposure for a company. So, how is it possible to tell whether a worker is an independent contractor (IC) or an employee?

Independent contractor status depends on legal interpretations, the enforcement agency, and judicial gloss. But the common denominator is control. This derives from the common law definition of "servant" (i.e., employee) as a "person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Indeed, "many recent judicial opinions on this subject have refused to extend employer-related liability beyond parties that exercise daily, direct control over workers."

Some US employment laws, such as the National Labor Relations Act (NLRA) and Title VII, lack their own substantive definition of "employment." In these cases, the US Supreme Court has directed courts to use the common law control test. Under this test, courts find employee status when the employer directs how the work is performed, determines the hours, and directs the employee. On the other hand, workers will be classified as ICs when they contract to perform specific tasks or achieve particular results, while retaining independence and self-management over their performance.

For those statutes that supply a definition of "employment," the test differs slightly. The most notable of these is the FLSA, which defines "employ" to mean "to suffer or permit to work." The Court has repeatedly commented on the "striking breadth" of the phrase "suffer or permit," noting that it is meant to cover even workers "who might not qualify as such under a strict application of traditional agency law principles." Accordingly, instead of the common law control test, courts use an ostensibly broader "economic realities" test to determine employee status under the FLSA. Under the economic realities test, the dispositive inquiry is "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself."

For this inquiry, courts use a series of non-exhaustive factors. The Eighth Circuit lists three; the First, Third, and Eleventh Circuits list four; the District of Columbia and Fifth Circuits list five; the Second, Fourth, Sixth, Seventh, and Tenth Circuits list six; and the Ninth Circuit lists thirteen. Application of these unwieldy tests can lack focus and lead to seemingly contradictory decisions. All courts, however, follow some variation of the factors used by the Court in United States v. Silk: the employer's control over the worker, the worker's opportunity for profit or loss, investment in facilities, permanence of relation, and the skill and initiative displayed. Thus, when determining whether contract workers are truly ICs, in-house counsel should ask the following questions:

- **What is the nature and degree of control the company exercises over the worker?** An employer assigns an employee work, provides training, and directs the time, place, and manner of work; in contrast, an IC controls and has discretion over meaningful aspects of the work performed.
- **Can the worker, through entrepreneurial skill, affect profit or loss?** An employee's sole concern is doing a good job and/or working more hours; in contrast, an IC can control costs and increase profits by hiring others to expand the business, purchase cheaper equipment, work more jobs for different entities, negotiate their rates for a particular project, etc.
- **How does the worker's investment compare to the employer's investment in the specific job in question?** An employee makes little if any investment in their ability to work for an employer, aside from acquiring the requisite skill set; in contrast, an IC makes investments (e.g., hiring others, purchasing equipment, and advertising) that support their business beyond a particular job.
- **Is the relationship between the worker and the employer permanent or indefinite?** An employee is engaged (usually) at-will, but semi-permanently; in contrast, an IC works on a job-

to-job or project-to-project basis and for multiple parties, unless they choose to work for a single entity (e.g., a lawyer who represents one big, important client).

- **Does the work performed require special skills and initiative?** An employee, regardless of skill, is beholden to a single employer; in contrast, an IC capitalizes on their skill set to find clients and generate business.

Even if most or all these factors weigh in favor of finding a worker to be an IC, this is not dispositive. The ultimate test is whether, as a matter of economic reality, a worker is in business for themselves. If so, they are an independent contractor.

Because courts look past the labels the parties apply to the “economic reality” of their relationship, best practices for ensuring that ICs are not misclassified generally focus on actual, day-to-day interactions. For example, companies should ensure that they are in fact exercising little control and supervision over a contracted workforce. However, this is not to say that a company must wade into the gig economy and simply “hope for the best.” Courts recognize that general contractual requirements regarding safety and quality control are consistent with independent contractor status. For example, a company can outsource an inventory audit to a CPA and impose a deadline, require the CPA to pass a drug test and background check, wear proper protective equipment before walking the warehouse, and otherwise adhere to industry standards for conducting inventories. These safety and quality control requirements might seem to be “control,” but courts have recognized that they are consistent with legitimate subcontracting relationships.

In general, to maintain a legitimate independent contractor relationship, counsel should focus on outsourcing jobs that are limited in time and scope, rather than ongoing operational necessities. Along these same lines, companies should not continually hire the same workers for the same roles, as this begins to look more like employment. Contract workers should be allowed, if consistent with the accomplishment of the contracted-for-work, to work for *competitors* without adverse consequence.

When companies engage contractors to supplement their workforces (for example, if temporary accounting contractors are hired to help the accounting department employees close out year-end books), they *must* differentiate between their employees and contractors, especially if they are performing similar tasks. Companies can do this by exercising less direct control over the contractors, using different uniforms, paying them differently, setting different work schedules, requiring the contractors to use their own tools of the trade (where applicable), engaging the contractors for a limited task, and allowing the contractors to work for competitors without restriction (if feasible).

While the independent contractor agreement is not dispositive of whether a worker is a contractor or employee, it does set the stage for how the relationship will work as a matter of reality, and that reality is dispositive. As a result, best practices also include careful drafting of the service agreement. The agreement, at a minimum, should clearly identify the relationship as one between a contractor and an entity, negotiated at arms’ length, whereby the worker affirms that they are an independent contractor and agrees to various trappings of contractor status, such as providing invoices, providing services pursuant to a limited and defined scope of work, and agreeing to maintain all necessary licenses and insurance. While the characterization of the relationship is not dispositive, courts do take this into account. Ideally, the contractors will have signed *through* an entity that they incorporated to sell their services and that they have sources of revenue *other* than this contract.

The agreement should also contain an arbitration clause explicitly covering employment-classification disputes and mandating that employees proceed with such claims on an *individual* basis, not a classwide basis. This is the gift that the Court gave employers in *Epic Systems Corp. v. Lewis*, when it held that Section 7 of the NLRA, which protects employees' right to engage in "concerted activity" for their mutual aid or protection, does not preclude class action waivers in arbitration agreements. Similarly, Uber was able to overcome a wage-and-hour class action by compelling arbitration on an individual basis, due to a clause in its service agreements. Not all arbitration agreements are created equal, however. In January 2019, the Court of Appeal for Ontario, Canada, ruled that Uber's arbitration agreement was "unconscionable" because it was designed to "take advantage of its drivers who are clearly vulnerable to the market strength of Uber." The court seemed particularly persuaded by the fact that Canadian drivers could have to pay up to US$14,500 to start arbitration and then travel to the Netherlands to conduct the arbitration. In short, given the valuable benefit of a class/collective action waiver in an arbitration agreement, and the potentially devastating effect of having that waiver invalidated, when drafting independent contractor agreements with class/collective waivers, counsel should remember the Southern adage that "pigs get fat, but hogs get slaughtered."

Bringing in a third party and the risks of joint employment

In light of the risks of misclassification that can arise out of a direct relationship with a contractor, many companies choose to use intermediaries, like staffing agencies or referral services, to engage workers who would then be independent contractors of the main company. But when businesses use intermediaries, they may unwittingly be held liable for the *intermediary's* workplace violations under a "joint employer" theory. For example, the FLSA "contemplates several simultaneous employers, each responsible for compliance with the Act." And while the prevalence of FLSA litigation informs this article, it should be noted that the NLRA and employment discrimination statutes all recognize the joint employer theory of liability as well.

There are two kinds of joint employment: horizontal and vertical.

Horizontal joint employment occurs when two or more separate but related companies jointly employ a worker or benefit from their work. For example, imagine a home healthcare worker who sees patients on Monday through Thursday for Company A and Friday through Sunday for Company B. If Company A and Company B share staff and management, this might be a horizontal joint employment situation. In labor law parlance, this is called a "single employer" theory of liability. The focus is on the relationship between each of the *employers*. Factors that guide this inquiry include (1) common ownership between the two employers, (2) interrelation of operations, (3) common management, and (4) sharing of resources and/or shared staff. Once a horizontal joint employment relationship is established, "the employee's work for the joint employer during the workweek is considered as one employment," and all joint employers are jointly and severally liable for compliance, including payment of all overtime hours of work.

Vertical joint employment occurs when one company provides labor to another company and the workers are economically dependent on both. In contrast to the horizontal theory, the focus is on the relationship between the alleged *employer* and the alleged *employee*. This often arises when a company hires workers through a third-party contractor, such as a staffing agency. This happens in the cable industry, where cable providers often contract with installation companies to provide the workers who actually install and repair cable equipment. Dozens of cases have alleged that there is vertical joint employment between the cable companies and the employees (or independent contractors) of the installation companies. As with the IC analysis, courts use myriad factors to ascertain whether an end-user firm jointly employed a worker:

- Whether the end-user firm directs, controls, or supervises the putative employee's work;

- Whether the end-user firm's premises and equipment were used for the putative employee's work;
- Whether the intermediary had a business that could or did shift as a unit from one putative joint employer to another;
- The extent to which the putative employee performed a discrete line-job that was integral to the end-user firm's business; and
- Whether the workers worked exclusively or predominantly for the end-user firm.

However, as with the IC analysis, courts focus on whether the end-user firm has daily, direct control over the putative employees. When contracting with a third party for services, end-user companies should structure the relationship so they have the least amount of control consistent with effectively accomplishing the business purpose of the engagement in the first place.

Courts have also recognized that the US Congress never meant for the FLSA to apply to "strategically oriented" or "typical outsourcing relationships." Thus, courts have held that the joint employer theory is generally inapplicable to ordinary subcontractor/contractor relationships. The lesson is that courts are receptive to arguments that businesses had innocent, legitimate *motives* when outsourcing. If hit with a lawsuit alleging liability under a vertical joint employer theory, the company will need to be able to articulate a legitimate, compelling business reason for the contractor relationship — without such an explanation, the unspoken assumption will be that the company used the contractor relationship to avoid complying with laws that apply to employees.

Best practices, as with determining who is an IC, include ensuring that the end-user firm minimizes the level of control over outsourced workers and job functions. Again, however, courts are not so blind to the realities of business that an end-user must sign a contract and "hope for the best." Contractual oversight that relates to quality control and safety requirements is permitted. But end-users should not have the authority to have workers' employment with the intermediary terminated, dictate the precise manner of work or otherwise control the daily tasks of outsourced workers. The contract should also include a clause specifying that the staffing agency will indemnify the end-user for any employment law violations, and maintain employment practices liability insurance to cover any work-related claims.

Part II: The legal risks of outsourcing or moving to independent contractors

For US-based companies, the decision to outsource often means terminations of incumbent employees. The legal risks associated with such terminations should be evaluated before the outsourcing commences.

Decisional and effects bargaining

For companies employing a unionized workforce, the decision to outsource has special legal complications. The NLRA, which bestows certain collective-bargaining rights on employees, acknowledges that some employer decisions, such as closing an unprofitable factory, are up to management. Nonetheless, even in these scenarios, an employer may still have a duty to bargain with its employees' certified bargaining representative over the *effects* of a managerial decision, unless the contract waives the union's right to bargain.

Thus, before outsourcing, employers of a unionized workforce should consider whether doing so will trigger (1) decisional bargaining, whereby the employer must bargain with the union about making a given decision (e.g., outsourcing a department); or (2) effects bargaining, where the employer must only bargain over the effects of the decision to outsource.

Deciding which one will apply to a given situation is not always clear. But the board takes the position that decisional bargaining is triggered when work is merely transferred from one location to another without any substantive change. In such a case, an employer only escapes from having to bargain over the decision if it can prove that (1) labor costs did not motivate the decision or (2) even if they did, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

Employers with unionized workforces should consider whether the outsourced labor they plan on using is substantively different from their unionized workforce and how compelling their core business reasons are for outsourcing. The greater savings that outsourcing can yield, the likelier that the decision will be found to be committed exclusively to the employer's discretion.

The WARN Act and notice

The US Workers Adjustment and Retraining Notification Act of 1988 (WARN Act) requires 60 days' advance written notice when an employer plans to conduct a "plant closing" or a "mass layoff." The WARN Act applies to any business that employs (1) 100 or more full-time employees or (2) 100 or more employees (including part-time employees), who, in the aggregate, work at least 4,000 straight-time hours per week.

The WARN Act's notification requirement is triggered when terminations constitute either a "mass layoff" or "plant closing." A mass layoff is an "employment loss" at a single employment site of either (1) at least 50 full-time employees constituting at least 33 percent of active employees, or (2) 500 or more full-time employees. A plant closing occurs when 50 or more full-time employees suffer an employment loss as a result of a permanent or temporary shutdown of (1) a single site of employment or (2) one or more facilities or operating units within a single site of employment. Notice may be delivered by any method, provided that the method is designed to ensure that the affected parties receive notice at least 60 days before the terminations begins.

A company that is laying off employees and then having some of that work done by independent contractors may face serious financial consequences for violating the WARN Act. Generally, the WARN Act provides each terminated employee who did not receive proper notice for back pay and benefits, including the cost of medical expenses that would have been covered under an employee benefit plan, for each day of the violation, for a maximum of 60 days. Courts also have the discretion to award attorneys' fees and costs to prevailing parties.

Employment discrimination concerns

Making matters even more complicated, the decision to move certain functions to a lower cost center that is demographically different from the current location can spark a discrimination lawsuit.

Title VII, which prohibits employers from taking an adverse employment action because of an individual's race, color, religion, sex (including gender and pregnancy), or national origin, allows two types of claims: (1) disparate treatment and (2) disparate impact. A disparate treatment claim alleges that an employer *intentionally* discriminated against an employee. A company who outsources to contractors will have a strong defense to a disparate treatment claim if they can show that the outsourcing was motivated by legitimate business considerations, such as cost-cutting.

However, under a disparate impact theory, the inquiry is whether a neutral employment practice or decision has had a disproportionate impact on a protected group, regardless of intent. To prove a disparate impact, a plaintiff must first point out a specific employment practice and then demonstrate that the challenged employment practice harmed a protected group. In doing so, the plaintiff may rely entirely on statistics. If this showing is made, the employer must show that the challenged practice is supported by a legitimate business justification. Even if the employer makes such a showing, though, the plaintiff can still prevail if it can show that the same business objectives could have been achieved by a less discriminatory alternative.

In the outsourcing context, as the Tata case demonstrates, discharged workers may allege that the decision to outsource disproportionately affected them on the basis of national origin (US-born) or race. This may leave companies who outsource services to foreign countries vulnerable to disparate impact claims.

It is therefore imperative for companies contemplating outsourcing job functions to a foreign third party to ensure that the decision is supported by a sound economic analysis. Additionally, impacted employees should be offered a severance package conditional upon signing a full waiver of rights, including under the discrimination laws.

Part III: Best practices for other jurisdictions

Before outsourcing work-related functions abroad (or over the internet), companies should consider that many US legal concepts are not applicable internationally. The concept of “at will” employment generally does not apply outside of the United States. Whereas US employers may terminate employees without notice for any reason, so long as it is not an unlawful reason (or in breach of an express contractual provision), this presumption typically does not apply in other countries.

Rather, employment relationships outside of the United States are governed by contract, collective or trade agreements, work council directives, treaties, and/or statutes. In many countries, employers can terminate only for cause, and termination without cause subjects employers to liability for severance benefits. And, indeed, many non-US employment laws, especially in Europe, are far more protective of employees than US law and mandate certain rights, such as vacation and leave. Thus, it is always important to fully vet a jurisdiction’s employment laws before engaging workers there.

Luckily, the distinction between employee and independent contractor is not exclusive to the United States, with many countries having very similar litmus tests (and penalties) for determining whether a worker is an IC or employee. As such, for companies outsourcing to certain countries, it is vital to ensure that not only the form of the agreement, but also the substance of the relationship, supports engagement as ICs. One important caveat is that some countries recognize the concept of a “dependent contractor,” a worker who shares many of the characteristics of an IC, but who depends heavily on one entity for business. Some countries, such as Canada, provide greater protections, such as reasonable notice before termination, for these workers who fall between employee and IC. As the law of the country where the worker is located will generally govern the relationship, general counsel should always acquaint themselves with local law before engaging a foreign worker.

Regarding how to structure the service agreement, many of the insights described earlier are applicable to contracting with workers in other jurisdictions. Best practices include language that specifically delineates the duties, deliverables, and roles of the contract workforce with an emphasis on the lack of daily, direct control of the end-user firm has over the workforce. Relatedly, the agreement should be limited in duration and scope and set specific project milestones to be completed by a specific time. Recall that IC status is more likely to be found when workers are engaged on a project-by-project basis. Finally, service agreements should also include an indemnity clause covering any potential employment violations.

Conclusion

The gig economy, combined with the easy availability of collaboration over the internet, has provided vast opportunities for efficiencies to be gained through creative staffing, placement, and outsourcing. And, in the right circumstances, outsourcing work can be more cost-effective than training, re-training, or hiring employees to accomplish the same tasks. But gig workers are no panacea to workplace ills. They have proven to be extremely aware of their legal rights and quick to resort to litigation — and the court of public opinion — when they feel their rights have been infringed. Any corporate counsel whose client is considering a foray into the gig economy should therefore proceed with caution, and only after ensuring that all necessary agreements are in place. In short, when retaining the services of an independent contractor, *caveat emptor*.

Further Reading

Buchanan et al v. Tata Consultancy Servs., Ltd., No. 15-CV-01692, 2017 WL 6611653 (N.D. Cal. Dec. 27, 2017).

See, e.g., Arguss v. Homejoy, 1:15-cv-00767 (N.D. Ill.); Cotter v. Lyft, 3:13-cv-04065 (N.D. Cal.).

For the leading cases on this topic see Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947); United States v. Silk, 331 U.S. 704 (1947). A related issue is that even if a worker is legally found to be an employee, liability will only attach to an employer for an employee’s torts if they were acting within the scope of their employment when the tort was committed. The leading case on this subject is Ira S. Bushey & Sons, Inc. v. U.S., 398 F.2d 167 (2d Cir. 1968) (Friendly, J.).

Keith Cunningham-Parmeter, From Amazon to Uber: Defining Employment in the Modern Economy, 96 B.U. L. Rev. 1673, 1691 (2016) (“Nearly every employment protection depends on the existence of an employer-employee relationship, and every employment test considers the level of control that putative employers retain over workers.”).

Restatement (Second) of Agency § 220 (1958).

Keith Cunningham-Parmeter, From Amazon to Uber: Defining Employment in the Modern Economy, 96 B.U.L. Rev. 1673, 1697 (2016).

Darden, 503 U.S. 326; see also Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 113 (2d Cir. 2000).

See Richard R. Carlson, Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations, 37 S. Tex. L. Rev. 661, 663 (1996).

29 U.S.C. § 203(g).

See, e.g., Darden, 503 U.S. at 326.

Hopkins v. Cornerstone America, 545 F.3d 338, 343 (5th Cir. 2008); see Silk, 331 U.S. at 712-14.

Ash v. Anderson Merchandisers, LLC, 799 F.3d 957, 961 (8th Cir. 2015).

Haybarger v. Lawrence Cty. Adult Prob. & Parole, 667 F.3d 408, 418 (3d Cir. 2012); Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998); Villarreal v. Woodham, 113 F.3d 202, 205 (11th Cir. 1997).

Thibault v. Bellsouth Telecommunications, Inc., 612 F.3d 843, 846 (5th Cir. 2010); Morrison v. Int'l Programs Consortium, Inc., 253 F.3d 5, 11 (D.C. Cir. 2001).

Keller v. Miri Microsystems LLC, 781 F.3d 799, 807 (6th Cir. 2015); Barlow v. C.R. England, Inc., 703 F.3d 497, 506 (10th Cir. 2012); Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 304-05 (4th Cir. 2006); Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003); Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987).

Torres-Lopez v. May, 111 F.3d 633, 639-40 (9th Cir. 1997).

Compare Cromwell v. Driftwood Elec. Contractors, Inc., 348 F. App'x 57 (5th Cir. 2009) (cable splicers performing services in the wake of Hurricane Katrine found to be employees), with Thibault, 612 F.3d at 846-48 (holding that cable splicers performing services in the wake of Hurricane Katrine to be ICs and distinguishing Cromwell based solely on the fact that the splicers in Cromwell worked for the putative employer for longer periods of time without explaining why this should tip the scales).

331 U.S. at 716.

Compare Carrell v. Sunland Const., Inc., 998 F.2d 330, 332-33 (5th Cir. 1993) (welders found to be ICs because, inter alia, they controlled how the manner and method of the pipe welding and determined their hours), with Brock v. Mr. W Fireworkers, Inc., 814 F.2d 1042 (5th Cir. 1987) (plaintiffs found to be employees because, inter alia, the employer controlled price of the merchandise sold, hours to be worked, and how to sell the products).

Compare Herman v. Express Sixty-Minutes Delivery, Inc., 161 F.3d 299 (5th Cir. 1998) (drivers were ICs because they could, inter alia, increase their profits by working for competitors of putative employer), with Dole v. Snell, 875 F.2d 802, 811 (10th Cir. 1989) (finding that cake decorators were employees because, inter alia, their earnings did not depend upon their judgment or initiative, but rather the employer's need for work).

Compare Silk, 331 U.S. at 718-19 (finding that truckers were ICs because, inter alia, they purchased their own trucks), with Hopkins, 545 F.3d at 344 (managers of salespersons were employees because, inter alia, invested nothing besides their skill set).

See Carrell v. Sunland Const., Inc., 998 F.2d 330, 332-33 (5th Cir. 1993).

See Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988) (ICs use skills in an independent way, such as by locating work opportunities (collecting authorities)).

See Goldberg v. Whitaker House Coop, Inc., 366 U.S. 28, 33 (1961).

See Herman v. Express Sixty-Minute Delivery Service, Inc., 161 F.3d 299, 302 (5th Cir. 1998) (holding truckers were ICs, despite the employer also employing truckers, because the ICs could work for other companies, did not wear a uniform, and were paid differently than the employee-truckers).

See, e.g., Lindsley v. BellSouth Telecommunications Inc., 401 F. App'x 944, 946 (5th Cir. 2010) (taking into account that the plaintiff considered himself "self-employed" when holding that he was an IC).

138 S. Ct. 1612 (2018).

O'Connor v. Uber Techs., Inc., 904 F.3d 1087, 1094 (9th Cir. 2018).

Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998); see Antenor v. D & S Farms, 88 F.3d 925, 932-33 (11th Cir. 1996); 29 C.F.R. § 500.20(h)(4)(i).

The joint employer test under the NLRA is currently in flux. In 2015, the National Labor Relations Board issued a decision that included a sweeping definition of joint employment. See Browning-Ferris Industries of California, Inc., 362 N.L.R.B. No. 186 (2015). This decision was then vacated by Hy-Brand Industrial Contractors, Ltd., 365 N.L.R.B. No. 156 (2017), which in turn was vacated due to a conflict of interest of one of the Board members. The Board thereafter decided to codify the joint employer standard through formal notice-and-comment rulemaking. The proposed rule would define "joint employer" as two or more employers that "share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." In other words, control is the lodestar.

See Chao v. A-One Med. Servs., 346 F.3d 908, 918 (9th Cir. 2003).

See Aluminum Corp. of Am. v. NLRB, 849 F.3d 250 (5th Cir. 2017).

See, e.g., Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 917- 18 (9th Cir. 2003) (finding home health care providers that share staff and have common management to be horizontal joint employers).

29 C.F.R. § 791.2(a).

See 29 C.F.R. § 500.20(h)(5).

See, e.g., Barfield v. N.Y. City Health & Hosps. Co., 537 F.3d 132, 143-49 (2d Cir. 2008); Zheng v. Liberty Apparel Co., 355 F.3d 61, 71-72 (2d Cir. 2003).

See Rutherford, 331 U.S. at 724- 25; Zheng, 355 F.3d at 72.

See, e.g., Layton v. DHL Express (USA), Inc., 686 F.3d 1172, 1173-74 (11th Cir. 2012) (finding that shipping company that hired a local third-party delivery company to source drivers was not a joint employer because it did not assign specific tasks or have oversight role, despite the drivers driving DHL branded vehicles, wore DHL-branded uniform, and DHL owned warehouse where drivers reported every morning).

Zheng, 355 F.3d at 67.

See, e.g., Artis v. Asberry, No. CIB. A. G-10-323, 2012 WL 5031196, at *5 (S.D. Tex. Oct. 16, 2012).

An end-user is certainly within its rights to ask the intermediary to assign or replace a particular worker for a project. Just because a law firm's client asks to have a certain partner handle a matter does not make the partner the client's employee. But a worker will very likely be deemed an employee of the end-user if it can direct — as opposed to merely "recommend"— the intermediary to terminate the worker, as the power to terminate is most closely associated with an employer's authority over an employee. See In re Enter. Rent-A-Car Wage & Hour Employment Practices Litig., 683 F.3d 462, 469–70 (3d Cir. 2012).

29 U.S.C. §§ 151 et seq.

See First Nat'l Marine Corp. v. NLRB, 452 U.S. 666 (1981); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Dubuque Packing Co., 303 N.L.R.B. 386 (1991).

See Torrington Industries, 307 N.L.R.B. 809 (1992); Dubuque Packing, 303 N.L.R.B. 386 (1991).

Dubuque Packing, 303 N.L.R.B. at 391.

See Nu-Skin Int'l, Inc., 320 N.L.R.B. 385 (1995).

29 U.S.C. §§ 2101(a)(2), (a)(3).

29 U.S.C. § 2101(a)(3).

The statute defines employment loss to mean "(A) an employment termination other than a discharge for cause, voluntary department, or retirement, (B) a layoff exceeding six months, or (C) a reduction in hours of work of more than 50 percent during each month of any six-month period." 29 U.S.C. § 2101(a)(6). See Graphic Communications Inter. Union, Local 31-N v. Quebecor Printing (USA) Corp., 252 F.3d 296, 299 (4th Cir. 2001); 20 C.F.R. § 639.6.

29 U.S.C. §§ 2101(a)(2), (a)(3).

29 U.S.C. § 2104(a).

42 U.S.C. §§ 2000e et seq.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518 (1993) (in a disparate treatment case, the plaintiff must prove "discrimination vel non").

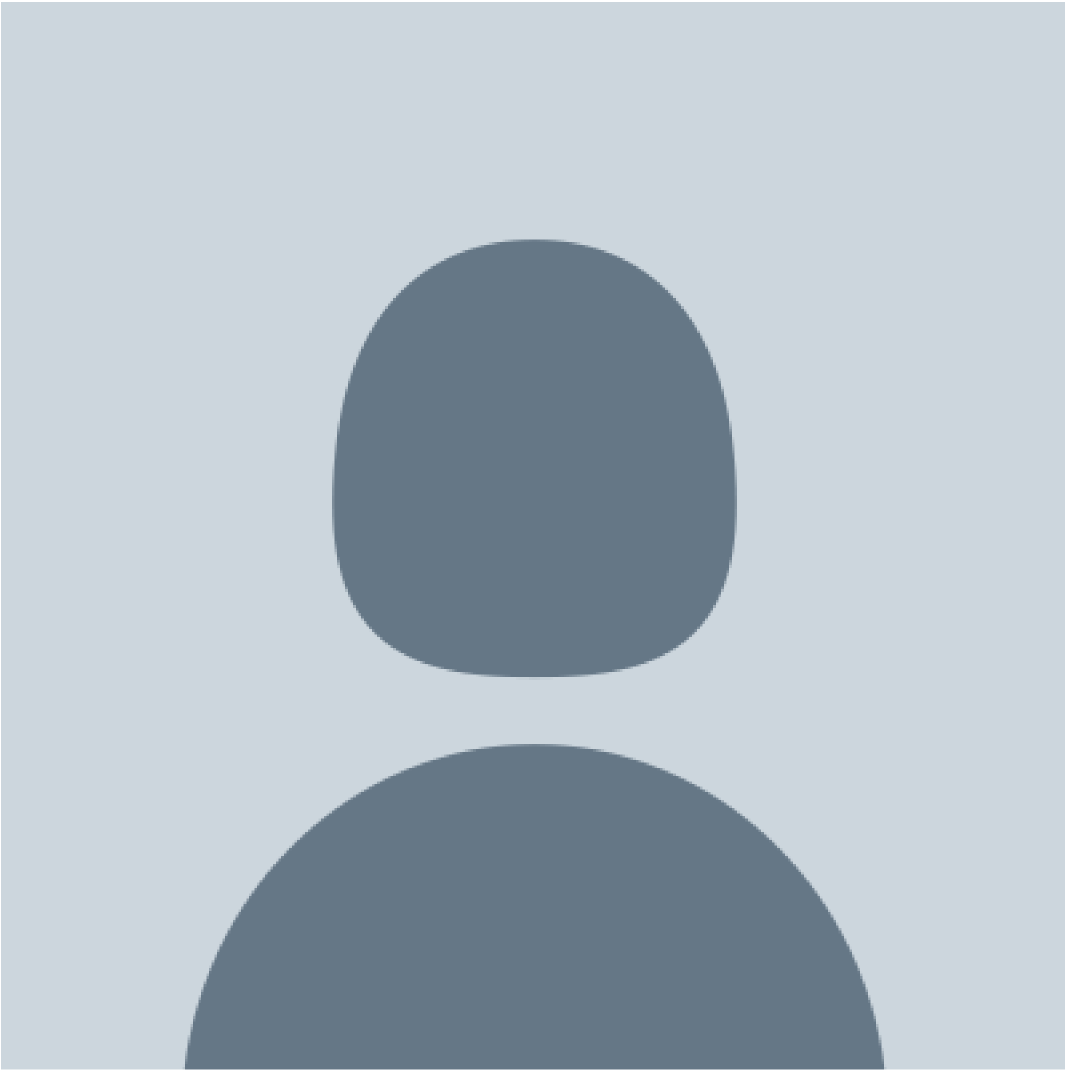
Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); see 42 U.S.C. § 2000e-2(k)(1)(A).

Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 998 (1988).

E.E.O.C. v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus., 186 F.3d 110, 117 (2d Cir. 1999).

See Fred Green, et al., The Nuts and Bolts of Employment Agreements for Foreign Employees Working Outside the United States, ABA Section of Lab. and Emp. Law, 5th Annual Lab. and Emp. Law Conference (Nov. 2–5, 2011).

C. Whitfield Caughman

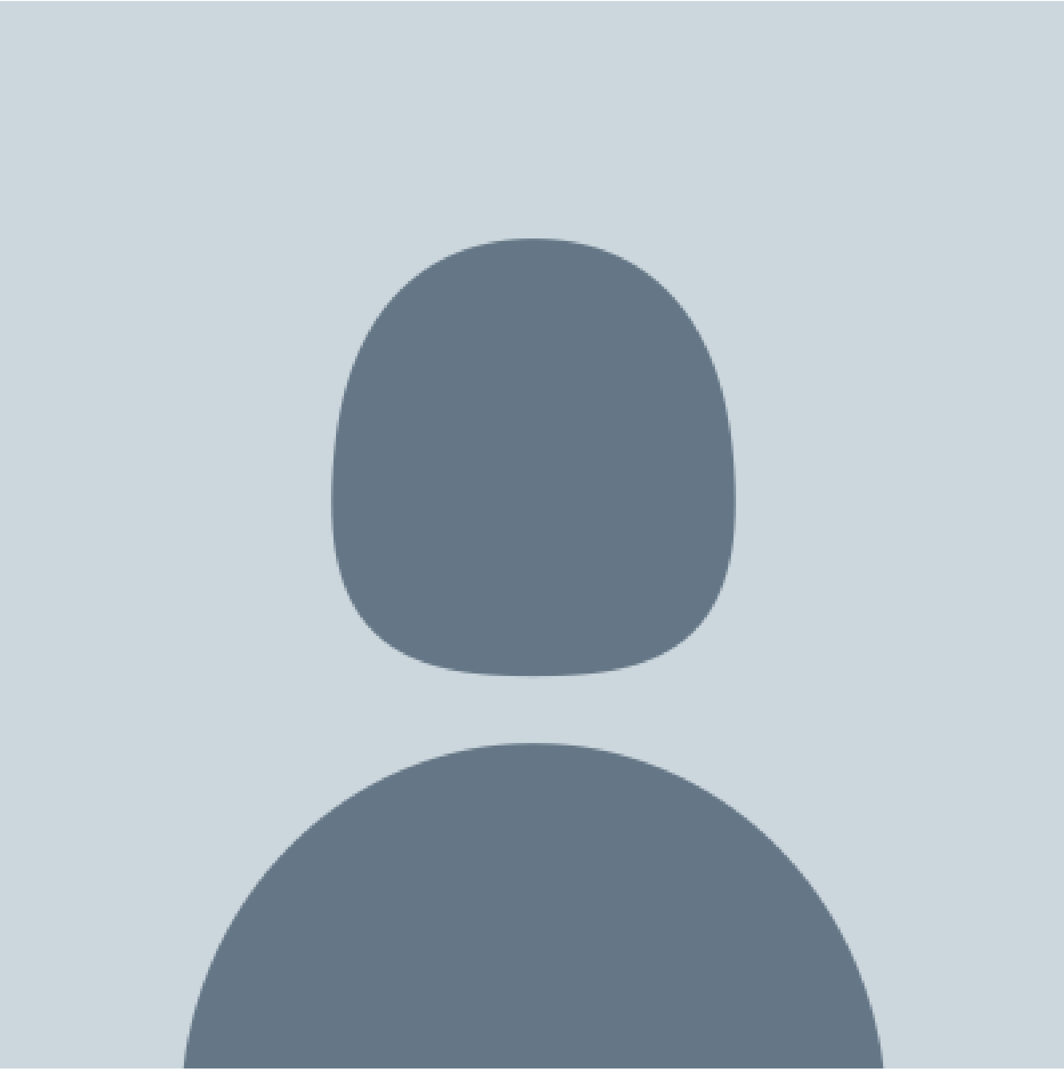


Senior Corporate Counsel

The Paradies Shops

The Paradies Shops owns and operates retail and dining location in airports and hotels, and it operates as a subsidiary of La gardère Travel Retail SAS.

Brett T. Lane

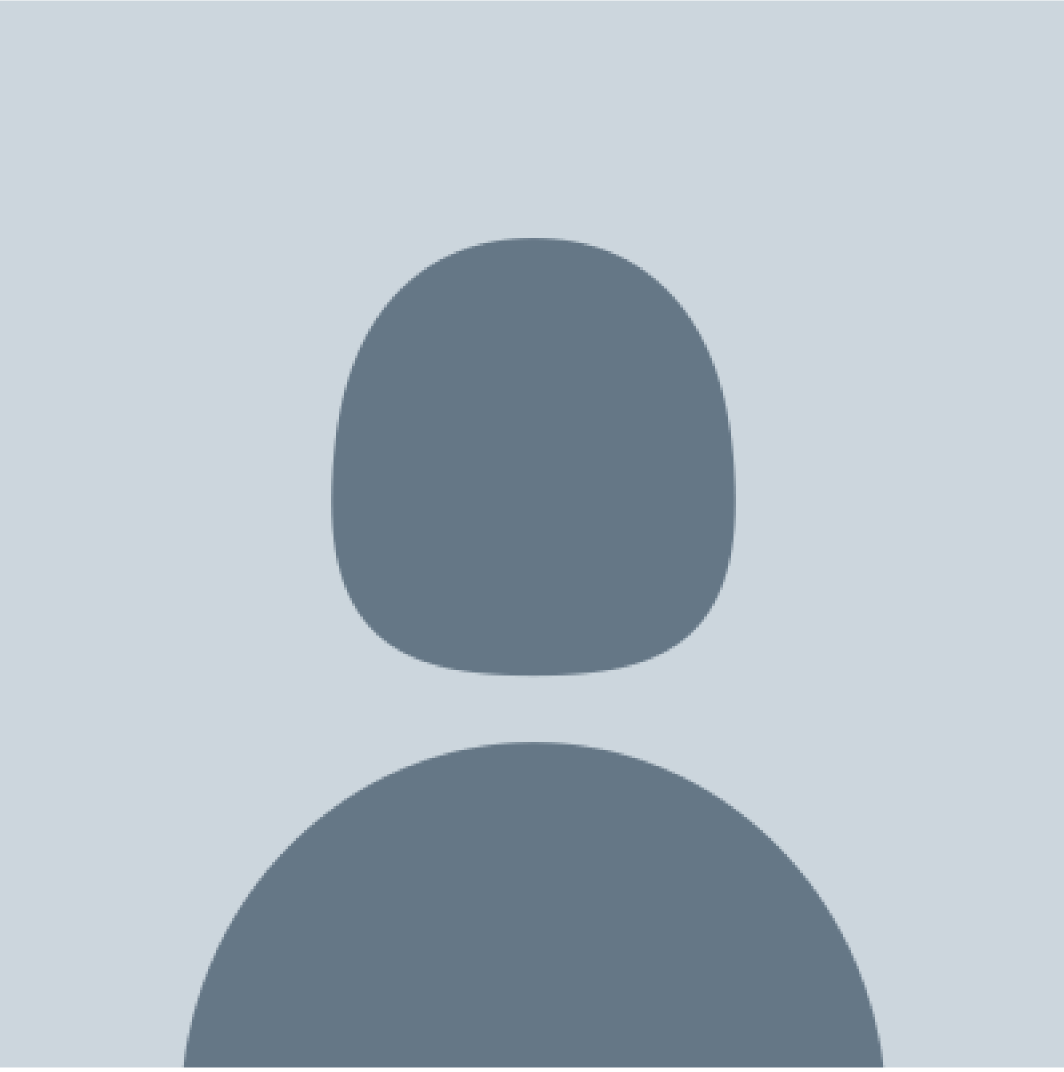


Associate General Counsel

Centurion

Centurion, a partnership between MHM Services and Centene, is a provider of healthcare and managed care services to correctional facilities.

[Peter N. Hall]

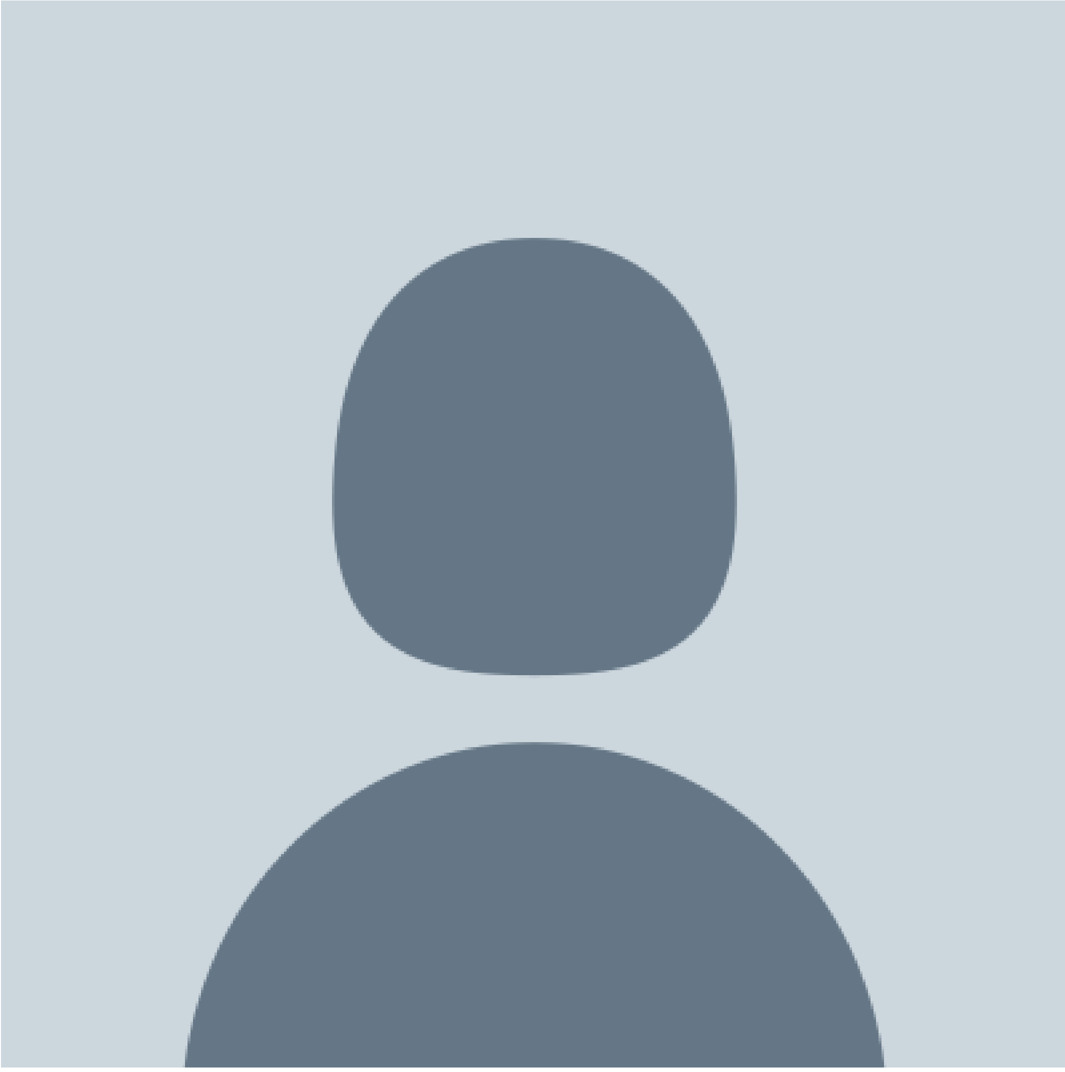


Attorney

Chamberlain Hrdlicka

At Chamberlain Hrdlicka in Atlanta, GA, he represents and counsels businesses in all areas of labor and employment law.

[Kyle D. Winnick]



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