36th Annual Workforce Management Briefing

Managing Workforce Compliance in an Unpredictable World

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Wage and Hour Compliance:
This Is Not the Time to Take a Break

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Panelists:

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MarketSource, Inc.

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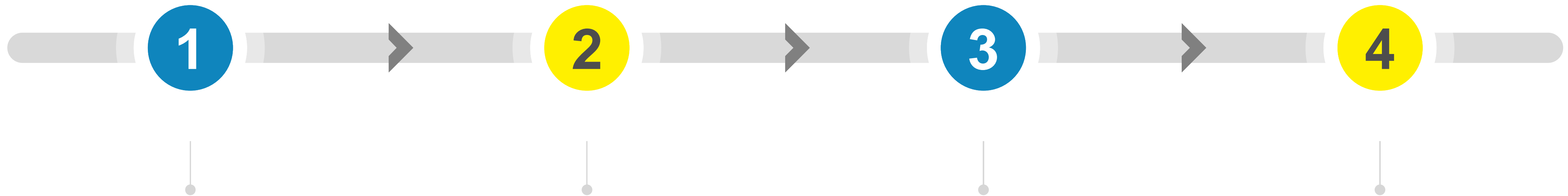
Agenda



Salary Level Test for White-Collar Exemptions: Developments & Expectations

Independent Contractor Compliance: Where the DOL Stands and Compliance Measures to Take Now

Trends and Developments in Wage and Hour Class & Collective Action Litigation

Gig Economy: Minimizing Risk When Employing a Contingent Workforce

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Salary Level Test for White-Collar Exemptions: Developments & Expectations

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Statutory and Regulatory Framework

Section 13(a) of the Fair Labor Standards Act (FLSA) exempts from the FLSA's minimum wage and overtime pay requirements "*any employee employed in a bona fide executive, administrative, or professional capacity … as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor].*" 29 U.S.C. § 213(a)(1).

Three-pronged test:

01 Paid on a salary basis,

02 Earn a specified salary level, and

03 Satisfy the applicable duties test.

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Statutory and Regulatory Framework *(continued)*

May 23, 2016: The U.S. Department of Labor (DOL) published a "Final Rule" that, among other things, would have:

- Increased the minimum salary threshold for white-collar exemptions, from *$23,660* per year ($455 per week) to *$47,476* per year ($913 per week), beginning December 1, 2016;
- Changed an estimated 4.2 million salaried white-collar workers from exempt to non-exempt status, absent some intervening action by their employers;
- Increased the minimum salary threshold for exempt highly compensated employees, from $100,000/year to $134,004/year, effective December 1, 2016; and
- Automatically adjusted the salary threshold for the white-collar and highly compensated employee exemptions every three years, beginning January 1, 2020.

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Lawsuits Invalidate the Rule

- Two lawsuits in the Eastern District of Texas, consolidated before the same judge, challenged the Final Rule.
- The district court issued a preliminary injunction blocking the rule on November 22, 2016—nine days before the rule was to go into effect—suggesting that the FLSA does not let the Department require any salary for these exemptions.
- The Department appealed to the Fifth Circuit, which set oral argument for October 3, 2017.
- On August 31, 2017, the district court entered summary judgment for the plaintiffs, concluding that the Final Rule is invalid because its salary threshold excludes too many workers performing roles Congress intended to be exempt from overtime, though acknowledging that the Department has the authority to set a more modest salary requirement.
- On September 5, 2017, the Department moved to dismiss its own appeal on the grounds that the final judgment in the district court rendered the appeal moot.
- The Department can still appeal the summary judgment ruling.

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Change May Still Be on the Horizon—DOL's Request for Information

On July 26, 2017, the DOL issued a Request for Information ("RFI"), seeking public input to aid the agency in formulating a new proposal to revise the regulations.

The 60-day comment period ends on *September 25, 2017*.

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Change May Still Be on the Horizon—DOL's Request for Information *(continued)*

Questions in the RFI include, among others:

- How should DOL determine the salary level(s) for these exemptions?
- Should DOL abandon the salary level test in favor of a duties-only test?
- Should multiple standard salary levels, and highly-compensated employee annual compensation totals, apply? If so, on what basis? By employer size? Census region? Metropolitan statistical area? Some other method?
- Are different salary levels appropriate for each of the executive, administrative, and professional exemptions?
- To what extent should non-salary payments count toward the salary level?
- Should the salary and compensation levels update automatically?

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Predicting an Outcome

Most likely scenario: DOL issues a new Notice of Proposed Rulemaking in late 2016 or early 2017 proposing a revised salary threshold of around $30,000 to $35,000, followed by a Final Rule in mid to late 2018 reflecting a similar standard

The wild card: *Alvarez v. Chipotle Mexican Grill* (D.N.J., filed June 7, 2017)

- ❖ Asserts that because the November 22, 2016 preliminary injunction in the Eastern District of Texas supposedly limited itself to barring DOL from taking further steps to implement or to enforce the Final Rule, the court in fact did not prevent the Final Rule from becoming effective on December 1, 2016.
- ❖ The legal theory is that publishing the Final rule in the Federal Register was the last act that DOL needed to take in the process, and that by operation of law the regulation became effective in the absence of an order staying the effective date of the rule or affirmatively invalidating the rule.

Realistically, employers should anticipate a modest increase to the salary threshold and perhaps to the standard for highly-compensated employees as well, effective sometime in late 2018 or early 2019.

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Independent Contractor Compliance: Where the DOL Stands and Compliance Measures to Take Now

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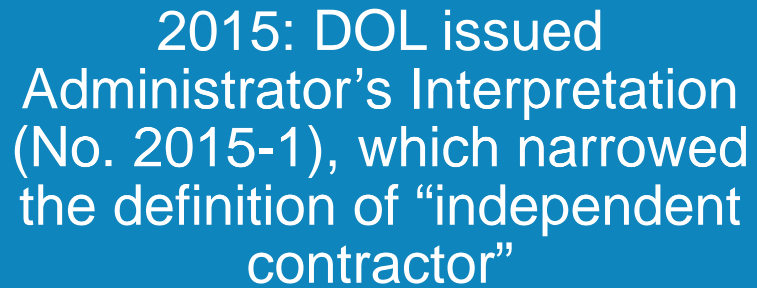
DOL Withdrawal of “Guidance” on Independent Contractors



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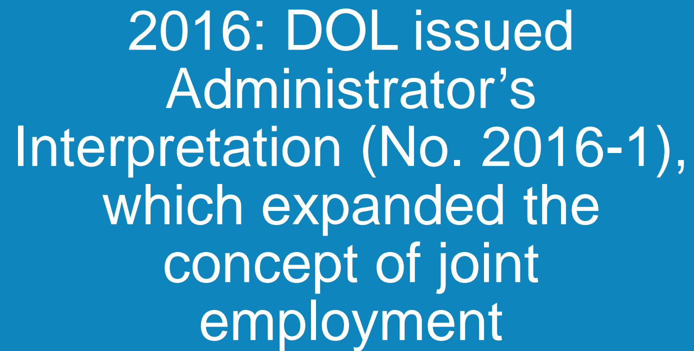
DOL Withdrawal of "Guidance" on Joint Employment



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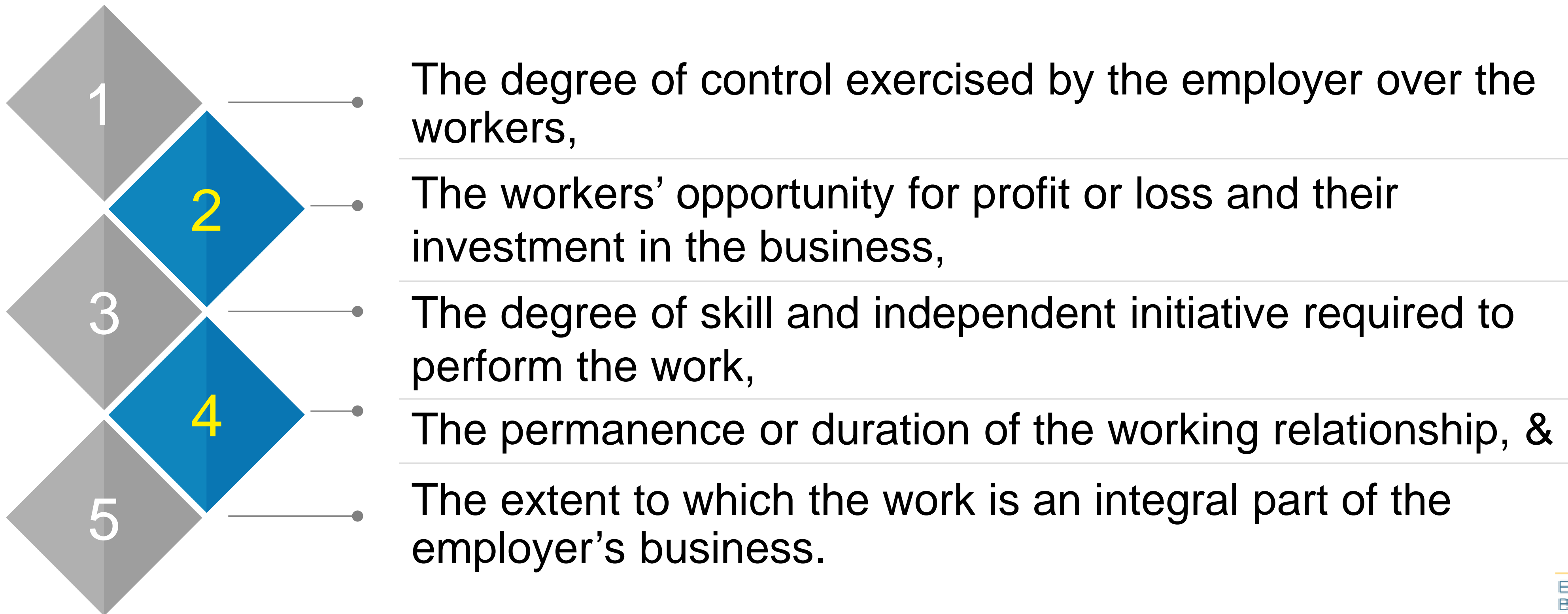
Economic Realities Test : Federal Court Standard for Independent Contractor Status Under FLSA

Whether an employment or an independent contractor relationship exists under the FLSA depends on five factors:



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Economic Realities Test : Federal Court Standard for Independent Contractor Status Under FLSA *(continued)*

No single factor is dispositive;
courts must analyze the totality of the relevant circumstances.

"The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves."
– ***Brock v. Superior Care, Inc*****. (2d Cir. 1988)**

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ABC Test for Independent Contractor Status

Many states, including New York, New Jersey, and Connecticut, use a variation of the "ABC test," instead of the "economic realities test," to determine independent contractor status.

Under the ABC test, a worker is deemed an employee unless *all three* of the following requirements are met:

1. The worker is free from the employer's control and direction in performing the work, both by contract and in fact;
2. The service performed is outside the employer's usual course of business (or alternatively, in some states, the service is performed outside all of the employer's places of business); *and*
3. The worker is customarily engaged in an independently established business that is similar to the service at issue.

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California Supreme Court to Weigh in on IC vs. EE Status

Dynamex Operations West, Inc. v. Superior Court, S222732

The court will address the legal standard for determining whether a worker in California is more appropriately classified as an employee rather than as an independent contractor.

***Issue presented*:**

- In a wage and hour class action involving claims that the plaintiffs were misclassified as independent contractors, may a class be certified based on the Industrial Welfare Commission definition of "employee" as construed in *Martinez v. Combs*, 49 Cal. 4th 35 (2010), or should the common law test for distinguishing between employees and independent contractors, discussed in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), control?

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California Supreme Court to Weigh in on IC vs. EE Status *(continued)*

U.S. Chamber of Commerce and California Chamber of Commerce: A decision to affirm the lower court's expansive ruling "would effectively eliminate independent contractor status for any use in California."

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Trends and Developments in Wage and Hour Class & Collective Action Litigation

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Arbitration Agreements: Are Class & Collective Action Waivers Valid?

U.S. Supreme Court granted certiorari in three cases to address whether employees can be required to sign arbitration agreements with class and collective action waivers:

- *Epic System Corp. v. Lewis*, No. 16-285 (from Seventh Circuit)
- *Ernst & Young LLP v. Morris*, No. 16-300 (from Ninth Circuit)
- *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (from Fifth Circuit)

Key Issue

Does the National Labor Relations Act or the Federal Arbitration Act take precedence?

Oral argument scheduled for *October 2, 2017*.

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Arbitration Agreements: Are Class & Collective Action Waivers Valid?

D.R. Horton, Inc., 357 N.L.R.B. 184 (2012)

How Did We Get Here?

D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013);
Murphy Oil USA v. NLRB, 808 F.3d 1013 (5th Cir. 2015)

CIRCUIT SPLIT:

Compare Second, Fifth, Eighth, and Eleventh Circuits

-vs.-

Sixth, Seventh, and Ninth Circuits + National Labor Relations Board challenge to *Murphy Oil*

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Time-Rounding: The New Wave of Class & Collective Actions

- Time-rounding policies are generally permissible under the FLSA.
- 29 C.F.R. § 785.48(b).
- The courts have confirmed that a rounding policy is generally legal as long as it is fair and neutral and will properly compensate employees for all time worked over a period of time.
- *Alonzo v. Maximus, Inc.*, 832 F. Supp. 1122 (C.D. Cal. 2011).
- *Contini v. United Trophy Mtg.*, 2007 U.S. Dist. LEXIS 42510 (M.D. Fla. June 20, 2007).
- *Harding v. Time Warner, Inc.*, 2009 U.S. Dist. LEXIS 72852 (S.D. Cal. Aug. 18, 2009).
- *East v. Bullock's, Inc.*, 34 F. Supp. 2d 1176 (D. Ariz. 1998).

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Time-Rounding: The New Wave of Class & Collective Actions *(continued)*

Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership, No. 13-5562 (9th Cir. May 2, 2016)

- Employer's rounding policy was consistent with federal regulation and neutral on its face and as applied.
- One minute of uncompensated time during log-in process was *de minimis.*

The plaintiffs are challenging time-rounding policies on the grounds that they disadvantage employees *in practice*.

Issue: Is time spent by employees on personal activities after punching in, but before commencing work, compensable? How does that impact an analysis of time-rounding practices?

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California: Recent Developments

An increase in Private Attorneys General Act (PAGA) representative actions

1

NOT CLASS ACTIONS

PAGA actions technically are not class actions, meaning that a stand-alone PAGA lawsuit is *not* removable to federal court under the Class Action Fairness Act—and PAGA plaintiffs need *not* satisfy class action requirements.

2

PENALTIES

PAGA authorizes penalties of up to $200 per employee for each pay period in which a Labor Code violation occurs. However, 75% of PAGA penalties recovered must be paid to *the state*.

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California: Recent Developments *(continued)*

3

NO ARBITRATION

Representative PAGA claims have largely been shielded from arbitration.

4

ENTITLEMENT TO CLASS LIST

To obtain contact information for the persons he or she seeks to represent, the named plaintiff need only allege that (i) the Labor Code violations occurred; (ii) the plaintiff was aggrieved; and (iii) the employer had a systemic, statewide policy that caused injury to other California employees.

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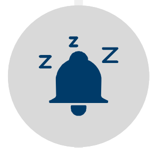
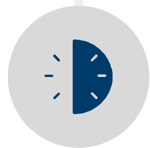
California: Recent Developments *(continued)*

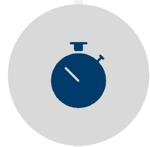
One Day's Rest in Seven—*Mendoza v. Nordstrom*, No. S224611 (May 8, 2017)



A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not *per se* prohibited.



The exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek. If, on any one day, an employee works more than six hours, a day of rest must be provided during that workweek, subject to applicable exceptions.



An employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however, forbidden from permitting or allowing an employee who has been fully apprised of the rest entitlement to independently choose not to take a day of rest.

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California: Recent Developments *(continued)*

Duty-Free Rest Breaks—*Augustus v. ABM Security Services, Inc*., 2 Cal. 5th 257 (2016)

The California Supreme Court concluded that state law prohibits an employer from requiring security guards to remain on-call, carry radios, and remain vigilant during rest breaks.

The employer subsequently settled for approximately $110 million.

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California: Other Pending Wage and Hour Decisions to Watch

"*De Minimis*" Doctrine

- *Troester v. Starbucks Corp.*, S234969
- Does the concept of *de minimis* apply to unpaid minimum wage and overtime claims?

Calculating OT Rate with a Flat-Rate Bonus

- Alvarado v. Dart Container Corp. of California, S232607
- Should employers use a state or federal formula in calculating flat-rate bonuses into overtime pay?

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The Gig Economy: Minimizing Risk When Employing a Contingent Workforce

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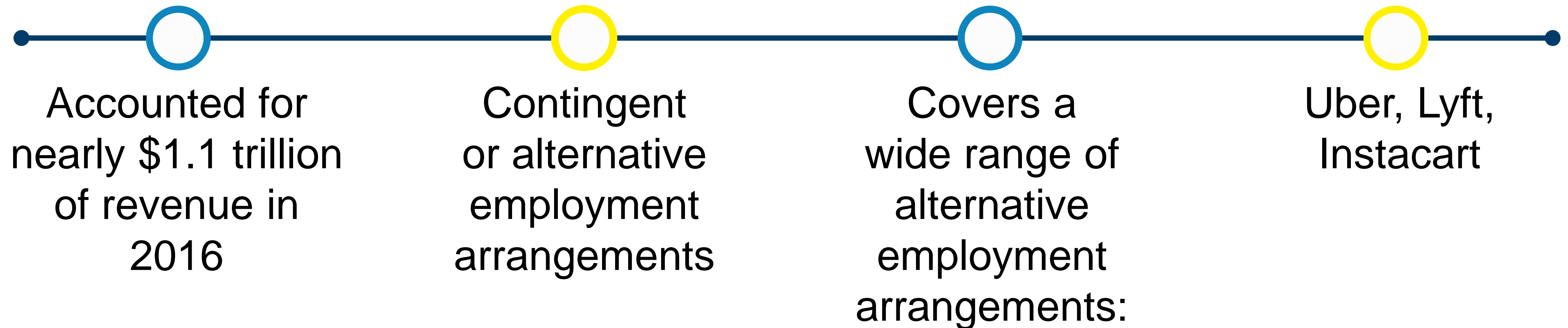
What Is the Growing "Gig Economy"?

Nontraditional work arrangements: A segment of the workforce is becoming increasingly prevalent, known as the "on-demand" or "gig" economy



- Independent contractors
- Freelancers
- On-call workers

- Workers provided by temporary help agencies or contract firms

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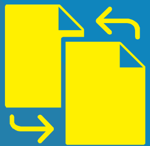
Wage and Hour Issues in Gig Economy and Contingent Workforce

FLSA provisions and rules promulgated within the context of a more traditional workplace are outdated and not readily applicable to on-demand workers.



Independent contractor vs. employee status—"a legal gray zone"?

- CA: While *Dynamex* is a traditional package delivery service, the California Supreme Court's decision could have a significant impact for "gig economy" employers.

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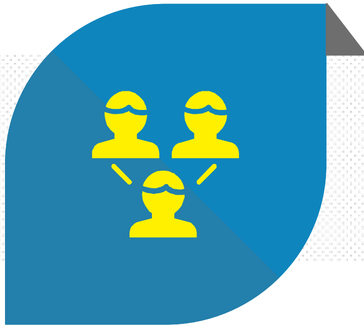
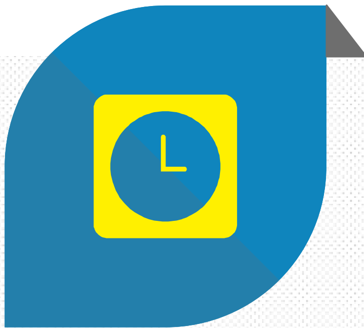
Wage and Hour Issues in Gig Economy and Contingent Workforce *(continued)*



Joint employment / co-employment



Tracking work time and record keeping

- FLSA has strict record-keeping requirements
- Contingent workers dictate their schedules, as well as log on and check e-mails to access work remotely
- What steps can employers take to avoid running afoul of record-keeping requirements?

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Government Action & Enforcement: What Can Employers Anticipate?

DOL's "Memorandum to the American People," Cabinet Exit Memo (Jan. 5, 2017)

called for changes to address gig economy employment.

- Identified a need for more data regarding emerging trend
- Bureau of Labor Statistics to conduct a survey on contingent and alternative employment for the first time since 2015, to help understand how many U.S. workers are participating in "gig work"

Secretary of Labor Alexander Acosta has indicated that the DOL needs to update its policies to reflect the new "gig economy" reality, possibly by empowering state and local governments to provide protections to gig workers.

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Epstein Becker Green's 50-State Wage and Hour App

Epstein Becker Green's updated version of its free, first-of-its-kind app, Wage & Hour Guide for Employers, now includes all 50 states – and more! The app puts federal and state wage and hour laws at the fingertips of employers. Plus, the updated app supports iPhone, iPad, Android, and Blackberry devices and has new capabilities.

Key features of the update include:

- New summaries of wage and hour laws and regulations covering all 50 states – plus federal law, the District of Columbia, and Puerto Rico)
- Ability to view and download all summaries, without charge, on **iPhone**, **iPad**, **Android**, and **BlackBerry** devices
- Direct feeds of EBG's **Wage & Hour Defense Blog** and **@ebglaw on Twitter**
- Easy sharing of content via email and social media
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Questions?