# PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

140 Geary Street, Seventh Floor ▪ San Francisco, CA 94108-4635
Phone: (415) 433-1099 ▪ Fax: (415) 433-9434 ▪ www.sfcounsel.com

**July 2015**

Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

## New Associate Joins Scherer Smith & Kenny LLP

We are pleased to announce that John Lough has joined our firm as a new associate. John is a graduate of University of Santa Clara. He is a valuable addition to our firm and will be working closely with Denis Kenny on litigation and employment matters. We hope that you have an opportunity to meet John soon and we look forward to his becoming a valuable member of our team.

## Independent Contractor Misclassification: Recent Notable California Matters

Many of you may have heard about the high-stakes and widely-publicized California class actions being waged against the behemoths of the ridesharing apps world: Uber and Lyft. Highlights of the Uber and Lyft lawsuits follow. Also included is an overview of recent independent contractor misclassification-related claims currently impacting operations at Southern California's major ports.

*THE UBER AND LYFT CLASS ACTIONS: Nature of Claims*

In separate class action lawsuits pending in the U.S. District Court for the Northern District of California, thousands of drivers from both ridesharing start-ups claim they should have been classified as W2 employees rather than 1099 independent contractors ("ICs") and, in turn, claim they are owed overtime, vacation/sick leave, healthcare insurance and other employee-related rights and benefits.

*THE UBER AND LYFT CLASS ACTIONS: Background Facts*

Both Uber and Lyft allow drivers to make themselves available for work whenever they want and allow them to accept or reject rides once they have been selected. These are factors militating toward IC status.

On the other hand, both companies expressly reserve the right to terminate the drivers' relationship or to terminate their use of the company app if a driver's customer ratings are deemed unacceptably low or for any reason at all. Both courts noted that this factor is a key one favoring employee status.

*THE UBER AND LYFT CLASS ACTIONS: Legal Analysis*

## In This Issue



William Scherer

Partner Notes

Sweaters are being unpacked. Wool hats are being taken down from their shelves. And parkas are being picked up from the cleaners. Yes, it's summer in San Francisco. Despite spending most of my life here, it continues to irritate me that a short drive 5 miles north, south, or east from the City brings the sun out from behind the fog, improved weather and increased temperatures of 10 degrees or more. But we at Scherer Smith & Kenny love our frozen little paradise. In addition to planning

Both Courts denied the companies' motions for summary judgment finding that because neither of the defendant companies could establish that their drivers were ICs as a matter of law, that decision could only be made by a jury after weighing all of the facts and circumstances including the following weighing against proper IC classification: the companies exert significant control over their drivers' work (e.g. Uber's "Driver Handbook" and Lyft's "Rules of the Road" instruct drivers on expected standards and protocol for customer services and the like, such as specifying dress code and music for Uber drivers and greetings of customers with a smile and a fist bump for Lyft drivers), set compensation and vehicle standards, and can terminate drivers at will.

U.S. District Judge Edward Chen, who heard the Uber suit, voiced skepticism about the firm's claims that it wasn't an employer, but rather a technology company that licenses its app to drivers given that Uber sets fares and screens and fires drivers.

U.S. District Judge Vince Chhabria, who heard the Lyft case, said that the current employment test for classifying workers is "woefully outdated" when applied to app-enabled firms such as Lyft; consequently, misclassification "will often be for juries to decide."

*SOUTHERN CALIFORNIA PORT DRIVERS' STRIKE AND ATTENDANT IC MISCLASSIFICATION CLAIMS*

*The Claims*: On April 27, 2015, ongoing labor unrest in the ports of Long Beach, San Diego, and Los Angeles led to a strike by hundreds of short-haul truck drivers. They claim that they were misclassified as independent contractors instead of employees thereby entitling them to (1) employee rights and benefits; and (2) representation by the Teamsters Union.

*Key Facts*: The drivers drive trucks owned by the trucking companies and work exclusively for those companies without being able to negotiate rates, refuse loads, or take work from competitors.

*Pending Legal Actions*: Some drivers have filed claims with the U.S. and California Departments of Labor while others have filed individual and class action lawsuits.

*Recent Precedent*: In April 2014, the California Labor Commissioner awarded $2.2 million (for unlawful deductions, reimbursable business expenses, interest and waiting time penalties) to seven port truck drivers misclassified as ICs. So, recent legal history does not bode well for the trucking companies (though not one-size-fits-all).

*IC MISCLASSIFICATION PREVENTION: SCREEN BEFORE YOU HIRE*

IC classification is a veritable legal landmine pervaded by fact-intensive legal analysis. More often than not, the employee/IC classification issue will be left for a jury to decide. And we all know the uncertainty that jury trials present. One reality is clear: California laws favor classification of workers as employees. So, when in doubt, the safest bet is to assume someone you hire is an employee. And, before you do consider retaining someone (i.e. an individual or a company) as an IC, consult with counsel specializing in labor and employment law.

We at Scherer Smith & Kenny remain available to assist you with any employment-related or other legal issues, including IC screening and compliance training and counseling.

Please contact Denis Kenny at dsk@sfcounsel.com for more information

*- Written by Denis Kenny*

## AB 2053: The Impact of California's New Workplace Anti-Bullying Law

summer vacations, summer camps for the kids, and barbeques with friends (all outside the City limits, by the way!), there are good things happening here at our firm.

Last month we welcomed John Lough as the firm's newest Associate. John brings 10 years of litigation experience to our firm and will largely be working with our litigation and employment team, though everyone will be depending upon his excellent research and analysis. John received his undergraduate degree in Mathematics from the University of California, Berkeley, and his Law degree from the Santa Clara University. We are delighted to have him start here, and expect to keep him quite busy.

Karen Yepez has been elevated to Legal Assistant, assisting our business department with government filings, entity formation, and commercial transactions. Karen has been with our firm for over a year now, and her work is outstanding. Karen is currently in pursuit of, and has nearly completed, her paralegal certificate through San Francisco State University.

Our partnership remains strong and Brandon Smith and I, and our business department, remain busy with commercial and intellectual property transactions, significantly increased real estate activity, and mergers and acquisitions. We have been actively raising money for several new ventures as well. The

## Workplace Anti-Bullying Law

For over ten years now, California employers with fifty or more employees (or "large" employers) have been required to offer a two-hour sexual harassment training to all supervisors once every two years pursuant to Assembly Bill 1825 ("AB 1825"). Broadly speaking, such training focused on defining and preventing sexual harassment, including such aspects as the investigative process, anti-harassment policies, and reporting of and remedies for sexual harassment. A large employer's failure to offer such training may be grounds for the imposition of penalties by California's Department of Fair Employment and Housing.

While the above framework still presently applies to large employers in California, Assembly Bill 2053 ("AB 2053") which was recently passed and signed by Governor Brown adds an additional aspect to AB 1825's training requirements that could potentially have far-reaching implications for large employers. Pursuant to AB 2053, as of January 1, 2015, large employers are required to include materials and content related to the prevention of "abusive conduct" in the workplace as a component of sexual harassment training. AB 2053 defines abusive conduct as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests."

The passage of AB 2053 was undoubtedly influenced by the recent national dialogue around bullying, yet it may ultimately have significant implications on traditional workplace harassment, discrimination, and retaliation policies. Namely, the "abusive conduct" standard does not expressly require the recipient of such conduct to be a member of some protected class, exhibit some protected characteristic, or have engaged in some sort of protected activity. This link has been the hallmark of discrimination, harassment, and retaliation claims brought under the federal Title VII Civil Rights Act and California's Fair Employment and Housing Act for nearly half a century. Consequently, while AB 2053 does not create any new right of action for employees who may experience abusive conduct in the workplace that does not rise to the level of actionable harassment, discrimination, or retaliation, it does appear to suggest such a right of action may ultimately be recognized in California in the future. Currently, neither the federal government nor any state recognizes such a cause of action.

Additionally, several commentators have suggested an employer's failure to address abusive conduct in AB 1825 training may impact claims brought under California Government Code section 12940(k), which imposes liability on an employer for "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring." The rationale behind such a claim would be that AB 1825 training constitutes such a reasonable step, and training absent this newly required abusive conduct component would therefore not be "reasonable."

In order to comply with AB 2053's new requirement, large employers in California should continue to timely offer AB 1825 training that is inclusive of this new component meant to prevent abusive conduct. This may include, for example, educating employees on conduct involving "malice," what constitutes a reasonable person standard under California and federal law, and how to determine the type of conduct that may or may not relate to an employer's "legitimate business interests." Finally, AB 1825's requirements regarding the credentials of trainers continue to apply to this new component. This means such training must be delivered by either a human resources professional, a licensed attorney with at least two years' experience, or a law school professor, any of whom must have a requisite understanding of the concepts, legal frameworks, and prevention strategies related to sexual harassment.

We at Scherer Smith & Kenny remain available to assist you with any employment-related or other legal issues, including the facilitation and delivery of AB 1825/2053-compliant training. If you have any questions, please contact Denis Kenny (dsk@sfcounsel.com) or Ryan Stahl (rws@sfcounsel.com) for further information.

- *Written by Ryan Stahl*

Bay Area's rising economic tide has created great optimism as our clients have eagerly moved to expand their businesses through new products and services, and added headcount and locations.

The litigation department likewise has been prosecuting a great number of matters towards resolution. Denis Kenny recently spoke before the San Francisco chapter of the California Applicant Attorneys Association, providing his take on independent contractor misclassification. As you may know, this issue is becoming increasingly important in light of the explosion of Uber and other personal service apps, many of whose business models rely on the generally less expensive classification of their workers as independent contractors rather than employees. This issue has important ramifications for the City's so-called "service economy."

From a personal perspective, it is this period of the business cycle that brings the most satisfaction. Optimism is high, investor interest is strong, and the transactions that are being carried out are full of promise, strength, and profits. It is a joy to help our clients during this period of time and help them realize their goals.

Now if just someone could do something about this fog…

- Written by William Scherer

# Electronic Signatures-Are They Enforceable?

We see a lot of contracts, stock certificates and corporate documents in helping our clients, all of which need to be signed, which means a lot of time spent tracking down signatures. In the past this meant mailing original signatures back and forth. This is slowly changing however as increasingly clients are using electronic signatures and not bothering with exchanging originals. These come in a variety of styles, such as the simple /John Doe/ to the use of 3rd party software programs such as DocuSign (www.docusign.com). The question arises though whether any electronic signature is acceptable and if so, can you use it any time?

The short answer is, "yes," electronic signatures can be binding without an original document being exchanged. Whether an electronic signature is binding is governed by the *California Uniform Electronic Transactions Act ( "UETA").* Under the UETA, to be enforceable the electronic signature must be shown to be the act of the person signing it and the parties must have agreed to conduct the transaction by electronic means.

Section 1633.9 provides:

"(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subdivision (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law. 1633.10. …."

*California Civil Code section 1633.1, et. seq.*

1. **You must be able to identify that the signature was the act of the person.**

The key element is that you must be able to identify that the signatory was the act of "the persons." In sum, if the document is returned to you by someone other than the signatory and there is no evidence that the signatory did in fact "sign it" then you should question whether it was properly signed. Ideally you would confirm directly with the person who "signed it" that they did, in fact, approve the execution of the document or sign it personally. For example, if the signatory emails his or her assistant and copies you on the email and states in the email "please apply my electronic signature and send it to Party A", then you can be fairly certain that what you received was authorized. If on the other hand you never see anything from the signing party agreeing to the final document or instructing that their electronic signature be applied then you should be concerned (absent other proof) that maybe it wasn't approved correctly.

2. **The parties must consent to conduct the transaction by electronic means.**

Regarding the second prong, the UETA only applies when the parties consent to conduct the transaction by electronic means. The Act provides that "[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct...." (*Ibid.*) "A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means...." (§ 1633.5, subd. (b) and (c).)

For example, many agreements contain provisions (usually appearing near the end) that agreements may be signed in counterparts and exchanged by facsimile or by other electronic means. Under such an agreement if the parties sign electronically then they will have expressly agreed to enter into the transaction electronically. Similarly, it's likely that an email exchange showing that they agreed to exchange signatures electronically would likely support such a finding.

**The issue of whether an electronic signature is binding was recently addressed by the California court in** *Ruiz v. Moss Bros. Auto Group, Inc., 2014 WL 7335221 (Cal. App. 4th Dist. December 23, 2014).* In *Ruiz*, there was a dispute over whether parties had agreed to arbitrate a dispute. One party sought to have the court enforce an arbitration agreement on the grounds that it had been electronically signed. The other party claimed they never signed it. The court found that the party seeking to enforce the agreement did not present sufficient evidence to establish that an electronic signature on its proffered arbitration agreement was "the act of ' the other party The proof the party presented in support of had been properly declaration from their business as a manager, stating that the signature was the other party's signature. The court said this was not adequate as there was no explanation as to how the business manager verified that the other, or any other party employee, electronically signed the document.

3. **Best Practices.**

In general, if you want to use electronic signatures effectively and in a manner that is enforceable later we recommend:

- The document contain a provision that authorizes that the document can be signed electronically by the party.
- You use a 3rd party software that password protects your signature or requires a login to use it so that it can only be used by you (or by those you authorize) and, if available, provides for a log of when it was signed and who logged in to access your signature.
- You confirm by email or through the program being used to sign the document that both parties intend to sign it electronically and exchange signatures in that manner.

Please contact Brandon Smith at bds@sfcounsel.com for more information.

*-Written by Brandon Smith*

## Areas of Practice

Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts