PERSPECTIVES

SCHERER SMITH & KENNY LLP
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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.

Fall 2017 Employment Law Alerts and Updates

As we enter the fall season we want to alert you to three notable updates and alerts: (1) proposed federal independent contractor legislation, (2) federal exemption rule litigation and recent failed push for California legislation concerning the same, and (3) new notice requirements for new hires concerning domestic violence protections.

I. Proposed Federal Legislation to Address Independent Contractors

In an attempt to bring some certainty to the uncertain realm of independent contractors "ICs"), U.S. Senator John Thune (R-S.D.), a member of the tax-writing Senate Finance Committee, introduced the New Economy Works to Guarantee Independence and Growth Act (the "NEW GIG Act") (S. 1549) on July 13, 2017. The legislation would amend the Internal Revenue Code of 1986 by providing a safe harbor based on objective tests concerning worker classification determinations and requiring increased reporting, among other things. The objective tests would focus on three areas, each of which must be satisfied for viable IC classification:

(1) General Service Provider Requirement focuses on the relationship between the "service provider" (worker) and the "service recipient" (customer) / "payor" (third-party facilitating the transaction and payment). The worker satisfies this requirement if the worker incurs his or her own business expenses, performs the service for a particular amount of time to achieve a specific result or complete a specific task, and satisfies at least one of

In This Issue

Denis Kenny

All work and no play makes Jack a dull boy. That centuries old proverb, made famous by Jack Nicholson in The Shining, seems especially fitting in our fast-paced 21st Century world. It means that without time off from work, a person becomes both bored and boring. Amidst the hustle and bustle of our business and personal

the following four factors: (i) has significant investment in assets or training for the services rendered, (ii) is not required to perform services exclusively for the hiring party, (iii) has not been treated as an employee by the hiring party during the 1-year preceding the subject engagement, or (iv) is not paid based upon hours worked but, rather, by job or project.

(2) Place of Business or Own Equipment Requirement requires that the worker has a principal place of business, does not provide services primarily at the hiring party's work site(s), pays fair market rent for use of the hiring party's work site or equipment (e.g. office space, computer, phone), or provides services primarily using the worker's own equipment.

(3) Written Contract Requirement requires that the parties sign a written contract confirming the IC relationship and that the worker is responsible for his / her / its own tax obligations, among other requirements.

In the context of the gig economy where an internet platform or app facilitates the transactions and payments between IC's and hiring parties, that third party would also not be treated as the employer under the NEW GIG Act.

As Senator Thune states, ""While the gig economy companies have created thousands of new jobs, they've also faced new challenges when it comes to how the service providers are classified by the IRS. My legislation would provide clear rules so these freelance-style workers can work as independent contractors with the peace of mind that their tax status will be respected by the IRS."

Support for the NEW GIG Act

Leaders of Uber, DoorDash, Instacart, Glam Squad, Postmates, Grubhub, Saucey, Handy, Shipt, and Hyr collectively wrote a letter to Senator Thune on August 21, 2017, expressing support for his bill. While urging Congress to include the bill in tax reform legislation, the company leaders stated that the NEW GIG Act "will enable continued growth and innovation in the "on-demand" economy by clarifying the tax treatment of independent contractors who work in this important sector." For a copy of the letter, please Click Here.

Prognostication

Federal legislation concerning independent contractors in the gig economy will almost certainly pass at some point during the current administration. In the meantime, regardless of whether the NEW GIG Act becomes law, any such federal tax reform legislation does not and will not impact the IC classification tests under federal wage and hour law (the Fair Labor Standards Act), the National Labor Relations Act, or any other federal law"and of course does not supersede state IC classification laws.

business and personal lives we rarely find the time to mix the two distinct worlds of taking time off and working.

Most companies hold an annual Holiday Office party. Others may honor staff birthdays and office anniversaries, perhaps, depending on the size of the business, by taking the employee, the department in which the employee works, or, like our 10-person firm, the office as a whole out to lunch. Some companies do these things better than others. For example, at one particular law firm, an employee would receive on their desk the morning of their birthday, a single, shrink-wrapped red rose with a typewritten note card reading "Happy Birthday _____." Needless to say, that gesture resulted in more jokes than gratitude amongst staff.

Aside from those types of occasional situations where our business and personal lives intersect, the two worlds largely remain separate. This is primarily a function of simply being too busy both to fit in social

events with our co-workers and realizing that every minute we spend in our work life takes away from the limited time we have to spend in our personal life. Add to that equation marriage, family, children, pets, exercise, hobbies,

For more information from Senator Thune's office on the NEW GIG Act, please Click Here. We will, of course, continue to track this bill and provide client updates.

II. Salary Threshold for "Exempt" Employees

a. Federal Exemption Rule Litigation

The months-long saga of the United States Department of Labor's ("**DOL**") proposed rule expanding overtime protections to more workers ("**Federal Exemption Rule**") effectively ended on August 31, 2017, when a Texas federal district court invalidated the Federal Exemption Rule. The Texas federal district court granted summary judgment against the DOL and concluded that the Federal Exemption Rule exceeded the DOL's authority. The court concluded that by having the Federal Exemption Rule more than double the minimum salary level, the DOL "effectively eliminates a consideration of whether an employee performs "bona fide executive, administrative, or professional capacity" duties," which Congress intended to be part of any exemption determination. (State of Nevada et al. v. U.S. DOL (E.D. Tex. Aug. 31, 2017), available at http://www.txed.uscourts.gov/notable-cases.) The Texas federal district court's order is notable because on September 5, 2017, the DOL ended its efforts to attack the decision. This effectively ends the Federal Exemption Rule.

That said, the proverbial jury is still out on the issue of a new regulations relating to the salary-level test, the duties test, and automatic updating of the salary level tests, among other things. The DOL is still accepting comments on its Request for Information on its "new" proposed exemption amendment rules until September 25, 2017. See Overtime Pay: Request for Information, https://www.dol.gov/whd/overtime/rfi2016.htm.
Expect to see some form of amended / revised exemption rules introduced in late 2017 or early 2018.

b. End of Proposed State Law(s) Impacting the Exemption Rules for Now

As California employers know, controlling California law applies stricter, worker-friendly, salary and duties tests for California employees to be exempt from overtime, meal-and-rest breaks, timekeeping, and other wage-and-hour obligations. And, for a brief moment, California employers saw proposed legislative that would have codified the Federal Exemption Rule under California law, increasing the minimum salary to $47,472/year or no less than twice the state minimum wage for full-time employment, whichever amount is higher (AB 1565). But, as the 2017 California legislative session drew to a close on September 15th, so did concerns that California employers would need to increase exempt employees' salaries or re-classify them as non-exempt employees. Specifically, AB 1565 did not pass this legislative session as it has been marked

volunteer and charitable services, and you have lots of valid, self-perpetuating reasons for keeping social work functions to a minimum.

But studies show that the intangible value of spending time with co-workers outside of work is well worth the effort it takes to fit it all in somehow, someway.

Our office struggles like others with the work-life balance. But we do make concerted efforts to encourage and support social office functions. We hold an annual Holiday party, and close the office to take everyone out for a nice lunch to honor employee birthdays and anniversaries. We hold monthly all-hands morning get together to share coffee and pastries and catch up on things. We also host an annual one-day off site on which we close the office for a weekday and go somewhere fun for the day together. Past events have included a Giants

baseball game, kayaking on Drakes Bay and visiting wineries in Napa and Sonoma Counties. This year, based on staff recommendations, we met for a nice lunch in Berkeley then took a short drive west to Golden Gate Fields for a Day at the Races. All of us received $50 to use as we wish. We sat together in The Turf Club restaurant talking about the races, the

�inactive.� That said, AB 1565 may reappear in a similar form in early 2018 given the ever-changing landscape of California employment laws.

III. Starting July 1, 2017, New Notice Requirements of Domestic Violence Protections

Employers with 25 or more employees have new workplace poster notice requirements. As background, domestic violence is well documented in American society. Under legislation passed in 2014, California seeks to protect victims of domestic violence, sexual assault, or stalking (collectively, **�Domestic Violence�**). Specifically, Labor Code § 230 prohibits an employer from discharging, discriminating, or retaliating against an employee who is a Domestic Violence victim and permits the employee to take time off from work to comply with a subpoena, obtain a restraining order, or obtain any other relief to ensure the health, safety, or welfare of the employee or the employee's child (**�Time Off to Go to Court�**). Moreover, an employer must reasonably accommodate a Domestic Violence victim concerning his or her safety while at work. (Id. § 230(f)).

Effective July 1, 2017, Labor Code § 230.1 requires employers with 25 or more employees to allow Domestic Violence victims to take unpaid leave no greater than 12 weeks provided to workers under the Family and Medical Leave Act to seek medical attention or services from a domestic violence shelter, program, or rape crisis center, psychological counseling, or receive safety planning related to Domestic Violence (**Time Off to Obtain Services**).

To promote awareness of these protections, affected employers must provide new hires and current employees upon request written notice of § 230.1 rights. The Labor Commissioner has developed a form

employers may use to comply these notice requirements: See, here. (**Labor Commissioner Notice**).

Employers with 25 or more employees will want to ensure that they include the Labor Commissioner's Notice in their new hire materials or have it readily available to employees who request it.

As you can see, every day brings a new change or challenge in the employment law arena.

Please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com) for more information on upcoming laws that may affect your workforce, scheduling a mandatory harassment training, or assessing and updating your workplace policies to ensure compliance with controlling law.

- Written by Denis Kenny & John Lough, Jr.

about the races, the betting options and other interesting and fun topics completely unrelated to work. Among the highlights of the day was one of our crew's $5 Trifecta bet which resulted in a payout of $841! Not bad for a day of getting paid to play! By the way, for those of you unfamiliar with horse race betting, a Trifecta requires the bettor to pick the first, second and third place horses in their precise finishing order. It is quite a feat, which many a seasoned race bettor may experience but a few times in their life.

One thing is clear after enjoying our annual summer office outings for these 17 years that Bill, Brandon and I have been in partnership: the intangible value of this event is immeasurable. Sure it hard to schedule. And many companies

would find it cost-prohibitive given the double whammy of paying staff not to work and paying for the expense of the day's events. But we all need to recharge our batteries from time to time and doing that together, as one office unit, is well worth the bottom-line measurements.

We encourage all business owners who read this to be conscious of the benefits associated with office mixers. After all, like it or not, for those of us full-time workers,

Legal Challenges and Constraints of Classifying Workers in the Gig Economy

At first glance, the recent San Francisco Business Portal publication entitled the "Freelancer Guide" described as "an overview of what it takes to be a part of the gig economy in San Francisco" "authored by a conglomerate of San Francisco civic and industry leaders, appears to be a step in the direction of recognizing gig / on demand workers as independent contractors. See, https://businessportal.sfgov.org/start/starter-kits/freelancer

Not so fast. The Freelancer Guide most significantly highlights that gig workers must register with and pay business permit fees to the City and County of San Francisco if they do business within the City limits. The Freelancer Guide also provides links to the forms and information about the registration process. Aside from those issues, the Freelancer Guide provides little substantive information to assist either gig workers or hiring companies seeking a "guide" to viable independent contractor services engagements. Critically, just because a worker registers his or her business and pays the associated fees, that does not mean such worker would, in fact, qualify as an actual independent contractor under controlling law.

That said, this type of publication may be a sign of wider acceptance of the need to create a third type of worker classification to add to the current W2 employee vs. 1099 independent contractor construct. The highly publicized Uber and Lyft misclassification class actions,

and the pending federal district court trial against Grubhub highlight the challenges the gig economy poses to our existing and, to some, outdated worker classification model. And the more lawmakers, courts and government agencies tasked with creating, interpreting and enforcing worker classification laws face these 21st century economic issues, the more likely legislative changes will occur.

A bigger-picture question is whether some gig workers may benefit more as an independent contractor than an employee. According to a recent Business Times article, non-employee / contract workers, on average, earn $103 per hour, or some $80,000 more per year more than full-time-employee software engineers. See, Here.

Admittedly, San Francisco software engineers represent a tiny sample size of primarily high wage earners. Nonetheless, statistics like these raise thought-provoking questions warranting more research. In seeking to protect workers' rights to wages and benefits as employees, are we helping or hurting them? Or, is this fight more about government agencies collecting payroll taxes to fund the "tax gap" created by the independent contractor / gig economy? We will continue to closely monitor developments in this dynamic legal arena. In the meantime, you be the judge...

Please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at

we spend more hours working and mingling with our co-workers than any other activity and group in our lives. So, let's embrace that reality and find ways to strengthen our work-life balance.

- *Written by Denis Kenny*

(rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com) for more information on upcoming laws that may affect your workforce, scheduling a mandatory harassment training, or assessing and updating your workplace policies to ensure compliance with controlling law.

-Written by Denis S. Kenny

The European Union's General Data Protection Regulation and How It Likely Applies to You

For nearly four years, the European Commission has been negotiating a uniform European Union ("*EU*") data protection framework for all EU member states. A final regulation was agreed upon and adopted on April 8, 2016, titled the General Data Protection Regulation ("*GDPR*"). According to the Commission, "the objective of this new set of rules is to give citizens back control over of their personal data, and to simplify the regulatory environment for business"The reform will allow European citizens and businesses to fully benefit from the digital economy."

The GDPR will officially take effect on May 25, 2018.

Though this is an EU regulation, our US- based clients should not ignore its impact. If you are operating and/or rendering services in the EU, regardless of where you are based, you must understand the importance of the GDPR and its application to you.

The following is summary of some of GDPR's key elements:

First, the biggest change is that the GDPR will apply to all companies processing the personal data of subjects residing in the EU, regardless of the company's location. The application of the GDPR is quite clear: it will apply to the processing of personal data of data subjects in the EU by companies not established in the EU if the companies' activities relate to offering goods or services to EU citizens. In addition, companies based outside of the EU who process the data of EU citizens will also have to appoint a representative in the EU.

Second, the GDPR gives individuals more rights with respect to their information. Specifically, the GDPR institutes:

- *Greater consent rights,* requiring that the consent be written in clear and plain language, easily intelligible and in an easily accessible form. The data subject must also be able to withdraw consent just as easily as they give it.

- A "*right to access*" giving the data subject the right to obtain confirmation as to whether or not personal data on them is being processed, where and for what purpose. Companies must also provide the data subject with a copy of

their personal data in an electronic format, free of charge.

- *Data portability* giving data subjects the right to require companies to transmit their personal data to another company.

- *Mandatory breach notification* within 72 hours where a data breach is likely to result in a risk for the rights and freedoms of individuals.

- *Data erasure rights* entitling the data subject to have companies erase their personal data, cease further dissemination of the data, and potentially have third parties halt processing of the data if the continued processing of the data is not justified.

- *Privacy by design* requiring that companies include data protection in the design of their systems from the beginning, rather than adding it later. It also requires companies to hold and process only the data absolutely necessary for the completion of their duties, and to limit access to personal data to those needing it to carry out processing activities.

Third, the GDPR increases penalties for non-compliance. The intent it to require companies handling sensitive personal data to take their data protection measures more seriously.

Fourth, the GDPR requires companies (both EU and foreign) whose core operations require regular and systematic monitoring of EU individuals on a large scale or whose operations involve data relating to criminal convictions and offenses to hire a data protection officer (DPO). The DPO's responsibilities will include ensuring the internal application of the regulations, and keeping a record of all processing operations involving personal data.

Conclusion:

Again, the reach of the GDPR should not be underestimated. In today's global economy, many of our clients' operations and activities extend to the EU or involve EU-resident data.

For those clients who are required or simply wish to be GDPR-compliant, we recommend retaining (whether internally or through an external service provider) a DPO who can assist in evaluating the current internal data processing and handling methods, and who can make effective compliance recommendations. When selecting a DPO, client should bear in mind that the individual should have expert knowledge on data protection law and practices.

If you wish for further information on the GDPR, and whether or how it might apply to you and your company, please feel free to contact Heather G. Sapp, Esq. (hgs@sfcounsel.com), or

free to contact Heather G. Sapp, Esq. (hgs@sfcounsel.com), or Brandon D. Smith, Esq. (bds@sfcounsel.com).

- *Written by Heather Sapp*

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