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Time Well Spent
Session 6:

The Employment Relationship: Independent Contractors and Joint Employment

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Seyfarth Shaw LLP

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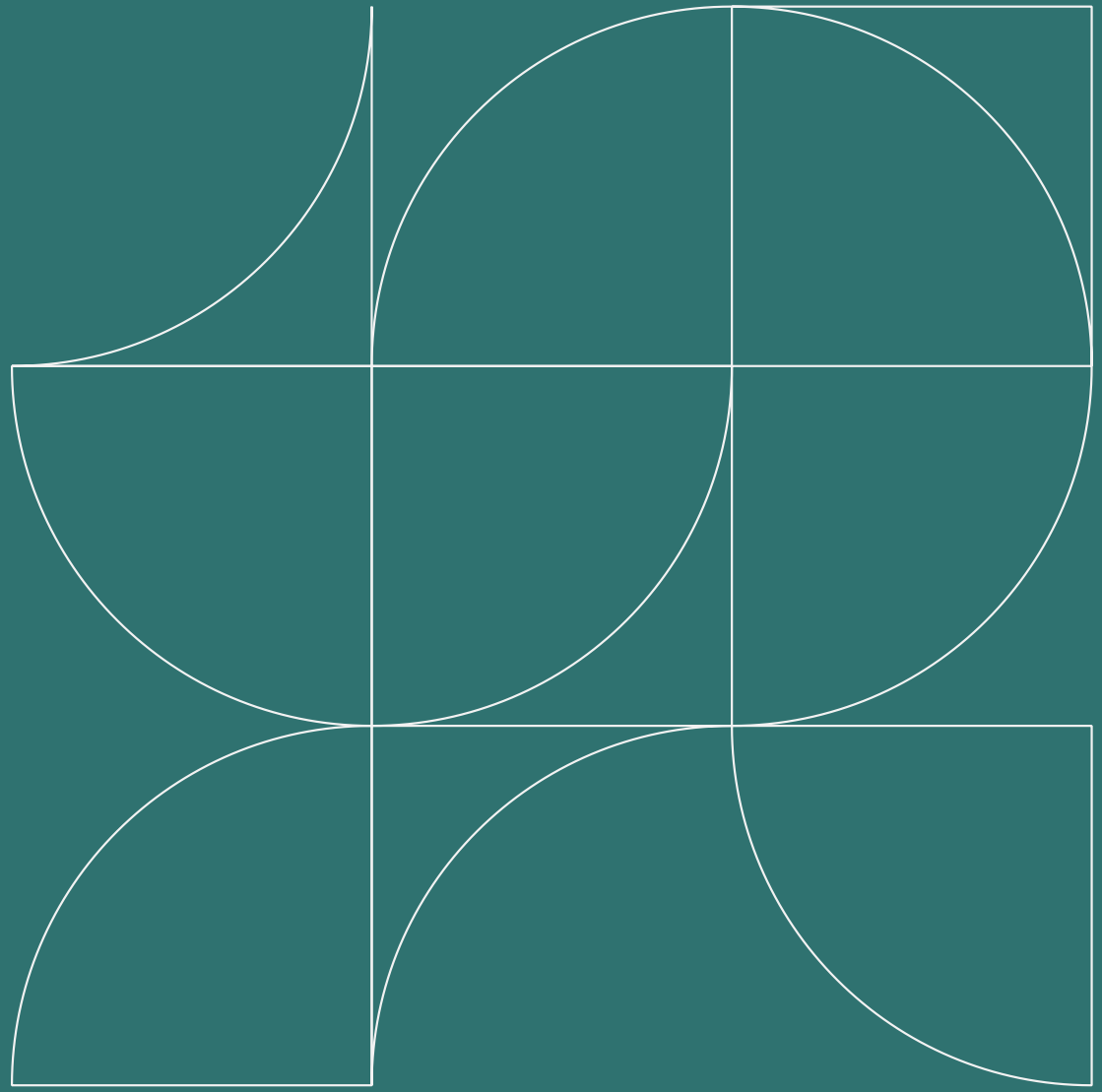
2 | Independent Contractor – California, Other State Law

3 | Joint Employment Under the FLSA – A Moving Target

4 | Joint Employment – California, Other State Law

5 | Upcoming Webinars

Independent Contractor - FLSA



Employees Under the FLSA

- The FLSA provides a circular definition of "**employee**" as "an individual employed by an employer"
  - Classification preferences irrelevant

- Courts have historically adopted a multifactor **"economic reality"** test based on the Supreme Court's decisions in *United States v. Silk* and *Rutherford Food Corp. v. McComb*
  - Test asks "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render services or are in business for themselves"
  - But the manner in which the test's factors have been articulated and applied varies by Circuit

2021 Independent Contractor Rule

- On January 7, 2021, the DOL promulgated an **interpretative regulation** concerning independent contractor status, in its first rulemaking on the subject

- Elevated **two core factors**:
  - Nature and degree of the worker's **control** over the work
  - Worker's **opportunity for profit or loss** based on initiative, investment, or both

- Also looked to skill, permanence, and whether part of integrated unit of production

- After administration change, the DOL unsuccessfully attempted to withdraw the rule

2024 Independent Contractor Rule

- **New DOL Rule** effective March 11, 2024

- Abandons "core" factors and looks to:
  - **Opportunity for profit or loss** depending on managerial skill;
  - **Investments** by the worker and putative employer;
  - Degree of **permanence** of the work relationship;
  - Nature and degree of **control**;
  - Extent to which the work is an **integral part** of the potential employer's business;
  - **Skill and initiative**; and
  - Any additional factors.

2024 Independent Contractor Rule: Opportunity for Profit or Loss

- Considers whether the worker has opportunities for profit or loss **based on managerial skill** (including initiative, business acumen, or judgment)

- Working more hours or taking more jobs at a fixed rate generally not relevant

- Instead looks to the worker's ability to:
  - Determine or negotiate pay
  - Decline jobs or order work
  - Engage in marketing or efforts to expand business
  - Hire others, purchase materials, or rent space

2024 Independent Contractor Rule: Investments

- Considers whether the investments by the worker are **capital or entrepreneurial** in nature
  - Does the investment increase the ability to do more work, reduce costs, or extend market reach?
  - Costs of equipment for a specific job, costs of labor, or costs unilaterally imposed by the putative employer are generally evidence of employee status

- Calls for a **comparison of worker's investments to the potential employer's investments in its overall business**
  - **Qualitative**, not quantitative

2024 Independent Contractor Rule: Permanence

- Asks whether the work relationship is **indefinite, continuous, or exclusive** of work for other employers
- However, the seasonal or temporary nature of the work isn't necessarily evidence of IC status
- Key inquiry: Is a lack of permanence **tied to the worker exercising his own business initiative**?

2024 Independent Contractor Rule: Nature and Degree of Control

- Considers the putative ***employer's* control**, including reserved control over the work and economic aspects of the relationship, including:
  - Setting the schedule
  - Supervision and discipline
  - Controlling prices or rates for services
  - Limiting ability to work for others
- Actions for the *sole purpose* of complying with the law are not evidence of control
- DOL declines to provide that *actual* control is more relevant than what could happen in theory (but also provides no guidance on how to weigh them)

2024 Independent Contractor Rule: Integrality

- Considers whether the work performed is an **integral part of the putative employer's business**
  - Is the work "critical, necessary, or central"?
  - Focus not on the worker, but on the work

- Rejects "integrated unit of production" standard articulated in *McComb*

- Standard "is one of those bits of 'reality' that has neither significance nor meaning. *Everything* the employer does is 'integral' to its business – why else do it?" *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1541 (7th Cir. 1987) (Easterbrook, J., concurring).

2024 Independent Contractor Rule: Skill and Initiative

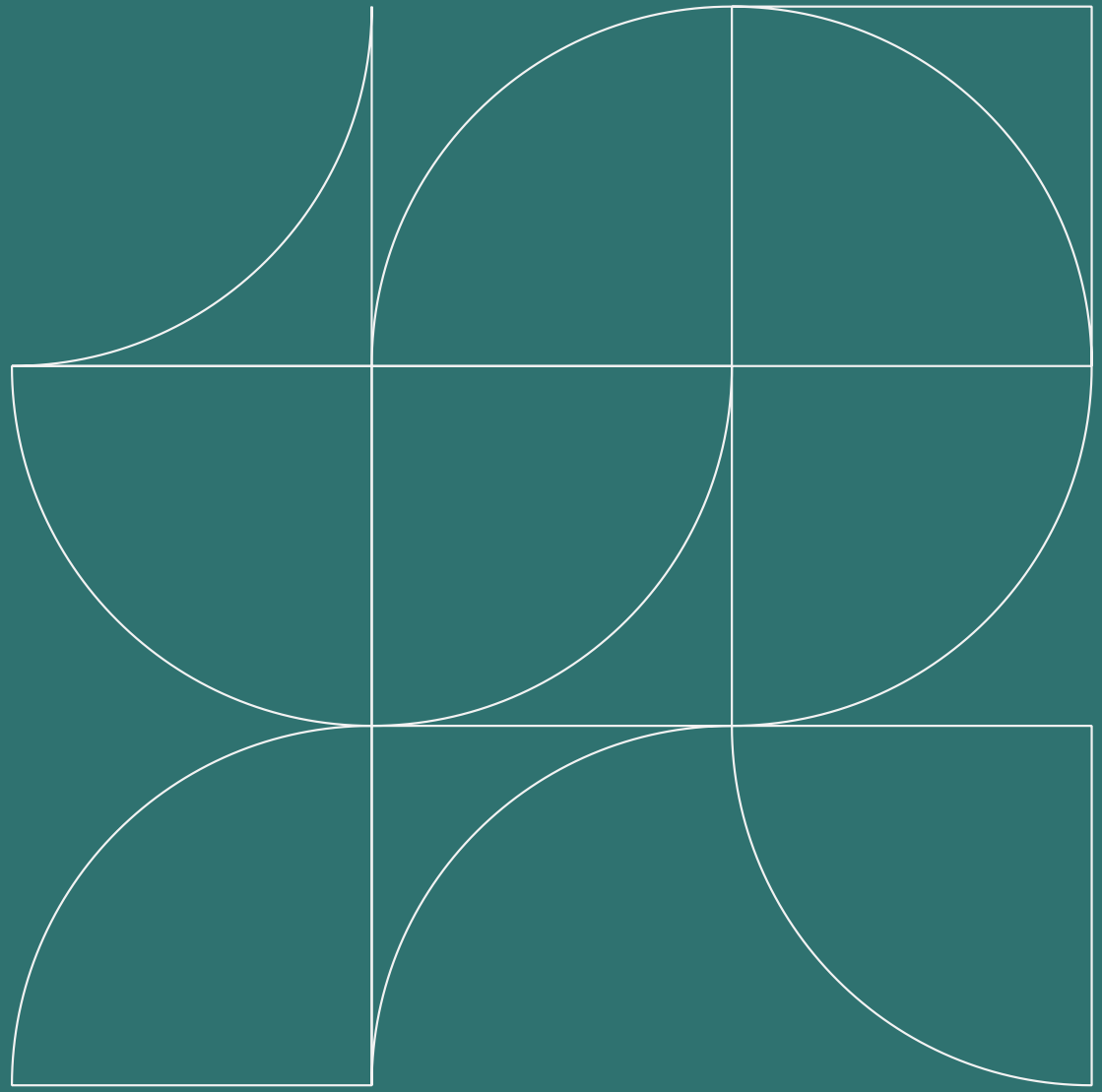
- Considers whether worker uses **specialized skills** to perform the work, and whether those skills contribute to business-like initiative
- Reliance on **training from putative employer** may be evidence of employee status
- The exercise of business initiative, without specialized skill, is not necessarily evidence under this factor

2024 Independent Contractor Rule: Questions that Remain

- Minimal guidance as to:
  - What should be considered as an “additional factor”
  - How to weigh the factors against each other, and how to weigh facts within factors
  - How to handle facts counted in multiple factors

- Questions as to whether:
  - Courts will defer to the rule
  - Legal challenges to the rule will succeed
  - The rule will survive an administration change
  - Legislative activity will gain any traction

Independent Contractor – California, Other State Law



AB 5: The Foundation for California's Independent Contractor Laws

- Codified the **"ABC Test"** for employee status adopted by the California Supreme Court in ***Dynamex***
  - A: The worker is **free from the control** and direction of the hiring entity
  - B: The worker performs work that is **outside the hiring entity's usual course of business**
  - C: The worker is **customarily engaged in an independently established trade**, occupation, or business of the **same nature** as that involved in the work performed
- Expanded the reach of the ABC Test
- Applied to work performed on or after January 1, 2020
- **Exempted numerous occupations** from the ABC Test, making the multi-factor *Borello* test the governing standard for employee status

Exemptions from the ABC Test Under California Law

- California exempts numerous professions from the ABC Test if certain criteria are met. Examples include:
  - Business-to-Business Exemption
  - Referral Agency Exemption
  - Professional Services Exemption
  - Single Engagement Exemption
  - Music Industry Exemptions

Proposition 22

What Does It Cover?

- Transportation Network Companies; and
- Delivery Network Companies that:
  - **Do not unilaterally prescribe specific dates**, times of day, or a minimum number of hours during which the drivers must be logged into the app or platform;
  - **Do not require the driver to accept any specific rideshare** or delivery service request as a condition of maintaining access to the app or platform;
  - **Do not restrict the driver from performing rideshare or delivery services for other network companies**, except when the driver is working for the network company; and
  - **Do not restrict the driver from working in any other lawful occupation** or business.

Proposition 22 (cont.)

Benefits

- For drivers who work at least 15 hours a week (of “engaged time”), **a health care subsidy** consistent with the average contributions required under the Affordable Care Act;
- A **new minimum earnings guarantee** tied to 120% of minimum wage, with no maximum (tied to “engaged time”);
- **Compensation for vehicle expenses** (mileage compensation for “engaged miles”);
- Occupational **accident insurance** to cover on-the-job injuries; and
- **Protection against discrimination and sexual harassment**.

Proposition 22 (cont.)

Where Things Stand Now

- In March 2023, the California Court of Appeal overturned a trial court decision deeming Prop 22 unconstitutional
- The Court of Appeal held that app-based drivers may be classified as independent contractors. However, the court concluded that Prop 22 violated the separation of powers doctrine and severed a provision that would have limited the legislature's ability to pass legislation enabling independent contractors to collectively bargain.
- The Court of Appeal's decision is under review by the California Supreme Court

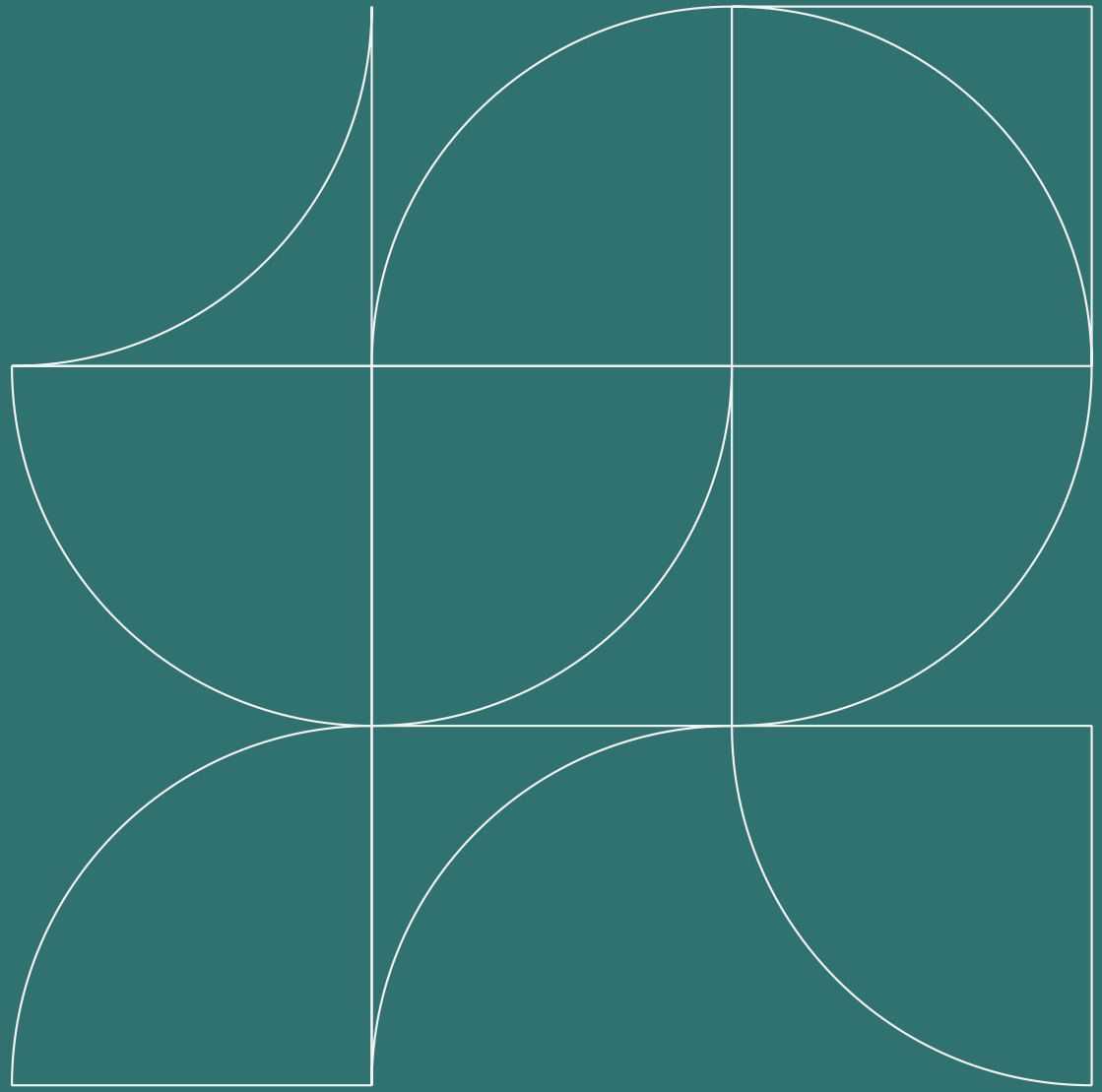
State Laws Are All Over the Map

- Numerous states have **adopted the ABC Test,** or a version of it
- In other states, contractor classification turns on the **right to control, economic realities, or something else** altogether
- Many states have **different tests** for contractor classification depending upon the **type of claim** (e.g., wage/hour, unemployment, workers' comp)
- Efforts to expand the ABC Test in other states have not taken hold…yet

The Federal Landscape is Evolving

- DOL's Final Independent Contractor Rule is already the subject of multiple challenges in court and SCOTUS's upcoming decision on *Chevron* deference may come into play
- FTC may attempt to use competition laws to crack down on contractor misclassification
- The NLRB reinstated a worker-friendly test in *Atlanta Opera*

Joint Employment Under the FLSA – A Moving Target



Brief History

January 2020

- The DOL announced a final rule regarding joint employment (Trump-era)

- The Trump-era regulations were challenged by a coalition of states after they went into effect, and on September 8, 2020, a New York federal court partially invalidated them.

September 2021

- Early in the Biden administration, the DOL rescinded the Trump-era joint employer rule and the Biden administration has not issued a replacement rule.

Where Are We Now?

- There is currently **no single, uniform test for joint employer status under the Fair Labor Standards Act**
- Employers are left to rely on case law
- Courts assess whether the putative joint employer has sufficient **functional control** over the employee to be treated as an employer under the FLSA
- In doing so, courts have articulated varying **multi-factored tests**, often specifically tailored to the industry at issue or the particular facts presented
- Remember: Unlike independent contractor tests, joint employer tests **presume that the worker is an employee of at least one employer**

Multiple Articulations of the Economic Reality Test

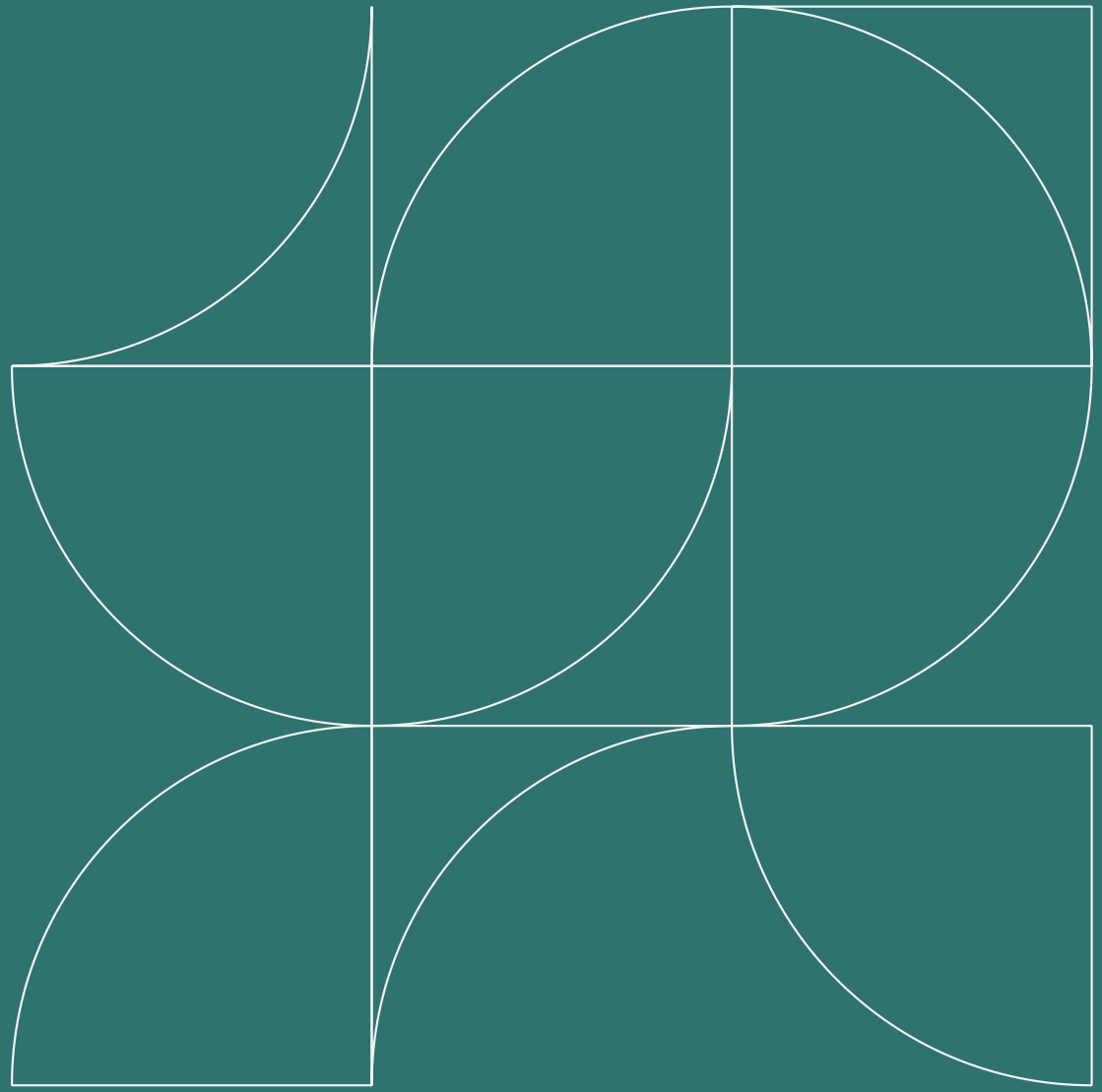
- The U.S. Courts of Appeals **Use Different Tests**:
  - First and Third Circuits: four-factor test
  - Second and Fourth Circuits: different six-factor tests
  - Fifth Circuit has used a four-factor and a five-factor test, each with different factors
  - Ninth Circuit originally adopted a four-factor test, but later expanded to a 13-factor test
  - Eleventh Circuit uses an eight-factor test

- Focus on putative joint employer's **control over the putative employee** vs. relationship between the two or more business entities alleged to be joint employers

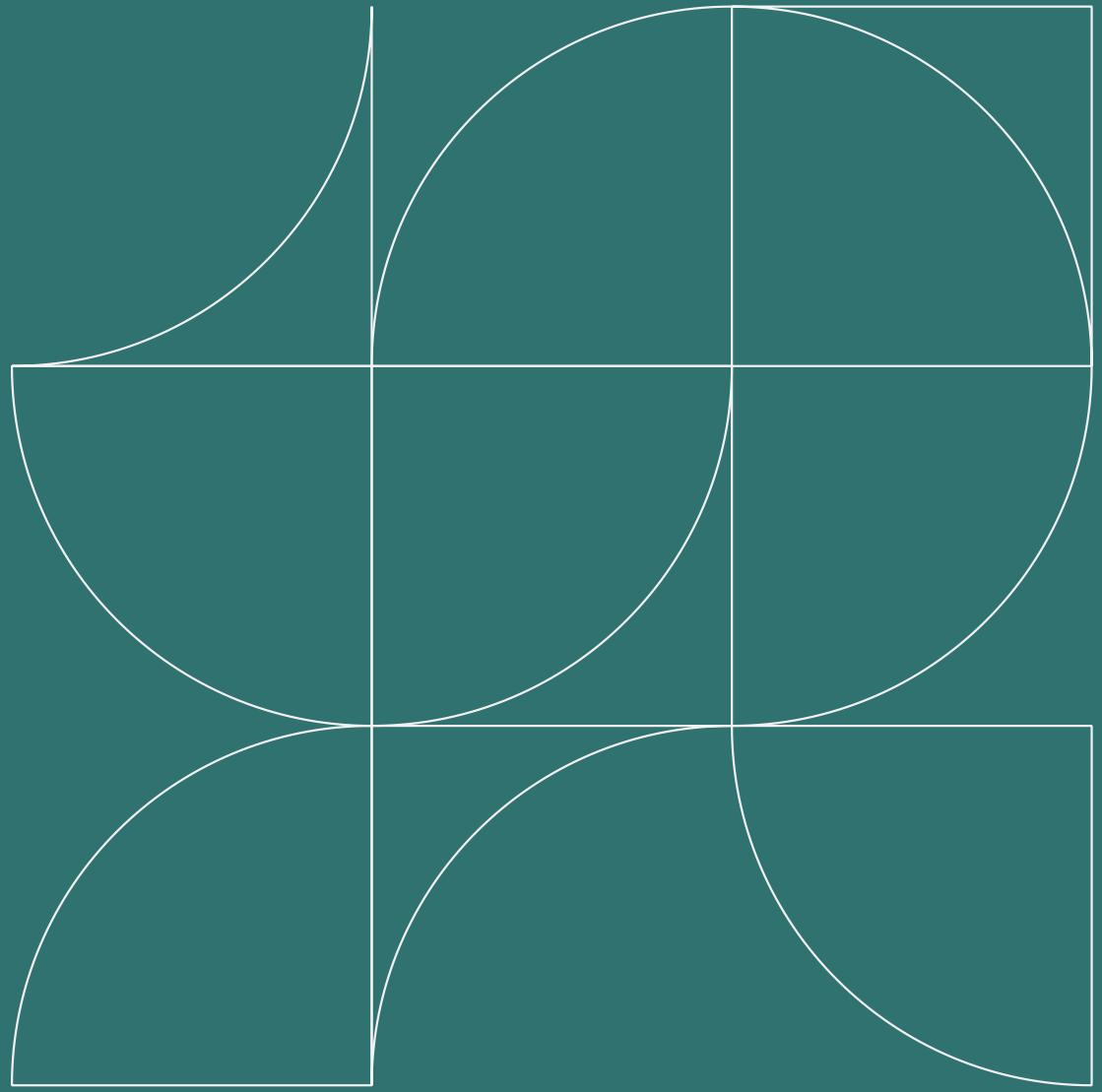
What Does This All Mean?

- There currently is **no one-size-fits-all approach** to defending joint employment claims under the FLSA.
- Putative employers should **carefully consider the jurisdiction**, as well as how the **facts** of their particular arrangement will fare under the various formulations, when developing a defense strategy and advocating for the application of any particular test.
- Remember: public policy arguments favor a finding that the subcontracting relationship at issue is legitimate, advantageous to the broader economy, and is therefore not an attempt to avoid FLSA compliance.

CLE Code



Joint Employment – California, Other State Law



Joint Employment

- Tests differ across the states, but generally focus on the alleged employer's **control over terms and conditions of employment**

- In California, **workers employed by staffing agencies** are considered joint employees for purposes of unpaid wage claims and failure to secure workers' compensation coverage


Upcoming Webinars

Webinar Series . . .

1 | 10 Years of Wage & Hour Wisdom and What's on the Way

2 | Defeating or Limiting Plaintiffs' Motions to Distribute Collective Action Notice

3 | Winning the Battle over Class Action Certification and Collective Action Decertification

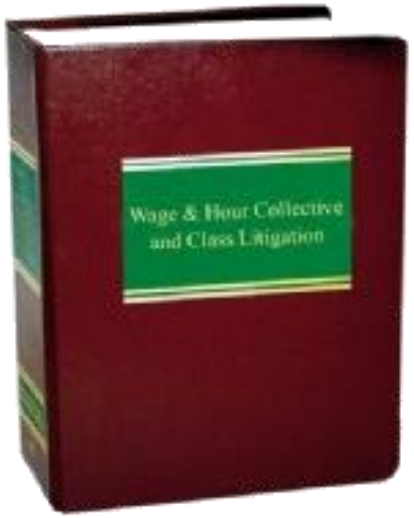
4 | The Rise of Mandatory Arbitration Programs

5 | Developing and Defending Exempt Status Classifications

6 | The Employment Relationship

Still to come…

7 | What is "Work?"



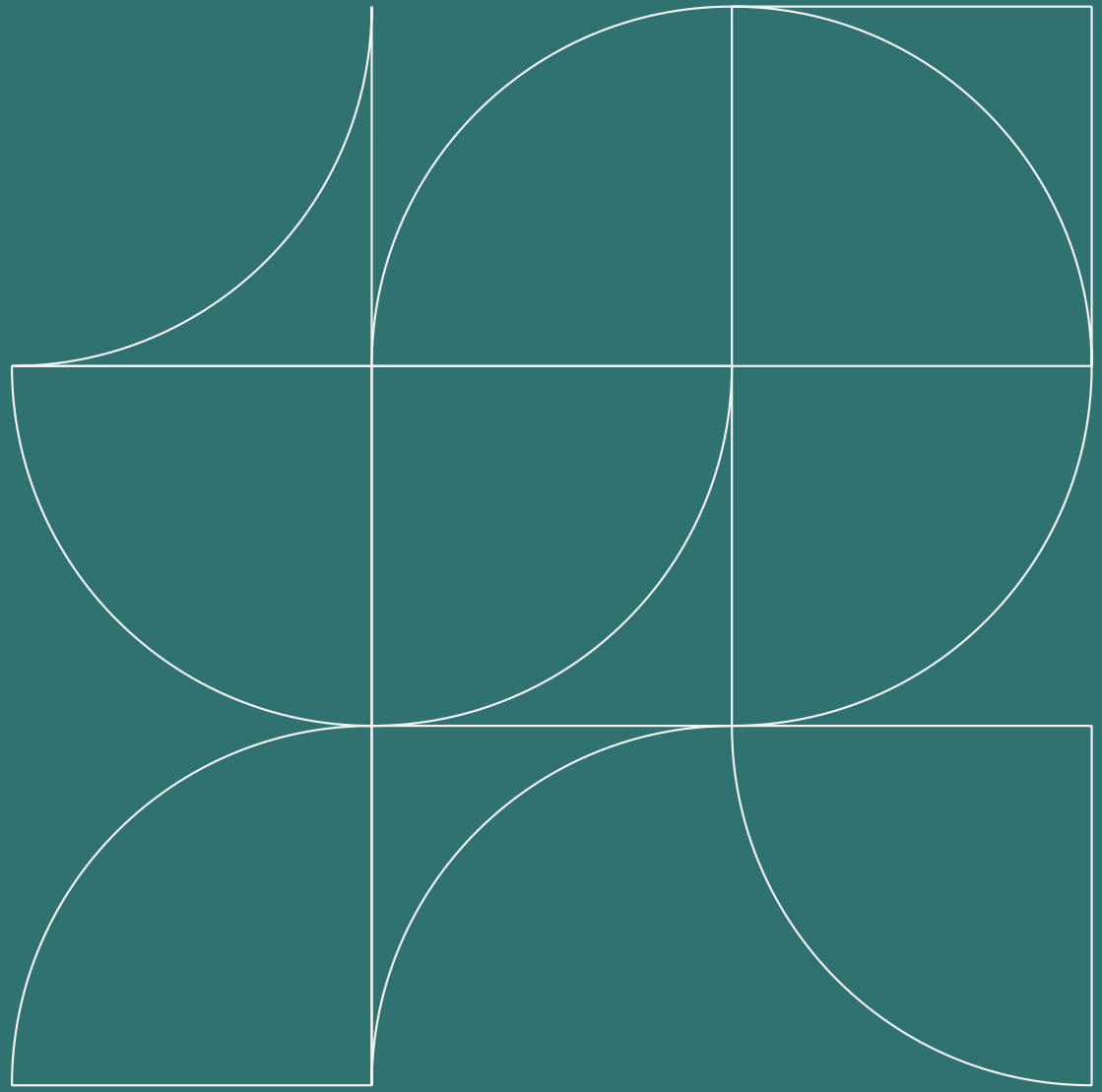
The Authoritative Wage & Hour Litigation Treatise

If you don't already have a copy of the treatise, the book can be purchased here:

https://www.lawcatalog.com/wage-hour-collective-and-class-litigation.html

The order link will be provided in our webinar follow up materials, or please reach out to your favorite Seyfarth attorney to order a copy.

Questions?



Thank You

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