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THE NEW ON-DEMAND WORKFORCE MODEL: EMPLOYEE BENEFITS AND LABOR ISSUES IN THE AUTOMOTIVE AND MOBILITY INDUSTRY

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Morgan Lewis Automotive Hour Webinar Series

Series of automotive industry focused webinars led by members of the Morgan Lewis global automotive team. The 10-part 2021 program is designed to provide a comprehensive overview on a variety of topics related to clients in the automotive industry. Upcoming sessions:

APRIL 14 | Continuing to Capitalize on Emerging Technology in the Automotive and Mobility Space: A 100-Day Report on Biden Administration Opportunities

JUNE 2 | Trademark and Copyright Considerations in the Automotive and Mobility Space

JULY 14 | White Collar and Regulatory Developments Affecting the Automotive and Mobility Industry

AUGUST 11 | Power and Opportunity: EVs, Hydrogen and Other Vehicle Power

SEPTEMBER 15 | SPACs and Other Vehicles for Investment in the Automotive and Mobility Sectors

NOVEMBER 10 | New Market Entry and the Anachronistic US Distribution System: What the Future Portends

DECEMBER 8 | The IP Anatomy of the Automotive Nervous System

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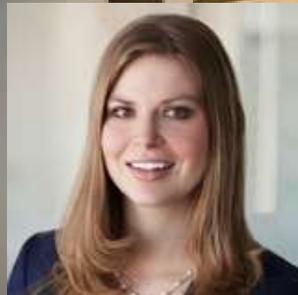
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Best Practices for the Use of External On- Demand Human Resources

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Best Practices for the Use of External On-Demand Human Resources

- Over the last 20 years, the explosive growth and change in certain functions within auto companies manufacturing and/or distributing in the US (for example, but not limited to, the IT function) led to those functions being staffed largely with external workers under various arrangements:
 - Individual independent contractor, contracted through external employment agency
 - Individual independent contractor, without separate external employment agency (“freelancer”)
 - Small staffing/consulting vendor
 - Large staffing/consulting vendor

Best Practices for the Use of External On-Demand Human Resources

- Now, external on-demand human resource procurement is being closely examined and modified across the US and practices are changing.
- Why?
 - Increasing legal and regulatory enforcement – the government wants its tax money, wants collective labor rights and individual employee rights to be protected by the “secondary employer,” not only the “technical employer,” and workers’ lawyers use employee-favorable laws to make “external” irrelevant;
 - Business assessment that certain functions serviced by external on-demand resources are no longer a peripheral function of the business, i.e., the function is or has become a core function of the business and/or needs to be internal for quality control; and
 - Business assessment that internal workforce feels more secure, performs better, and has less turnover.
- Watch out for: (1) independent contractor misclassification and (2) joint employer liability with staffing/consulting vendor.
- Will we see more CA Prop 22-type hybrids: minimum wage; benefits; retention protection?

California's Independent Contractor Test: *Dynamex Operations West, Inc. v. Sup. Ct.*, 2018 WL 1999120 (Cal. S. Ct. 2018)

- 2 delivery drivers for Dynamex filed a putative class action, alleging they were misclassified as independent contractors rather than employees.
 - Same-day courier service
 - Fleet of independent contractors (previously classified as employees)
 - Provide own vehicles and pay own expenses
 - Paid based on individually negotiated contracts
 - Set own schedule, but must inform Dynamex when they choose to work
 - Must wear Dynamex shirts/badges and use vehicle logos
- The Court adopted the “ABC” test, which presumes that a worker is an employee unless the hiring company can show that the worker:
 - (A) is free from the control and direction of the hirer in the performance of the work
 - (B) performs work that is outside the usual course of the hiring entity’s business, **and**
 - (C) is customarily engaged in an independently established trade, occupation, or business

“Blue States” (and Biden?) Independent Contractor Test: A-Test

- Worker is free from the control and direction of the hirer in the performance of the work, both under the contract for the performance of the work and in fact
 - Free from control and direction *under the contract*
 - Free from control and direction . . . *and in fact*
 - Principal cannot control performance of services to the “type and degree” of control a business typically exercises over employees
 - Business need not control the precise manner or details of the work in order to be found an employer; broader control may suffice

“Blue States” (and Biden?) Independent Contractor Test Continued: B-Test

- Worker performs work that is outside the usual course of the hiring entity’s business
- Facts courts review:
 - Usual course of business may be found in advertising, contracts, or other summaries of the business
 - Contractors perform same functions as employees
 - Work is “key component” of business vs. sporadic and subordinate
 - Work is frequent, customary, regular

“Blue States” (and Biden?) Independent Contractor Test Continued: C-Test

- Worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed
- Facts courts review:
 - Both free to operate independent enterprise *and* does so in fact
 - Worker’s independent enterprise is not interconnected or dependent on hiring company, and would survive without it
 - Features of independent trade, such as purchasing own tools and equipment, incorporation/registration, licensure, offering services to the public or other potential customers, advertising, separate place of business, separate clientele and income, and managing own liability insurance

Joint Employment Tests

- Tests differ somewhat from law to law, agency to agency, circuit to circuit, state to state, administration to administration.
- Examples:
 - Trump DOL (FLSA) test (now vacated as overly narrow and we await Biden test): Does the secondary employer have the ability to hire or fire, supervise or control schedules, set pay rates, and maintain employment records, and does it actually do at least one of these?
 - Common Title VII, ADA, ADEA and FMLA factors:
 - Primary factors: degree of control secondary employer exercises over employees, and economic realities of parties' relationship.
 - With the following additional factors bearing on the first two: use of secondary employer's premises and equipment; degree to which job is integral to secondary employer's production process; secondary employer's supervision of employee's work; employees work exclusively or predominantly for secondary employer; workers' opportunity for profit and loss; skill and initiative required for job; duration of relationship; method of payment.

Best Practices for the Use of External On-Demand Human Resources: *Risk and Liability*

- The potential costs of misclassification and/or joint employment liability—back wages, overtime, tax liability, retroactive exposure for employee benefits, unpaid unemployment and workers' compensation insurance contributions, fines, penalties, and damage awards — continue to present serious risks for employers.
 - Although the law permits the use of ICs, recent legislative and regulatory efforts by both federal and state legislators and regulators have highlighted a growing intolerance for these relationships.
 - Moreover, some courts are conditionally certifying FLSA collective actions and certifying state wage and hour class actions for groups of ICs.

Best Practices for the Use of External Resources: *Risk and Liability – Areas of Potential Risk*

- Wage & Hour Laws: Non-Employees determined to be employees will have claims for overtime compensation, minimum wages, meal and rest breaks, and reimbursement for business expenses. Wage & hour litigation is typically high-stakes, involving class and collective actions, double damages, long statute of limitations periods, and attorneys' fees. In addition to civil liability, the Fair Labor Standards Act ("FLSA") and many states provide for separate civil/administrative penalties, criminal fines, and even imprisonment for failing to pay earned wages. *See, e.g.*, 29 U.S.C. § 216(a) (providing for a fine of up to \$10,000 and imprisonment of up to six months for a willful violation). Criminal prosecution under these statutes to date has been rare, but cannot be ignored. Additionally, corporate officers may be individually liable for violations.
- Benefits: Non-Employees determined to be employees can claim entitlement to benefits offered to employees. Benefit-related claims can come as high-stakes class actions involving double damages and attorneys' fees under ERISA. Welfare and "fringe" benefit plans such as life insurance, long-term disability insurance, can also carry risk.

Best Practices for the Use of External On-Demand Human Resources: *Risk and Liability – Areas of Potential Risk*

- Internal Revenue Service (“IRS”) and Tax Issues: The secondary employer would be responsible for back withholdings for payroll for Non-Employees determined to be employees.
- Affordable Care Act: If determined to be common law employees, and the individuals work for 30 hours or more per week and the secondary employer failed to offer health coverage by the first day of their fourth month of employment, the secondary employer could be responsible for a \$2,300 excise tax per full-time employee (including those offered health coverage).
- Discrimination, EEO, and Leave Laws: the secondary employer could face liability under employment-related laws, including for discrimination and harassment, and unpaid vacation and medical leave. Under certain state laws, corporate management can be held individually liable.

Best Practices for the Use of External On-Demand Human Resources: *Risk and Liability – Areas of Potential Risk*

- Organizing Risk: Based on the NLRB's current legal landscape, there is heightened risk that the secondary employer would be considered joint employer of staffing agency workers, workers could join existing unions, the secondary employer would be obligated to bargain with a vendor's organized employees, and would, in turn, lose significant operational flexibility.
- Increased Enforcement: The U.S. Department of Labor could increase audits of secondary employers to address classification and wage issues. The IRS could similarly increase audits of secondary employers.
- State-related employment laws: the secondary employer could face significant penalties for failing to pay workers' compensation, unemployment insurance, and other premiums/contributions for Non-Employees deemed to be employees.
- Immigration Risk: Failure to properly engage in immigration compliance. Secondary employers can face both civil and criminal penalties.

Best Practices for the Use of External On-Demand Human Resources: *Guidelines for External Resources*

- Typical US arrangement for use of external resources

Engaging for...	Engaging External Workers	Engaging Vendors
Turnkey Services	Never hire an external worker for a turnkey need	Only hire vendors from company's preferred vendor list who meet specific financial, quality, and security criteria. <i>Criteria: Preferred Vendor Provider List, RFP process, and rules for interacting with external workers apply</i>
Discrete Project Services	Rules for retaining external workers apply. Engagement duration limited. <i>Criteria: Decision Tree, Duration of Engagement, and rules for interacting with external workers apply</i>	Only hire vendors from company's preferred vendor list who meet specific financial, quality, and security criteria. Engagement duration limited. <i>Criteria: Preferred Vendor Provider List, RFP process, and rules for interacting with external workers apply</i>

- No External Independent Workers
- Limited External Vendor Workers from Preferred Provider List
 - Turnkey Services – duration of contract set by purchasing; unlimited duration of worker engagement
 - Discrete Project Services – time-limited duration of contract and worker engagement
- Adherence to rules regarding manner and method for interacting with external workers

Best Practices for the Use of External On-Demand Human Resources: *Preferred Provider Criteria*

- Preferred Provider Criteria includes three components:
 - (1) Due Diligence to understand nature of business, including: company history, geographic reach, org structure, client portfolio, financial ratios, product track record, litigation history, and compliance processes.
 - (2) Terms of Engagement to create norms of the partnership that can be enforced effectively, including: talent tenure tracking, people management requirements which puts onus on vendor, internal policy revision frequency, market-based bill rates, secondary employer-favorable indemnification.
 - (3) On-Going Support that outlines expectations for relationship support, in the following categories: influence over product roadmap, logistical performance, technical support, and relationship support model for communications with secondary employer.

Joint Employer at the NLRB

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Why You Should Care: Consequences of Joint Employer Status

- Union Organizing and Collective Bargaining
- Unfair Labor Practice Liability
 - *Union/non-union impact*
- Impediments to Cancellation or Failure to Renew Contracts
 - *Malbaff doctrine is marginalized*
 - *Union/non-union impact*
- Picketing and Secondary Boycotts

The NLRB and “Joint Employer” Status - History

1. TLI (1984)/Laerco (1984)/Airborne Express (2002): **Standard for a joint employer is based on “direct and immediate” control**
2. BFI (2015): **NLRB expands joint employer beyond “actual” control**
3. Hy-Brand I & II (Dec. 2017/Feb. 2018): **The pendulum swings back and forth**
4. NLRB Rulemaking (April 2020): **Restores the pre-BFI standard**
5. BFI (2020): **Reversed on remand**

The NLRB's Prior Joint Employer Standard

Same test
for
30 years

Whether one entity meaningfully affects and exerts sufficient ***actual control*** over the essential employment conditions of another entity's employees.

Do the two entities "share or codetermine those matters governing the essential terms and conditions of employment"?

Browning-Ferris Industries (2015)

Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island
Browning-Ferris Industries of California, Inc., d/b/a Leadpoint Business Services, and
Browning-Ferris Industries of California, Inc., d/b/a Leadpoint Business Services, and
Browning-Ferris Industries of California, Inc., d/b/a Leadpoint Business Services, and

Basic Concepts . . .

- (1) A company/client and vendor (or other entities) will be a “joint employer” **if one entity “codetermines”** what the NLRB considers **“essential terms and conditions of employment”** affecting the other entity’s employees
- (2) NLRB in BFI **expanded** “joint employer” status . . . in three big ways:
 - Vendor/Client will be joint employers – even if they never exercise joint control – if possible joint control is **merely “reserved” in contracts**
 - Vendor/Client will be joint employers even if potential (reserved) joint control is never direct, and is **merely “indirect”** (e.g., contract pricing affects wages)
 - Vendor/Client will be joint employers even if potential (reserved) joint control never affects fundamental employment issues (e.g., hiring/firing), but merely affects **“limited and routine” matters** (e.g., day-to-day schedules or staffing)

Browning-Ferris Industries (2015)

Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island
BFI LLC d/b/a Leadpoint Business Services, and
BFI Overhead

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Joint Employer Regulation, Codified at 29 C.F.R. Part 103 (effective Apr. 27, 2020).

- In order for one business to be considered a *joint employer* of the employees of another business, the first employer “must possess and exercise substantial direct and immediate control” over one or more “essential terms or conditions of employment”
- The regulation defines and discusses the key concepts of *direct control* and *essential terms*, and their interrelationship
- Board returns to a pre-2015 type analysis under which control exercised by an employer must have a *meaningful* impact on the employment relationship

Direct and Immediate Control Over Essential Terms and Conditions of Employment

- “Direct and immediate control” means control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer’s employees. Such control is not “substantial” if it is only exercised on a sporadic, isolated, or *de minimis* basis.
- Redefines essential terms to an expanded but specific list: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.
- “The Board has also modified the [] rule to factor indirect control over essential terms or conditions of employment, contractually reserved control over essential terms or conditions of employment, and control over mandatory subjects of bargaining other than essential terms and conditions of employment into the joint-employer analysis, “*but only to the extent [they] supplement[] and reinforce[] evidence of the entity’s possession or exercise of direct and immediate control over a particular essential term and condition of employment.*”
- Joint employer status cannot be based merely on indirect control or a reserved right

The NLRB in 2021 and beyond



The Biden NLRB – c. September 2021

Republicans		Democrats			Democrat
					
John F. Ring	Marvin Kaplan	New Member	Chairman Designated 1/21/2021 Lauren McFerran	New Member	AGC Peter Ohr or New GC (four-year term)
(end of term 12/16/2022)	(end of term 8/27/2025)		(end of term 12/16/2024)		
Board Members					General Counsel

Back To the Future: A Return To the 2015 BFI Standard?

- Some version of the standard introduced in the 2015 BFI decision or a similar, more expansive standard likely will return in the next four years
- Rulemaking to change rulemaking
- Rulemaking process could begin after the balance of power at the NLRB shifts, as early as September 2021
- Miscimarra analysis – 527 days on average for a rule to be proposed, considered, and issued under the process
- Preparation for anticipated change in standard – risk analysis

Examples of Risk Factors

- Right to reject applicants or remove workers from property
- Drug and alcohol testing
- Caps on contractor's wages or labor cost increases
- Right to approve/authorize overtime
- Scheduling of hours of work or breaks
- Specification of number of workers to be employed
- Training of contractor's employees
- Monitoring productivity or dictating speed of work
- Detailing work assignments or tasks to be performed
- Promulgating work rules or preferred work practices

Steps to Reduce Risk

- Remove latent right to control language from contracts
 - If there is no overriding business reason for the language
 - Or if the language is contrary to actual practice
- Avoid specific caps on labor costs
 - Consider alternatives to cost-plus arrangements
 - Quantify cost/price in other ways
- Minimize direct or indirect control over methods or means to accomplish work
 - Using contractor as intermediary still carries risk
 - Contractor should determine details of performance
- Balance risks presented by responsible contractor policies or audits
 - Labor law risks vs. employment law and PR risks

Benefits Issues for On-Demand Workers

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Who is the Employer Under the Code?

- The Internal Revenue Code (the Code) also requires a determination of employer status
- Focus is on worker classification, which continues to be an IRS enforcement priority
- Common law test is organized into three broad categories with multiple factors to be considered under each:
 - **Behavioral:** Does the business owner control or have the right to control what the worker does and how the worker does his or her job? Does the owner set the worker's hours? Does the owner oversee the work and the worker's performance or is the work project based and autonomous?
 - **Financial:** Are the business aspects of the worker's job controlled by the business owner? Who has the risk of loss: the business owner or the worker? How is the worker paid: upon completion of the project or ongoing as services are performed? Does the business reimburse the worker's expenses or are they the responsibility of the worker? Does the worker provide his/her own tools/supplies, etc.?
 - **Type of Relationship:** Are there written contracts or employee type benefits such as pension plan, insurance or vacation pay? Will the relationship continue and is the work performed a key aspect of the business?

Not Necessarily the Same Employer Under the NLRB/DOL Rules

- Situations where an individual is an employee under the Code, but not NLRB/DOL rules
 - As recipient organization, should try to align/adjust relationship to avoid complexity
 - Consider excluding individuals from participating in benefit plans based on organization's classification (even if later reclassified), in light of this complexity

Leased Employees

- “Leased Employees” are treated as if they are employees for many benefit plan purposes under the Code – but not others
- What is a “Leased Employee?”
 - Not an employee of the recipient organization
 - Providing services are pursuant to an agreement between the recipient and a leasing organization
 - Provided services to the recipient on a substantially full-time basis for at least a year
 - During any consecutive 12-month period, either:
 - Performed at least 1,500 hours of service for the recipient; or
 - Performed at least 75% of the number of hours of service customarily provided by an employee of the recipient
 - Performed services under primary direction or control of the recipient

Special Rules for Leased Employees

- Service Crediting
 - For vesting and eligibility, but not necessarily benefit accruals
 - Can limit exposure by excluding Leased Employees from eligibility under the Plan
 - For retirement plan purposes – defined benefit and defined contribution – but not retiree medical
- Coverage and nondiscrimination testing
 - Must be included in coverage test
 - Exception/safe harbor if:
 - Leasing organization maintains a money purchase plan meeting certain requirements (rare), and
 - Leased employees are less than 20% of recipient's non-highly compensated workforce
 - If not excluded, as a class, from plans, then would be included in other nondiscrimination tests (e.g., ADP/ACP testing)
 - Also counted for welfare plan testing purposes (e.g., Code section 105(h) and 125 testing)
- Limits on contributions, benefits, and compensation
 - Recipient treated as having paid compensation and contributions to leasing organization's plan (if any)

Leased Employees Are Not Employees for Purposes of ERISA

- Providing benefits under a welfare plan may trigger an inadvertent multiple employer welfare arrangement (MEWA)
 - Additional reporting requirements – e.g., Form M-1
 - Subject to state regulation
 - Variety of requirements – some treat as if organization is an insurer
 - New reporting and other requirements being developed
 - Can be practically impossible to comply
 - Often easier for insured vs. self-insured benefits, but depends on states and benefits at issue
- Some welfare benefits to be wary of
 - Onsite clinics
 - Employee Assistance Programs (EAPs)
 - COVID testing? Vaccines?

Other Ways to Engage Variable & On-Demand Workers

- Gig workers/ad hoc freelancers
 - But see back to classification issues above
- “Phased” retirement and rehiring retirees
 - But consider impact on retirement benefits – including distributions from both qualified and nonqualified plans
 - “Bona fide” termination
 - Suspension of benefits
 - Code section 409A separation from service

Other Ways to Engage Variable & On-Demand Workers

- Part-time workers
 - But if use for long periods, new “long-term part-time employee” rules
 - Apply to those who
 - have worked at least 500 hours in each of the immediately preceding three consecutive 12 month periods, and
 - have reached age 21 by the end of the three-year period
 - Must allow them to make elective deferrals into 401(k) plan
 - Deferrals only - does not require matching or other employer contributions
 - Participation must by the earlier of:
 - the first day of the plan year following completion of age and service requirements, or
 - 6 months after completion of age and service requirements
 - Special nondiscrimination and top-heavy testing relief available
 - Counting hours for service towards eligibility began 1/1/21
 - Service towards vesting is required retroactively

Questions?

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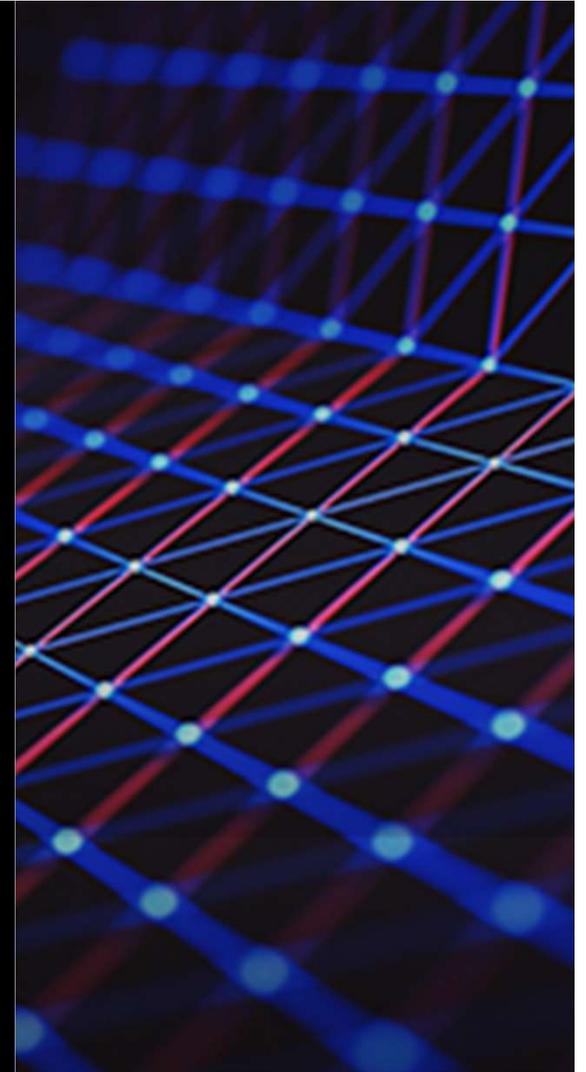
Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



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