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Daily Journal

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Labor & Employment

**Rising tide of joint
employer lawsuits**

Profiles of California's Top Labor and Employment Lawyers

EDITORS' NOTE

Who's an employer? That is one of the most significant questions to emerge in the past year. Whether in the context of franchised operations, independent contractors or staffing agencies, businesses across the country are puzzling over how regulators and courts will draw the line amid tectonic shifts in the global economy. Should companies distance themselves from franchisees, or start paying more attention? Some employers breathed a sigh of relief in August 2014 when the California Supreme Court said in a 4-3 ruling that Domino's Pizza isn't liable for alleged harassment of a franchisee employee. But — just days earlier — the National Labor Relations Board decided that McDonald's is jointly liable for the labor violations of its franchise operators. Can courts force ride services to provide regular benefits or basic employment protections? In March, a pair of rulings in the Northern District of California called into question the business models of Uber and Lyft, two highly successful ventures to emerge out of Silicon Valley. They and other sharing economy businesses have created legions of what might be called micro-entrepreneurs — independent contractors who are in control of their schedules but who, at the same time, are often on call around the clock, working piecemeal to earn a living wage. For the lawyers on the Daily Journal's list of top practitioners in California, employment has been and will remain one of the busiest areas of the law. Their accomplishments continue to boost the state's influence over the rest of the country. In reviewing hundreds of nominations from law firms, alternative dispute resolution providers and others, we sought to recognize work that is having a broad impact on the legal community, the nation and society. We honor the best of them in these pages.

LABOR & EMPLOYMENT

ATTORNEYS IN CALIFORNIA

PROFILES CALIFORNIA'S TOP LABOR AND EMPLOYMENT LAWYERS

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ERIC AMDURSKY 6 O'Melveny & Myers LLP	KRISTINA LAUNEY 22 Seyfarth Shaw LLP	DAN STORMER 36 Hadsell Stormer & Renick LLP
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COVER STORY

Joint employer suits are on the ascent

By Matthew Blako DAILY JOURNAL STAFF WRITER

Curtis Johnson's job is to transport dead bodies and other human remains from where a person died to a funeral home.

Johnson sued his employer, Serenity Transportation Inc., for alleged labor law violations. He also tacked onto the suit his employer's employer, Service Corporation International, a multibillion dollar funeral services company that is headquartered outside of Houston and uses Serenity Transportation as a labor contractor.

With a revised complaint filed in April by Peter Rukin at Rukin Hyland Doria & Tindall LLP, Johnson's putative class action is part of a trend in which workers sue not just their immediate employer — often a subsidiary, subcontractor or staffing agency — but also a parent company or joint employer. *Johnson v. Serenity Transportation Inc. et al.*, RG14-728931 (Alameda Co. Super. Ct., filed April 9, 2015).

A newly enacted California law combined with recent court decisions suggests "there is going to be a lot more joint employer litigation in the future," according to R. Brian Dixon, co-chairman of the wage and hour practice group at Littler Mendelson PC, reshaping employment lawsuits and perhaps forcing major corporations to set up new legal and

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CONGRATULATIONS DAVID & DADDY!

The deRubertis Law Firm, APC congratulates David M. deRubertis for his continued recognition by the Daily Journal as one of California's Top Labor & Employment Lawyers.

The deRubertis Law Firm, APC also welcomes Alyssa Schabloski as the newest member of our team.

The deRubertis Law Firm, APC handles virtually all types of employment-related matters on behalf of employees (including serving as "eve of trial" trial counsel), catastrophic personal injury and wrongful death matters, and contingency business and civil litigation matters statewide.

*Congratulations to our Daddy for being the coolest trial lawyer ever!
We are so proud of you and love you very much!
Love Chloe & Dylan*

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operational barriers with their subsidiaries to escape litigation.

Just in the past year, class actions have settled favorably for plaintiffs alleging joint liability against Wal-Mart Stores Inc. and West Coast port terminal operator SSA Marine Inc.

Decisions on the horizon include whether McDonald's Corp. is responsible for wage and hour allegations against individual franchisees. *Ochoa et al. v. McDonald's Corp. et al.*, CV14-2098 (N.D. Cal., filed May 7, 2014).

Plaintiffs' lawyers like Rukin stated that joint employer complaints "are in response to the continued fissuring of responsibility and obligation" from employers, and confront, according to Theresa M. Traber of the Law Offices of Traber & Voorhees, "layers of insulation" employers erect to evade accountability.

Traber is the plaintiffs' lawyer in the Wal-Mart case.

Defense lawyers counter the complaints are a solution in search of a problem, a trendy issue whose prevalence is exaggerated by unions and pro-labor politicians as federal labor statistics show no spike in the number of California subcontracted jobs over the last several years.

AB 1897, creating automatic legal liability for the parent company of a labor contractor that commits wage and hour violations, resulted from fierce lobbying by unions like the International Brotherhood of Teamsters, noted Jeffrey M. Tanenbaum, a partner at Nixon Peabody LLP.

"Unions find it more difficult to orga-

nize temporary workers so they want to minimize or potentially eliminate their use," Tanenbaum said.

Barbara J. Miller, a partner at Morgan, Lewis & Bockius LLP, said AB1897 — enacted Jan. 1 — is part of Gov. Jerry Brown's administration being "particularly concerned about this idea of an underground workforce that is not getting paid minimum wage."

Another common complaint is that plaintiffs' lawyers are nakedly opportunistic in looking for deep-pocketed joint employers.

C. Joe Sayas, a plaintiffs' lawyer at The Law Office C. Joe Sayas, said he added parent company SSA Marine to a lawsuit settled in May regarding West Coast port truck drivers largely out of fear the initial defendant, trucking company Shippers Transport Express Inc., would go bankrupt.

The settlement included \$11.4 million for the drivers, and their reclassification as employees from independent contractors — enabling the workers to join the Teamsters union. *Taylor et al. v. Shippers Transport Express et al.*, CV13-02092 (C.D. Cal., filed March 12, 2013).

Regardless, it is not just politicians, unions, and plaintiffs' lawyers who are receptive to the idea of joint employer liability. Both federal and state court judges made major recent rulings favorable to workers.

Winding down now is a class action against Wal-Mart, Schneider Logistics Inc. and Schneider subcontractors Impact Logistics Inc. and Premier Warehouse Ventures LLC filed on behalf of 2,397 workers at Wal-Mart's Riverside County distribution center warehouse. *Carillo et al. v. Schneider Logistics Inc. et al.*, CV11-8557 (C.D. Cal.,

filed Oct. 17, 2011).

U.S. District Judge Christina M. Snyder preliminarily approved in May a \$21 million settlement in the case on top of prior settlements reached with Impact and Premier.

Crucially, the settlement came after Snyder denied summary judgment for Wal-Mart's motion that they were not responsible for the many labor law violations alleged by plaintiffs at the Mira Loma warehouse.

Key evidence against Wal-Mart included the fact that even though the company did not hire or fire the workers, it owned the distribution center and controlled the workforce enough that it provided performance metrics Schneider had to meet.

The Carrillo case "will open the door to more lawsuits" said Tanenbaum, as more workers and lawyers see the size of the settlement.

Meanwhile, a 2nd District Court of Appeal decision last year found that a corporation with no employees, The Ensign Group Inc., was responsible for any unpaid overtime wages at the corporation it owned that had employees, Cabrillo Rehabilitation and Care Center. *Castaneda v. The Ensign Group Inc. et al.*, 239 Cal. App. 1015 (Sep. 15, 2014).

Castaneda was the first state court case to find that "a parent company cannot avoid wage liability with respect to its wholly owned subsidiary," according to Bryan Schwartz of Bryan Schwartz Law.

While these decisions lay the groundwork for more complex joint liability cases involving, for instance, three layers of employers or unusual business models, AB1897 specifically makes it easy for plaintiffs' lawyers to show joint responsibility in wage and hour

claims involving staffing companies.

"Certainly the possibility of more litigation from the legislation is easy to see," said Miller of Morgan Lewis. "The more interesting piece will be whether it actually impacts the relationships between companies and vendors and changes the behavior of companies who need a more flexible workforce."

Dixon of Littler Mendelson said companies would now pay more money "for sophisticated contractors" they can trust not to stiff workers, thanks to the legislation and recent court decisions.

"Employers don't want to deal with having more control," Dixon said. "The basic impetus of contracting something out is not just to save money but to outsource something the company doesn't have the time or expertise to manage."

One way employers might work around joint liability are indemnification provisions, according to Sandy Rappaport of Hanson Bridget LLP, as AB1897 does not prohibit a parent company from drawing up contracts indemnifying it from contractor misdeeds.

Plaintiffs' lawyer Traber also said that indemnification provisions are a tool parent companies may increasingly use.

No complaints are known to have been filed so far that specifically cite AB1897, though some lawyers predict after an educational period it could become the claim de jour of the plaintiffs' bar.

Referring to the now ubiquitous Private Attorney General Act of 2004, Rukin said, "PAGA also wasn't used a lot when it was first introduced."

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LABOR & EMPLOYMENT

Mary-Christine ("MC") Sungaila

FIRM

Snell & Wilmer LLP

CITY

Costa Mesa

SPECIALTY

Civil appellate litigation



Sungaila's state Supreme Court victory on behalf of client Domino's Pizza LLC allowed franchisors operating throughout California to breathe a sigh of relief. The court determined that setting rules for franchises regarding brand management did not make the franchisor an employer that was vicariously liable for sexual harassment by a franchisee.

"In California, this was the very first franchise case the California Supreme Court ever decided. ... Until this case in the Court of Appeal, there was one case I think from the '70s."

For Sungaila, the alternative decision would

have had deep impact on California. A number of franchises filed amicus briefs in this case, which demonstrated to the court that this was a concern to companies that operate with the franchise model. *Patterson v. Domino's Pizza LLC*, 2014 WL 4236175 (Cal. Aug. 28, 2014).

In April, Sungaila won a motion to dismiss on behalf of James John Liautaud, CEO and founder of Jimmy John's Franchise LLC. A class of assistant managers alleged that the tight control that Liautaud has over Jimmy John's Sandwich Shops made him a co-employer. They filed suit against Liautaud as well as Jimmy John's Franchise LLC alleging violations of the Fair Labor Standards Act and Illinois's

Minimum Wage Law.

U.S. District Judge Charles P. Kocoras ruled that Liautaud's control over franchisees does not establish that he has control over the conditions and terms of employment of the franchisee's employees. The judge also dismissed a claim seeking declaratory relief that the confidentiality and noncompete agreements signed by the named plaintiffs was overly broad. Kocoras cited *Patterson* as persuasive authority in the order. For Sungaila, it was exciting to see that the case is having an impact outside of California.

— Hetert-Qebu Walters