

# **CONTINGENT RIGHTS:**

## **THE LEGAL LANDSCAPE FOR NONSTANDARD WORKERS IN CALIFORNIA**



**National Employment Law Center & The Center on Policy Initiatives**

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# **Contingent Rights: The Legal Landscape for Nonstandard Workers in California**

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## **ABOUT THIS REPORT**

**The National Employment Law Project** advocates on behalf of low-wage workers, the poor, the unemployed and other groups that face significant barriers to employment and government systems of support through litigation, policy advocacy, public education and support for organizing around economic justice issues. NELP's initiatives focus on welfare reform and workforce development programs, contingent and low-wage immigrant work, the unemployment insurance (UI) system, and policies balancing work and family responsibilities. NELP works in alliance with a broad network of grassroots organizations, advocacy groups and national constituency-based organizations. Working in tandem with these groups, NELP is committed to developing shared strategies to challenge regressive welfare policies, the exploitation of immigrant workers, the expansion of contingent work, and the many other new labor policies that continue to undermine the job security, wages and working conditions of all low-wage workers.

**The Center on Policy Initiatives** was established in 1997 to promote higher standards of living for poor and moderate-income families through research, policy development, public education and effective advocacy. CPI focuses on research and policy development that address structural factors and issues crucial for linking community and regional economic development.

The Center believes a fair economy is one in which economic opportunities are universally accessible. Specifically, a healthy community is one that offers good jobs, democratic workplaces, affordable health care, quality childcare, affordable housing and secure retirement benefits

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# **EXECUTIVE SUMMARY**

The rise in the number of nonstandard workers results from major changes in the United States economy, its business practices, and labor market dynamics. It affects millions of workers in very significant ways: from their job security, to their access to and portability of benefits, to their training and career advancement, to their protection under labor, employment and discrimination laws, and finally, to the wages they take home each week. Staffing strategies that use subcontracted or contingent work – strategies that once characterized only some low-wage workers such as garment and agriculture – have now spread to virtually every area of industry, including high technology and finance.

Unlike in other countries, social welfare and worker protective laws in the United States generally protect only those workers who are classified as “employees.” Thus, workplace benefits, such as unemployment compensation, workers’ compensation and Social Security retirement benefits, are available only to those who fit the specific definition of “employee” under a particular law. Entitlement to a myriad of workplace rights, including the protections of wage and hour laws, health and safety laws, discrimination laws and the right to organize and collectively bargain, also hinges on a specific definition of “employee.”

California has nearly two million workers employed in some form of nonstandard work. Depending on the category of nonstandard worker, California contains between fifteen and twenty percent of all nonstandard workers in the country.<sup>1</sup> In 1999, 12.1 percent of the California workforce was employed in nonstandard work, compared to 9.15 percent of the country.<sup>2</sup>

The number of jobs in one sector of the contingent workforce, the temporary help industry, more than doubled in the period 1991 through 1998, at a time when the number of jobs overall in California grew by just ten percent.<sup>3</sup> In California, as in other states across the country, employers stand to save between fifteen and thirty percent of payroll costs when they use labor intermediaries, rather than hiring workers themselves directly.

California has nearly two million workers employed in some form of nonstandard work. Depending on the category of nonstandard worker, California contains between fifteen and twenty percent of all nonstandard workers in the country.<sup>1</sup> In 1999, 12.1 percent of the California workforce was employed in nonstandard work, compared to 9.15 percent of the country.

In a study of misclassification of workers as independent contractors, California rated first among all states studied in the proportion of workers misclassified as independent contractors for purposes of unemployment compensation.<sup>4</sup>

As in other states, contingent workers in California frequently fall behind their non-contingent co-workers in terms of wages and benefits. Many industries that rely heavily on contingent workers have also been identified as frequent abusers of wage and hour and other laws. This report is called “Contingent Rights,” because, as will be seen, enforcement of the labor rights of these

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nonstandard workers is contingent on many things: the terms of the law, the courts, the will of the agencies that enforce their rights, and the sophistication of their employers in evading the law.

This report focuses on the definitional issues that determine whether or not a particular worker laboring in a particular industry is protected by a particular labor and employment law. It includes a general overview of the main areas of California law that protect workers, our specific findings and some recommendations for the state of California.

### **SPECIFIC FINDINGS**

#### **Gaps in California law.**

This report makes the following findings regarding gaps in the labor and employment law protections of workers:

- California’s laws use different definitions of “employee” for different state laws. Unscrupulous employers can more easily misclassify workers as “independent contractors” where definitions are narrow.
- California courts have never applied the broad definition of “employee” under wage orders adopted by the California Industrial Welfare Commission. There is good reason to believe that California legislators intended that the most liberal standard, that of “suffer or permit” to work, be the governing standard under the wage orders.
- California unemployment compensation law uses a test for employee status that can be easily manipulated by employers wishing to designate their workers as “independent contractors.” In fact, a study commissioned by the US Department of Labor found that, among the states studied, California had the most frequent misclassification of workers, involving nearly thirty percent of audited firms.
- Industry-specific “special” UI rules regarding the temporary help industry mean that when it comes to qualifying for UI benefits, temp workers are subjected to more stringent standards than other workers. Additionally, the transfer of UI payroll taxes from worksite employers toward a temporary help agency has an ill effect on the experience-rated system and on the balance of employers who must pick up the tab.
- Although the California discrimination law generally protects “persons<sup>5</sup>,” the state agency enforcing the law uses its own definition of the term “employ” under the Act. California courts have never directly addressed the definition of this term.
- It is not clear that joint liability of the worksite and labor intermediary employers can be established under the California discrimination law.

#### **Advances under way in California:**

California advocates are already making important efforts to protect contingent workers. These include:

- Establishment of a Joint Administrative Task Force intended to discover misclassification of workers by their employers.
- Several legislative proposals intended to address the inequities for temporary and subcontracted workers under the unemployment compensation system;
- A “responsible contracting” bill that would have covered subcontracting in agricultural, garment, construction, janitorial and security guard industries, but was vetoed in 2002;
- Some of the country’s most successful organizing campaigns around contingent work and contingent workers, in the home health care, garment and janitorial sectors.
- A newly commissioned study of underreporting of workers’ compensation premiums in the taxi industry.

There are many remaining challenges faced in California and elsewhere around the country. What is needed is a strategy that combines several approaches, including legislative and administrative changes, litigation, community and labor organizing in a way that protects workers across industries and in many contexts.

## **SUMMARY OF RECOMMENDATIONS**

The complexity of issues surrounding misclassification of workers as “independent contractors” and the use of labor intermediaries invites a strategy involving legislative policy, litigation, and organizing campaigns. Advocates in California have already passed and proposed legislation, litigated cases, and engaged in organizing campaigns that have made a difference. This paper acknowledges those changes and suggests other approaches that may close some of the gaps identified in the Summary of Findings noted above. Although we focus on policy changes, these cannot be divorced from the many successful organizing campaigns that have improved, and will continue to improve the lives of nonstandard workers in California. The changes that we suggest can be part of this overall strategy.

### **Legislative changes:**

A comprehensive proposal that advocates should consider is whether there is one statutory model that could be applied universally. For the test of “employment,” adoption of the “suffer or permit” test should be considered.

A proposal that would apply joint employment rules to all labor protective laws would harmonize the law and ensure that the true workplace employer does not escape liability through the use of a labor intermediary. Language specifying that a worksite employer is not relieved of employer status by contracting out would achieve this result. Additionally, California could consider legislation that would penalize engaging in various types of conduct that undermines labor protections: terminating an employee, limiting the term of his or her employment, or misclassifying an employee to avoid compliance with labor and employment laws.



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A slightly less comprehensive proposal, focused on particular industries that abuse subcontracting, was embodied in the 2002 legislative proposal on “responsible contracting,” vetoed by Governor Davis.

California should take a different approach for the purposes of provisions that require the payment of taxes and involve experience rating, including the workers’ compensation and unemployment compensation laws. Statutory changes such as those proposed for unemployment compensation and adopted for workers’ compensation, that make certain that experience ratings for taxes are properly assigned, should be expanded to other industries.

California should consider pay equity legislation that would make it illegal to pay less in wages and benefits after a worker has been employed for a specific period of time and include automatic conversion to permanent work.

California should re-regulate its temp industry. The employment agency law should be amended to cover all employment agencies without regard to whether they charge a fee to the client company or the worker. The framework of the employment agency law – including bonding requirements, record keeping mandates, agency fee limitations, and other industry standards – should apply to all temporary placement firms and be expanded as necessary to respond to current abuses. In addition, agency enforcement roles should be clarified, and workers given a clear mechanism for agency enforcement of their rights.

### **Agency enforcement:**

California’s Employment Enforcement Task Force, whose job it is to identify misclassification among employers, is a model for the country. The work of the task force should be continued and expanded, and additional sectoral studies, such as that recently commissioned for the taxicab industry, should be considered.

Search for ways in which state agencies can, in an efficient manner, use existing tax reports to track down abusers of the system.

### **Private Litigation:**

This report has identified several areas in which litigation might achieve a result that would expand workers’ access to the protection of labor laws. These areas include:

- Clarify “suffer or permit” standard for proof of “employee” status under wage and hour laws;
- Joint employer liability under unemployment compensation laws; and
- Clarify a broader definition of employee and joint liability under FEHA.



## **INTRODUCTION**

The term “nonstandard” (or “contingent”) worker comprises a large and increasing number of persons whose employment relationships are distinct from the traditional pattern of full time, permanent employees. In this study, the term “nonstandard” worker comprises workers in the following situations:

- Workers employed on a part-time or intermittent basis, including casual or seasonal workers, day laborers, and on-call workers;
- Independent contractors, especially misclassified and involuntary “independent contractors;” and
- Workers paid by a labor intermediary, including staffing agencies, day labor agencies, labor contractors, or contract companies.

The rise in the number of nonstandard workers results from major changes in the United States economy, its business practices, and labor market dynamics. It affects millions of workers in very significant ways: from their job security, their access to and portability of benefits, their training and career advancement, their protection under labor, employment and discrimination laws to the wages they take home each week. Staffing strategies that use subcontracted or contingent work – strategies that once characterized only some low-wage workers such as garment and agriculture – have now spread to virtually every area of industry, including high tech and finance. Here are some examples of the abuses in this system:

- “Independent contractor” janitors in Los Angeles pay larger contractors for the privilege of cleaning certain floors in buildings managed by yet another corporate interest on behalf of the building owner, and in some cases even subcontract out sections of floors to other family members or individual workers.
- In the California strawberry fields, some farm workers are characterized as independent business people investing in growing a crop on their own plot of land. The reality is that they are sharecroppers. They tend a small portion of a corporate farmer’s land, having virtually no opportunity for real profit (despite much downside risk), and virtually no autonomy to exercise independent judgment because that might jeopardize the marketability of the farmer’s crop.
- Labor intermediaries, such as farm labor contractors, are commonly used in California agriculture. A University of California study found that two-thirds of employers using contractors were paying fees so low that mandatory taxes and benefits, such as social security, workers’ compensation and unemployment compensation deductions, could not be paid and the workers still be paid minimum wage.
- In the home health care industry in Los Angeles, prior to a successful organizing drive, health care workers were treated as independent business people with no “employer,” despite the economic powerlessness of their position and the obvious fact that they worked for someone else.

- A survey by the Coalition for the Humane Rights of Immigrants and Refugees of Los Angeles (CHIRLA), found more than 9,000 domestic worker agencies operating in five counties throughout southern California. Weekly pay for the domestic workers referred by the agency averaged just \$150 for six days of work, with many reports of violations of wage and hour laws.<sup>6</sup>
- In a rare investigation of Los Angeles garment factories, the US Department of Labor found that 67 percent of garment factories violate wage and overtime laws, and that 98 percent of the factories violate health and safety laws. Of the 5,000 factories investigated, DOL found that nearly 1400 workers were owed nearly \$900,000 in wages.<sup>7</sup>

Nonstandard work must now be recognized as a permanent – and growing – feature of the new economy. As such, it is important to examine labor-protective laws in order to determine where subcontracted workers are left out of legislation, and how they might be re-included.

Because compliance with workplace benefits and workplace rights laws costs employers money, they have a financial incentive to disclaim “employee” status, or to “contract out” for employee status with another entity. It has been calculated that employers save from fifteen to thirty percent of payroll costs by treating workers as non-employees. In addition, denying employee status avoids the administrative costs and the loss of control that result from the need to pay lawful wages and to comply with discrimination, health and safety, and other laws.

Across the country, employers have been able to flout labor laws and to skate around the edges of labor protections because of two things: 1) the definition of “employee” differs in different laws; and 2) existing protections are unenforced. This paper will review major California labor and employment laws in order to determine the most appropriate areas for advocacy on behalf of nonstandard workers. It will begin with a short data section on the California industries that employ nonstandard workers, and wages and working conditions for these workers. Then it will address two questions under California law: 1) who is considered an “employee” under the law? and 2) Can more than one entity be considered an “employer” under the relevant law (“joint employers”)?

It has been calculated that employers save from fifteen to thirty percent of payroll costs by treating workers as non-employees.

The paper reviews the principal laws protecting workers in California: the California Wage and Hour laws, the California Occupational Health and Safety Act, the Fair Employment and Housing Act, the California Family Rights Act, Workers’ Compensation Act, Unemployment Insurance Code, and the California Agricultural Labor Relations Act. It also reviews two important laws that may protect nonstandard workers, the California Employment Agency law and the California Business and Professional Code’s Unfair Competition Law.

In order to make the analysis more concrete, the authors will include an analysis of four factual scenarios under each law and determine, in at least a loose manner, whether workers in each scenario might be covered under the employment law at issue, as well as who would be considered the workers’ employer.

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Here are the four scenarios:

- “Sharecropper.” Agricultural workers who are assigned a particular strawberry field as “theirs” by the landowner-grower. They must weed and harvest the berries from their field and are paid a share of the proceeds that the grower received from the packing shed. The hours that they work are not formally established, nor is there day-to-day supervision in the field. The workers supply no equipment. The packing shed contracts with the farmer to grow certain varieties of strawberries on which it has patents. The packer owns both the plants and the crop; packer specifies varieties, plants per acre, supervises fertilizing and use of pesticides, and has exclusive marketing rights.
- “Day Laborer.” Day laborers are hired through a temporary service agency and sent out on drywall jobs that last for three days to a week. Temporary service agency sets the wages, subject to its own contract with the worksite employer, pays all payroll taxes, provides transportation to the job, but does not supervise on site. Temporary service agency says that the day laborers are its employees.
- “Computer programmer.” Computer programmer applies for a job at a large technology firm in the Silicon Valley, and then is sent to an employee-leasing agency, which “hires” the programmer, and assigns her back to the technology firm. She works alongside other people who are classified as “employees” of the firm, for an indefinite term of employment. The worksite employer provides all direction and supervision, and sets the hours and method of work.
- “Trucker.” Trucker has leased a truck from a broker after taking a commercial truck driver course. He is paid by the container to move freight from the waterfront. He performs 80 percent of his work for a particular company, but sometimes gets contracts from other companies. In order to get a job, he must line his truck up on the waterfront every morning at 7:30 and remain until he gets a job. He was required by the company to sign a contract saying he is an “independent contractor,” and to purchase a business license.

### INDUSTRIES AND CONDITIONS FOR CONTINGENT WORKERS IN CALIFORNIA.

California has nearly two million workers employed in some form of nonstandard work. Depending on the category of nonstandard worker, California contains between fifteen and twenty percent of all nonstandard workers in the country.<sup>8</sup> In 1999, 12.1 percent of the California workforce was employed in nonstandard work, compared to 9.15 percent of the country.<sup>9</sup> The number of jobs in one sector of the contingent workforce, the temporary help industry, more than doubled in the period 1991 through 1998, at a time when the number of jobs overall in California grew by just ten percent.<sup>10</sup> Between 1995 and 1999, contingency rates fell for the country, but in California, they grew.<sup>11</sup> Temporary jobs were projected to increase by forty three percent in the fifteen largest counties in the state between 1995 and 2002.<sup>12</sup>

Overall contingency rates in California are particularly high for workers under the age of twenty-five, Hispanics and those with low educational attainment.<sup>13</sup> Temporary workers in California are disproportionately female, Black, and young.<sup>14</sup>

In California, rates of nonstandard work are highest in agriculture (15.2 percent), mining (11.5 percent), construction (eight percent) and services (9.2 percent). The business services sector, including software development, advertising agencies, equipment rental and leasing, security services, copy centers and temp agencies, accounts for over fifty percent of all nonstandard workers.<sup>15</sup>

The median weekly wage for all contingent workers was \$440 in 1999, compared with \$673 for workers in traditional work relationships.

Among female temporary workers, 42.2 percent worked in Administrative Support, compared to 24.8 percent of the traditional workforce.<sup>16</sup> Among male temporary workers, twenty four percent of workers were employed in Administrative Support, with Laborer occupations employing 22.9 percent of male temps.<sup>17</sup> The largest projected growth for the years 1995-2002 was expected in Production, Construction and Material Handling occupations.<sup>18</sup>

The median weekly wage for all contingent workers was \$440 in 1999, compared with \$673 for workers in traditional work relationships. It is likely that this median wage overstates wages for many workers, since the general category of nonstandard workers includes some independent contractors in middle-class sectors such as business consultants, real estate agents, and accountants.<sup>19</sup> In one sector of nonstandard work, that of temporary workers, hourly wages are up to 13.5 percent less than the wages of permanent full-time workers in the same industry.<sup>20</sup>

Nonstandard workers are about half as likely as others to be included in a pension plan, only 16.3 percent compared to 38.5 percent of all California workers. For those employed through a temp agency, only 5.9 percent are included in an employer's pension plan. Only 2.2 percent of temp agency workers are included in a health plan, and non have entirely employer-paid plans. By contrast, about fifty percent of California workers have an employer-provided health insurance plan.<sup>21</sup>

## **CHAPTER ONE: LEGAL TESTS**

This section of the report outlines the major California laws protecting workers employed in private industry. It focuses on state law, with references to federal law where appropriate.<sup>22</sup>

The authors answer two questions: Who is an “employee” rather than an independent contractor? And what entities can be held responsible as employers and under what conditions? The second of these questions refers to “joint employment,” where, under some laws, more than one entity, such as a manufacturer of garments and a garment jobber, can each be considered the “employer” of a particular worker and responsible for complying with the law.

California law employs a variety of legal tests to determine whether workers are “employees” or “independent contractors.” The two most frequently used in California are the ten-factor “Restatement of Agency” test and a five-factor “economic realities” test specifically employed by the California courts in workers’ compensation cases. Each of these tests presents its own challenges to workers attempting to make their employers responsible under labor protective laws.

Because different statutes use different tests to determine “employee” versus “independent contractor” status, each of the tests is outlined here.

### *Suffer or permit:*

This test looks at whether the supposed employer knew, or with the exercise of reasonable diligence, should have known of the work. The suffer or permit test implies that liability should be placed on one who controls the overall business where the work performed is integral to that business.

### *Economic realities:*

The economic realities test is more restrictive than the suffer or permit test, but generally considered a broad standard. In many cases, the “economic realities” test has developed as a series of factors applied to statutes that on their face use the “suffer or permit” standard. Under the economic realities test, courts do not always use the same factors to make their analysis. The five economic realities test factors identified in California case law, under workers’ compensation, CalOSHA and minimum wage law, are:

- The alleged employee's opportunity for profit or loss depending on his managerial skill;
- The alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- Whether the service rendered requires a special skill;
- The degree of permanence of the working relationship; and
- Whether the service rendered is an integral part of the alleged employer's business.<sup>23</sup>

### *Restatement of Agency test:*

California’s unemployment compensation regulations, and a precedential decision of the Fair Employment and Housing Commission (FEHC), use factors based on the Restatement of Agency. The unemployment regulations look at the following factors:

1. Whether or not the one performing the services is engaged in a separately established occupation or business.

2. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.
3. The skill required in performing the services and accomplishing the desired result.
4. Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.
5. The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.
6. The method of payment, whether by the time, a piece rate, or by the job.
7. Whether or not the work is part of the regular business of the principal, or whether the work is not within the regular business of the principal.
8. Whether or not the parties believe they are creating the relationship of employer and employee.
9. The extent of actual control exercised by the principal over the manner and means of performing the services.
10. Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.<sup>24</sup>

*Common law "control/right to control:"*

The common law control/right to control is the most restrictive test. It examines whether the putative employer controls, or has the right to control, the manner and means in which work is performed. The Restatement of Agency factors are often applied as a test for determining "control."

As noted, each of these tests presents its own challenges to workers attempting to make their employers responsible under labor protective laws. The suffer or permit to work test is simple and broad, but courts around the country have yet to apply it in the way that it was historically used.

The economic realities test is, in fact, an evolution of the "suffer or permit" test. Economic realities are generally considered the most liberal that is actually in use by courts and agencies. Its disadvantages are that the factors used are not always set in stone, and courts have felt free in the past to add and subtract certain factors, interpret each in the court's own way, and therefore achieve whatever result the court or agency's political leanings would indicate. These decisions are often detrimental to the worker. The five-factored economic realities test listed in this report, and adopted by California court in a workers' compensation case, is the most favorable to workers.

The ten-factored Restatement of Agency test has this same disadvantage. An additional disadvantage is that employers wishing to escape liability can easily manipulate certain factors, particularly using the Restatement test, such as whether they pay by time or by the job, whether they prepare payroll for the workers, whether they provide tools to the workers, whether they require a worker to procure a business license to show that s/he is "in business for herself," and whether they exercise control directly or through an intermediary. In recent past, employers have begun manipulating even the length of time that a worker will be employed, by signing contracts with payroll and leasing agencies that require that workers be terminated after one hundred days of work. It is often stated as a tool to apply the basic common law test of "control."



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Finally, the common law control test, though perhaps simpler than the Restatement test, will almost always dictate that a labor intermediary is the employer of the workers. Where such an intermediary is financially irresponsible, workers are cheated out of important labor protections. In some cases, application of the control test may result in low-skilled, low-wage workers being considered independent contractors.

### *California's Occupational Health and Safety Act*

California's Occupational Health and Safety Act uses a somewhat different approach to the problem of defining employee status. Under it, the "economic realities" test is first used in order to determine whether or not a particular individual is an "employee" or an "independent contractor." Once it is determined that the worker is an "employee," liability is imposed separately on several entities: those on whose property the work is performed, those who exposed the workers, those who created the hazard, and those who had contractual responsibility for ensuring that the hazard was corrected and those who had responsibility for correcting. The law may impose liability on an entity even where its own "employees" have not been exposed to a hazard.

THE FOLLOWING TABLE GIVES A GENERAL IDEA OF HOW EACH WORKER WOULD BE TREATED USING DIFFERENT TESTS.

	<b>Control over the manner and means of work</b>	<b>Restatement of Agency (UI, FEHA)</b>	<b>Borello economic realities (workers' comp, wage-hour, Cal/OSHA)</b>	<b>Suffer or permit (wage-hour (maybe), CFRA)</b>
"Sharecropper."	Likely not the employee of either entity.	Likely not the employee of either entity	Probably the employee of both entities	Yes, of both entities.
"Day Laborer."	Likely employee of temp agency only.	Possibly of temp agency only.	Probably the employee of both entities.	Yes, of both entities.
"Computer programmer."	Possibly the employee of worksite employer only.	Yes, of both entities, but possible for worksite employer to change relationship by changing length of time, method of payment or passing some responsibilities to the labor intermediary.	Probably employee of both entities.	Yes, of both entities.
"Trucker."	Likely not an employee.	Likely not an employee depending on how the employer has defined the relationship.	Probably an employee.	Yes.

## **CHAPTER TWO: EMPLOYMENT LAW ANALYSIS**

In this section, we review in detail each of the major employment law categories in California state law, including wage and hour laws, unemployment compensation law, workers' compensation law, the California Occupational Safety and Health Act, and California discrimination laws, including both the Fair Employment and Housing Act and the California Family Rights Act. For each of the principal questions: "Who is an employee?" and "What entities can be considered employers?" we looked at state law, major case law, regulations and policy, where available, to answer those questions. Each section begins with an "in a nutshell" analysis, which summarizes the conclusions. In addition, each section includes a likely answer to the question of "who is an employee" for each of the four hypothetical workers described above.

### **A. Wage and Hour laws**

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#### **In a nutshell**

**Purpose of the law:** Generally governs wages, hours, working conditions, and timeliness of payments to workers.

**Who is an employee?** No definitive court decision, but California courts would likely apply the economic realities test. Strong argument that more liberal suffer or permit test should be applied directly. For gratuities law, statutory test is slightly different.

**Which entity/entities can be held liable as an employer/joint employer?** California courts will likely apply joint employment test.

*Outcomes for "sharecropper," "day laborer," and "computer programmer." It is likely that workers would be considered employees of both entities. "Trucker" should be able to establish that she is the employee of the freight company, but the freight company would likely argue that trucker has an independent business. Substantial advocacy may be necessary to establish status.*

**Special rules for certain industries:** Garment, agriculture, industrial homework.

#### **1. Who is an employee? Suffer or permit, direct or indirect control, or economic realities?**

The term "employ" is not defined in the California Labor Code. Instead, the California Industrial Welfare Commission (IWC) is empowered to formulate regulations (known as wage orders) governing employment in the State of California.<sup>25</sup>

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The IWC has adopted orders for the following industries and occupations: personal service; canning, freezing and preserving; professional, technical, clerical, mechanical; public housekeeping; laundry and dry cleaning; mercantile; harvest products handling; transportation; amusement and recreation; broadcasting; motion picture; agriculture; agricultural workers; miscellaneous employees; personal service industry; and household occupations. Virtually all of the Industrial Wage Commission's wage orders state that the verb "employ means to suffer, or permit to work." This definition is identical to the definition found in the federal Fair Labor Standards Act, (FLSA), the law that governs minimum wage and overtime pay. The Wage Orders also state that an "employee" is "any person employed by an employer."

"Employer" is defined both in the Labor Code and in the wage orders, as anyone "acting directly or indirectly in the interest of an employer."<sup>26</sup>

*Economic Realities.* California courts have not explicitly adopted a test for determining "employee" status. Federal courts have grafted on to the "suffer or permit" language in FLSA a test to determine whether a worker is considered an "employee." Called the "economic realities" test, it is narrower than the test implied by the language "suffer or permit." A federal court decision has stated that the California courts would both likely use the "economic realities" test and likely find that California law allowed for the concept of "joint employment."<sup>27</sup>

*Suffer or Permit.* There is an argument, under both federal law and California law, that the "suffer or permit" language should be applied directly, rather than with the judicial gloss of the five-factor "economic realities" test. The "suffer or permit" language and test is derived, both in FLSA and in California law, directly from language used in early statutes developed by child labor reformers. Under it, the court asks only if the putative "employer" knew of the work, or with the exercise of reasonable diligence, should have known that it was taking place. It was specifically meant to trump contractual arrangements between businesses and labor intermediaries that avoid "employer" status.

The suffer or permit test focuses on the "employer's" control only in the sense of its control of an entire business operation and its ability to make sure that violations of the law do not take place. It focuses instead on whether the work performed is integral to the employer's overall operation, and includes "joint employer" situations. By contrast, the common law "control" test looks only to the entity that controls the details of the work, often the labor intermediary. In this sense, the suffer or permit test is much simpler and broader than any other test of "employer-employee" status, and would apply to more "joint employer" situations than the other tests would.

### **FOCUS ON: MARTINEZ V. MUNOZ**

Plaintiffs in this case argue for the application of the "suffer or permit" test in an agricultural setting. In *Martinez v. Munoz*, No. CV 001029, the workers argue that a warehouse-landowner is liable for wage and hour violations committed by a grower. In the case, the packing shed exercised pervasive control over the grower's business, advancing costs to cover wages, controlling all marketing decisions, and causing the grower to pick his berries at a loss for most of the harvest, as well as withholding payments owed when it was known that the grower could not make payroll. After an unfavorable decision in June 2002 in the Superior Court in San Luis Obispo County, the case is on appeal.

### ***Special rules for particular industries.***

*Industrial homework.* The California Labor Code on industrial home workers explicitly includes the “suffer or permit” to work definition in the statute.<sup>28</sup> The regulations for industrial homework establish a presumption that persons working in their homes for remuneration on articles to be delivered to another person are employees and not independent contractors.<sup>29</sup> This section is particularly helpful for certain high-tech workers, who, it has been reported, often are asked to take home “mother boards” for assembly, often working with their families to complete the work at night.<sup>30</sup>

The law completely outlaws home manufacture of particular goods, including food, drink, garments, toys and dolls, tobacco, drugs and poisons, bandages and other sanitary goods, explosives and fireworks. The Industrial Welfare Commission is empowered to outlaw homework in other industries.<sup>31</sup> It also requires licensing of any person employing industrial home workers.<sup>32</sup> Industrial homework is completely prohibited in the garment manufacturing business.<sup>33</sup>

*Gratuities law.* One section of the California Labor Code incorporates a slightly different definition of “employer” and “employee” for purposes of establishing that tips are the property of the employee. “Employer” includes every person in service under a contract of hire, and “employee” includes any person rendering service, whether by piece or by hour and whether the service is on a commission or other basis.<sup>34</sup>

*Personal attendants.* Certain “personal attendants” are partially exempted from IWC wage order 15. Baby sitters under age eighteen are exempted. Personal attendant also includes any person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household. The work involved in the exclusion is supervision, feeding or dressing of a child, or elderly or disabled person. A worker is a “personal attendant” only when no significant work other than this is required. Although these workers are covered under the minimum wage and meals and housing provisions, they are exempted from provisions regulating hours worked, record-keeping, uniforms and cash shortages.

## **2. Which entity/entities can be held liable as an employer/joint employer?**

California courts have not ruled on joint employer liability, but the use of the “suffer or permit” language cited above, the interpretation of that language in the child labor portions of the FLSA, and the federal court’s decision in *Burreerong v. Unawas*, 922 F. Supp. 1450 (C.D. Ca. 1996) indicate that joint employer liability is likely to be found, under each of the tests that the courts might apply.

*Burreerong* was a case involving a claim that industrial home workers were the employees of both the “operators,” labor intermediaries who employed them as garment workers, and the manufacturers of the garments. The workers said in their complaint that the manufacturer defendants had contracted with the operators to produce garments at prices too low to permit payment of employees’ minimum wages and overtime; that the manufacturers utilized the business practice of contracting out garment manufacturing work in part to avoid compliance with labor laws and liability for violation of those laws; that the manufacturers directly or indirectly employed the workers and exercised meaningful control over their work; that the

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operators acted, in effect, as supervisors and managers for the manufacturers and that the operator's facility in El Monte was an integral part of the process of garment manufacturing of each manufacturer.

The manufacturers asked the court to dismiss the case, saying that these facts could not prove that the workers were their employees. The court agreed with the workers, finding that the workers could prove their case against the garment manufacturers if they could prove the facts were as they stated.

*Employ directly or through an agent.* Apart from the “suffer or permit” or “economic realities” tests outlined above, the *Burzerong* case also suggests a third test of employer status grounded in the language of the Wage Orders and the FLSA. As mentioned above, under the wage orders, an employer can be anyone who directly or indirectly or through an agent exercises control over the wages or hours or working conditions of an employee. This definition has never been interpreted by a reported California decision, but is similar to the suffer or permit language in that it appears to disregard contractual arrangements that can mask a true employer-employee relationship, and incorporates the concepts both of joint employment and of indirect control over wages and working conditions.

### **Special rules for particular industries.**

*Garment:* A law specifically intended to cover joint employer situations in the garment industry took effect on January 1, 2000. AB 633, codified as Cal. Labor Code § 2670 et. seq., creates guarantor liability on the part of garment manufacturers and retailers engaged in garment manufacturing, for a garment contractor's minimum wage and overtime violations. The law applies once it is established that: (1) there is a failure to pay the wages for the work performed; and (2) the retailer or manufacturer contracted for the performance of garment manufacturing operations with the entity that failed to pay wages. Besides the wage guarantee, it includes an increase in manufacturer registration fees, bonding, and establishment of a separate fund for claims where bonds have been exhausted. Liquidated damages may be obtained for minimum wage and overtime violations against the contractor, and in some cases, against the manufacturer. The law also contains a “hot goods” provision, under which goods manufactured in violation of the law may be seized by authorities in order to guarantee payment of wages. The law is enforced in court actions through the Labor Commissioner's office, using an expedited administrative procedure, with a potential for an attorney fees award. Regulations under the law include licensing and liability for temporary agencies that refer garment workers to jobs.<sup>35</sup>

*Agriculture:* Like several other states with large agricultural industries, California has a law that governs labor intermediaries in agriculture, the farm labor contractor law.<sup>36</sup> It includes licensing for farm labor contractors, wage bonding and disclosures of terms and conditions of employment to workers. It includes, in the definition of farm labor contractor, those employed by a farm labor contractor and who provide transportation to workers employed in agriculture, known as “*routers*.” Amendments to the law passed in 2001 establish limited civil liability for agricultural employers' willful failure to pay wages, and their use of unlicensed labor contractors.

## **FOCUS ON SB 1466 – OUTLAWING FINANCIALLY INSUFFICIENT CONTRACTS - VETOED**

A proposal passed by the California legislature, but vetoed by Governor Davis in 2002, took a slightly different approach to joint employer liability. SB 1466 would have outlawed “financially insufficient contracts.” Advocates in construction, garment, janitorial and agriculture had long sought to enact legislation that would provide for joint and several liability to be imposed on employers that use labor intermediaries. Bills in the construction and janitorial areas had been vetoed. Bills in agriculture failed to pass the Legislature.

In the 2002 session, legislation was proposed which created a civil violation of the state Labor Code when a person or entity knows or should know that the contract for labor or services entered into with a specified contractor provides insufficient funds to allow that contractor to comply with applicable state and federal law requirements. The bill applied to the construction, farm labor, garment, janitorial, and security guard industries. It created a rebuttable presumption that a contract is financially sufficient if it is in writing, and meets certain requirements specified in the bill. These included disclosure of the basic terms of the contract, the contractor’s state tax ID number, the contractor’s workers’ compensation and vehicle liability insurance policy numbers, the wages to be paid to persons employed by the contractor, and the location of housing (if any) to be provided to persons employed.

The bill passed both houses of the legislature, but was vetoed by Governor Davis on September 30, 2002. The Governor’s veto message said that he had signed other bills that would help these industries, and “we need to give those laws time to work.”

*Industrial Homework*, Cal. Labor Code § 2650. In the industrial homework setting, the definition explicitly covers as the employer, anyone who directly or indirectly, through an employee, agent or independent contractor, delivers articles to be manufactured in a home and then returned.<sup>37</sup> Although the sixteen Wage Orders include similar language regarding control exercised through “an agent or any other person,” and the explicit reference to “independent contractor” is perhaps unnecessary, it may serve to make coverage clearer.

## **B. Unemployment Insurance**

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**In a nutshell:**

**Purpose of the program:** The unemployment insurance system is meant to compensate unemployed workers for some portion of the wages that they have lost. During hard times, the system is meant to replace part of lost wages, allowing families to make ends meet while providing the economy with much needed stimulus. The system is funded by state and federal employer taxes, and states are left largely free to establish their own eligibility criteria.

**Who is an employee?** Statute uses “control” test, but applied as Restatement of Agency ten-factor test.

**Which entity/entities can be held liable as an employer/joint employer?** Little potential for “joint employment.”

*Outcomes for “day laborer” and “computer programmer.” Likely these workers would be considered employees of labor intermediaries. Likely that “sharecropper” and “trucker” will be considered independent contractors.*

**Special rules for certain industries:** Temporary service agency is employer of workers referred through it; employees of those who must be licensed as contractors deemed employees of the contractor; special rules for in-home support services and domestics referred through an agency.

### **1. Who is an employee?**

California statute defines “employment” as any service performed by an employee for wages or under any contract of hire, written or oral, express or implied.<sup>38</sup> The term “employee” means an employee under the usual common law definition.<sup>39</sup> The common law definition of employee, often called the “control” test, is the narrowest legal test for determining employee status. Under that test, to determine whether one performs services for another as an employee, the most important factor is the right of the principal to control the manner and means of accomplishing a desired result. If the principal has the right to control the manner and means of accomplishing the desired result, whether or not that right is exercised, an employer-employee relationship exists. Strong evidence of the right to control is the principal's right to discharge at will, without cause.

California UI regulations establish that where the “right to control” test is not conclusive as to employee status, a ten-part test, taken from the Restatement of Agency, will control the decision.<sup>40</sup> Case law establishes a similar, eight-part test, listing the factors to be taken into consideration as (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.<sup>41</sup>

*Limitation of the rule:* newspaper carriers were held to be employees, using the control test. The employer set the carriers' "purchase price" for the newspaper and the carriers received a check for the difference between the retail price of the papers and the purchase price, the employer personally made all collections and bore the risk of loss in all cases, had the right to fire the carriers, and the carriers were not involved in a separate and distinct occupation of their own, but were essential to the employer's business.<sup>42</sup> They were held to be independent contractors where the carriers themselves "purchased" the papers from the putative employer, made the collections, and bore the risk of loss. These cases suggest that employers wishing to avoid a finding that they exercises common law "control" can simply set up forms of doing business that made the news carriers into independent contractors.

These cases suggest that employers wishing to avoid a finding that they exercises common law "control" can simply set up forms of doing business that made the news carriers into independent contractors.

California UI law has at least two separate exclusions from coverage for "independent contractors." The first generally excludes individuals who have a substantial investment in facilities used in connection with their work, or if services are in the nature of a single transaction not part of a continuing relationship with the employer.<sup>43</sup> Certain workers are presumed to be independent contractors: these are attorneys, physicians, dentists, engineers, architects, accountants, chiropractors, and certain scientists.<sup>44</sup>

The second excludes from coverage those whose work is not in the course of the employer's trade or business, unless the amount paid for the work is fifty dollars or more and the worker has worked for the employer 24 days during the quarter.<sup>45</sup>

### **Special rules for particular industries.**

Certain employees are statutorily excluded from the definition of "employee" under the unemployment compensation system. These include certain domestic workers, transcription services, certain intermittent or adjunct instructors, newspaper deliverers, student nurses or interns, and golf caddies.<sup>46</sup>

### **Misclassification of workers.**

California has taken some steps to address the misclassification of workers as independent contractors. A national study published in 2000 for the US Department of Labor attempted to discover the extent of misclassification in the unemployment insurance program.<sup>47</sup> Interviewees in California said trucking, construction, high tech, and piece workers were frequently misclassified as independent contractors. The study found that the highest incidence of misclassification occurred in construction (2.8 percent), manufacturing (2.6 percent) and transport and communications (5.6 percent), with the highest raw number in construction.<sup>48</sup> In audits conducted as part of the study, California had a high percentage, twenty nine percent, of audited employers who had misclassified workers.<sup>49</sup> Of the states studied, California had highest percentage of UI taxes underreported, at 7.46 percent.<sup>50</sup>



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In audits conducted as part of the study, California had a high percentage, twenty nine percent, of audited employers who had misclassified workers.<sup>1</sup>

At the time of the study, California was taking steps to cross-match IRS forms 1009-Misc., the forms used by independent contractors to report income, against UI tax data, in order to determine whether employers were converting employees to independent contractor status.<sup>51</sup> California created as well an Employment Enforcement Task Force whose task it is to identify employers who are cheating workers out of benefits.<sup>52</sup> The task force continues to operate and to report to the California Legislature. The most recent report indicates that the EETF conducted 394 investigations in 2000, and assessed over \$2 million in Labor Code citations, along with 369 audits that resulted in tax assessments of almost \$6.5 million.<sup>53</sup>

### **2. Which entity/entities can be held liable as an “employer” or “joint employer?”**

California UI law includes a definition of a temporary services employer or a leasing employer, as one who contracts with a client to supply workers who perform for the client. If certain conditions are met, then California law specifies that the temporary services employer or leasing employer is “the” employer of the worker.<sup>54</sup> These include that the temporary agency 1) negotiate with the client over time, place, type of work, working conditions, quality and price of services; 2) determines the assignment of the workers; 3) retains authority to assign or reassign a worker who is determined unacceptable; 4) assigns or reassigns the worker; 5) sets the rate of pay for the worker; 6) pays the worker from its own account; and 6) retains the rights to hire and terminate workers.<sup>55</sup>

If a worker is employed by a temporary services employer or leasing agency, defined as one who performs these six functions, then the temporary services employer or leasing employer is the employer of the worker. If the agency does not perform all six functions, California law declares that the worksite employer is the employer.

The transfer of UI payroll taxes away from the worksite employer and toward a temporary help agency has an ill effect on the UI system, on other employers, and on benefits. A recent study by the Center for Urban Economic Development at the University of Illinois describes this effect.<sup>56</sup> First, fundamental to the design of UI systems is the experience rating system, under which UI payroll taxes are tied to the level of benefits paid to an employer’s former workers. The experience rating system is intended to provide employer incentives to stabilize the workforce, avoid turnover, and deter chronic, temporary layoffs. When worksite employers transfer the UI payroll tax to a temporary service agency, which is virtually in the business of chronically laying off workers, the system suffers.

Second, California has a relatively low maximum payroll tax rate. No employer can be obligated to pay more than 5.4 percent of its payroll in UI taxes, regardless of the actual layoff experience of the firm. By contrast, more than half of the states have maximum tax rates higher than 5.4 percent -- Tennessee and North Dakota are at ten percent, followed by Minnesota and Kentucky at nine percent.<sup>57</sup> A study by the California Employment Development Division found that in California, 4.7 percent of temporary service agencies are at the maximum tax rate.<sup>58</sup> California is potentially losing taxes because of the combination of the tax shift to temporary service agencies and the maximum tax rate.

Finally, temporary services agencies have a great incentive to keep temporary workers off of benefits, in order to keep these chronic costs low. In many states, they vigorously fight the unemployment claims of their ex-employees. Nationally at the time of the temporary staffing industry study, thirty nine percent of the unemployed receive unemployment benefits, but only twenty eight percent of employees of temporary service agencies receive benefits.<sup>59</sup>

In many states, the state has adopted special interest legislation that makes it even more difficult for workers who have been employed by temp agencies to search for and accept other work. These restrictive state laws require that employees of temporary services agencies contract the temp agency for reassignment before being considered eligible for UI benefits. In California, an EDD policy imposes the same call-in rule.

**FOCUS ON: AB 2771 – 2002 LEGISLATIVE SESSION**

AB 2771 was meant to address some of the inequities to the UI system, to competing businesses, and to workers, by the transfer of UI payroll tax liability to temporary service agencies. This bill would have required that no additional eligibility, suitable work, or seek work requirements be placed upon an individual because he or she has worked for a temporary services or leasing employer. It was vetoed by Governor Davis.

*Assistants:* The California code says that anyone hired as an assistant to help an employee is deemed also to be the employee of the principal employer itself, whenever the employer had actual or constructive knowledge of the work.<sup>60</sup> An old DET tax manual provided that the principal employer is considered the employer of clerical, selling or other help employed by branch managers, supervisors or department heads.<sup>61</sup> In the 1940's a court held that assistants engaged by an employer's commission salesmen to arrange for demonstrations or to assist in demonstrations of sewing machines and paid by the salesmen out of their commissions are held to be employees of the employer for purposes of the California Act.<sup>62</sup>

*Employment by contractors:* California law also provides that an employee of anyone who is licensed or required to be licensed as a contractor is the employee of the contractor.

The sections on third-party employers, focused as they are on establishing that a particular entity is “the” employer of the workers, leave little argument for a joint employment relationship between the worksite employer and the temporary agency. These laws do determine that where there is an employer – employee relationship, some entity must pay the premiums for unemployment compensation and the worker is entitled to UI benefits.

Some potential theories of joint employment have been developed under the federal anti-discrimination laws, and are covered in section E below. Where two businesses are sufficiently integrated so that they are in essence operating as one, or where one business could be shown to be the agent of another, there might be some potential for joint employment. From a point of

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view of the health of the UI system and fairness to other employers, the matter of which entity pays the UI taxes is a critical one.

### **Special rules for particular industries**

California state law has special provisions for designating who is the “employer” in certain industries. Two of these are especially important because they apply to jobs that are common low-wage employment. For in-home supportive services, the employer may be either the recipient of the services, the person or organization with whom a county contracts to provide in-home support, or the county itself, depending on contract provisions and on certain provisions of the welfare and institutions code.<sup>63</sup> For workers performing domestic duties after being referred through an employment agency, the employment agency may sometimes be considered the employer of the worker.<sup>64</sup>

## **C. Workers' Compensation**

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### **In a nutshell:**

**Purpose of the law:** Workers' compensation is intended to cover medical expenses and replace a part of the lost wages of workers who are injured in connection with their employment, or who have certain occupational illnesses.

**Who is an employee?** By ruling of the California Supreme Court, the test for establishing employer-employee status is the "economic reality" test, with special deference given to the history and purpose of protective legislation.

**Which entity/entities can be held liable as an employer/joint employer?** Courts routinely apply "joint employment" principles in workers' compensation cases.

*Outcomes for "sharecropper," "day laborer" and "computer programmer." Workers might be considered employees of both entities, but agency would look first to labor intermediaries for responsibility. "Trucker" should be able to establish employee status, but trucking company would likely argue that it is an independent business.*

### **1. Who is an employee?**

Under the California workers' compensation law, "employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.<sup>65</sup> An independent contractor is a person who renders service for a specified recompense for a specified result, who is subject to the control of the employer only as to result of the work.<sup>66</sup>

The statute has been interpreted as encompassing the common law "control" test for determining employer-employee status, by reverse implication from the definition of independent contractor. The "control" test is the most stringent test employed under any statute.

However, the California Supreme Court, in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*,<sup>67</sup> interpreted the "control" test broadly. In *Borello*, a strawberry "share-cropping" case, first held that "control" is to be examined in the context of who has control of the operation as a whole. In most cases, the "control" test is states as who has control over the manner and means in which work is performed. If courts examine control of an operation as a whole, they are much more likely to find employee status where any worker performs service for another through a labor intermediary. The Court took note of both the Restatement of Agency test, and the "economic realities" test often employed under the Fair Labor Standards Act. Perhaps most significantly, the Court held that the test must look at the nature of the work and the overall arrangement between the parties to determine whether covering a particular worker would come within the "history and fundamental purposes" of the statute.

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The *Borello* case expands the universe of workers who can take advantage of the workers' compensation system. In light of the purpose of the statute to protect workers and its reliance on "control of the enterprise" and the nature of the work, many low-wage and low-skill workers should be covered under worker's compensation. After *Borello*, the Court of Appeal applied its principles in *Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.*,<sup>68</sup> which held that cabdrivers were employees of Yellow Cab, *Rinaldi v. Workers' Comp. Appeals Bd.*,<sup>69</sup> (almond harvesters were deemed employees of the growers); *Ware v. Workers' Comp. Appeals Bd.*,<sup>70</sup> (golf caddy deemed employee of club); and *Gonzalez v. Workers' Comp. Appeals Bd.*<sup>71</sup> (Newspaper deliverers were employees of newspaper).

### **FOCUS ON: MISCLASSIFICATION IN THE TAXI INDUSTRY**

The 2002 legislative session saw passage of SB 1407, which requires a report by April 1, 2003 on misclassification of workers in the taxicab industry. After the Yellow Cab workers' compensations decision, concerns arose that taxi companies were illegally converting their drivers from employees to independent contractors, and thereby depriving them of the protections of the workers' compensation law. This study is intended to capture underreporting of hours in this industry.

### **Employees statutorily excluded.**

The statutory exclusions cover a number of volunteer situations, as well as some law enforcement positions and persons employed by family. The most important exclusion is for people employed about the house, including child care workers, but these are only excluded if employed for less than fifty two hours or earning less than \$100 in wages in the ninety days before their injury.<sup>72</sup>

Certain workers whose employers have not paid into the system can choose whether they would nonetheless like to be covered under the workers' compensation system. Domestic workers employed for more than fifty two hours per week, gardeners for private homeowners who work more than forty four hours per month, and those engaged in casual employment where the work contemplated is to be completed in not less than ten working days, can file both a complaint against their employer, and an application with the appeals board for compensation.<sup>73</sup>

*Workers who have partnership agreements* Workers who have partnership agreements, where the purpose is the performance of the labor on a particular piece of work, are employees of the person having such work executed. This section has been interpreted to cover workmen employed by a hotel to clean and replant the hotel garden, even though they considered themselves "partners." *California Compensation Ins. Co v. Industrial Accident Commission.*<sup>74</sup>

### **Employees statutorily included.**

California Labor Code § 2750.5 establishes that in any instance in which a particular license is required, and the worker does not have the license, he is presumed to be an employee. The statute includes licenses required under a particular chapter of the Business and Professions Code, generally covering construction projects and licenses.

The employer can overcome the presumption that the worker is an employee by proof of three factors: (1) the result of the work and not the means by which it is accomplished is the primary

factor bargained for, (2) the individual is customarily engaged in an independently established business, and (3) the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status.<sup>75</sup> The employer has the burden of proof in establishing these factors.

The statute refers specifically to workers' compensation, and has also been applied in tort and CalOSHA cases, but arguably applies to all California labor and employment laws. It could be argued that the statute also would cover the putative "employees" of the unlicensed contractor.

**FOCUS ON: AB 2816 - Who is the "employer" in the construction industry? Who pays the workers' compensation premiums, and on what basis?**

The California State Building and Construction Trades Council successfully advocated for AB 2816 in the 2002 session. The new law requires temp agencies, employer referral services or labor contractors to pay workers' compensation premiums based on the safety record of the construction contractor. Temp agencies must therefore classify workers and pay workers' compensation premiums appropriately. In the past, unscrupulous contractors with poor safety records could simply use a temp agency for future hiring and lower its workers' compensation premium levels.

## **2. Which entity/entities can be held liable as an employer/joint employer?**

California courts have regularly applied the concept of "joint," (sometimes called "dual") employment in the workers' compensation context. Joint employment exists when two employers engage the services of a worker in a joint enterprise, and where the worker is subject to the "control" of both employers. For example, an individual employed under the in-home supportive services program who sought workers' compensation benefits was found to be an employee both of the state, in view of its control over administration of the program, and the individual recipient of her services. *In-Home Supportive Services v. Workers' Comp. Appeals Bd.*<sup>76</sup>

California courts use a concept of "special employer," to find that workers assigned by temporary service agencies are the employees of the worksite employer. The factors used by the court are (1) An employee provides unskilled labor; (2) The work he or she performs is part of the employer's regular business; (3) The employment period is lengthy; and (4) The employer provides the tools and equipment used. In 1997, a worksite employer was found to be the "special employer" of a temporary services agency worker, since the worksite employer had the right to control her work, she performed her work on the company's job site using its tools and equipment, and received training, assignments and instruction from the worksite employer. *Wedek v. Unocal Corp.*<sup>77</sup> Where the court finds that there is both a "general" and a "special" employer, in a situation where an employer furnishes a worker to another, the worker may look to both employers for workers' compensation benefits.

### **Special rules for particular industries**

Any person who performs domestic service comprising in-home supportive services is an employee of the recipient of such services for workers' compensation purposes if the state or county provides for direct payment to the worker or to the recipient of in-home supportive services.<sup>78</sup>

## **D. Health and Safety Protections**

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### **In a nutshell**

**Purpose of the law:** The California Occupational Safety and Health Act of 1973 was enacted for the purpose of assuring safe and healthful working conditions for all California working men and women.

**Who is an employee?** The Occupational Safety and Health Appeals Board uses the “control” test, but refers to the five-factor “economic realities” test from the California Supreme Court’s decision in *Borello* to determine employee status.

**Which entity/entities can be held liable as an employer/joint employer?** Both as a matter of case law and a 1999 statutory change, the Act is applied to a variety of “joint employer” situations.

*Outcomes for “sharecropper,” “day laborer” and “computer programmer” Likely that workers would be considered employees of both entities. Likely that “trucker” would be considered an employee, but potential that issues would have to be litigated.*

### **1. Who is an employee?**

Under the California Occupational Safety and Health Act, an employee is “every person who is required or directed by any employer to engage in any employment or to go to work or be at any time in any place of employment.”<sup>79</sup> This definition is identical to that in Labor Code § 3300 (worker’s compensation section).

The California Occupational Safety and Health Appeals Board has had some opportunities to determine the test for “employee” versus “independent contractor” under the Cal/OSHA statute. While the Board’s decisions refer to the common law “control” test, it cites with approval the five-factor test applied by the California Supreme Court, for workers’ compensation coverage, in the *Borello* case cited earlier in this report.<sup>80</sup>

In addition, in any instance in which a license is required, and the worker does not have a license, he is presumed to be an employee.<sup>81</sup> In *Jesse Ramirez Drywall*, the Board found that two drywallers were the employees of a drywall contractor whose license had expired.<sup>82</sup> It found, based on the common law principles, that the workers did not hold themselves out as a business, they customarily worked for other drywall installers, and the work they were doing was in drywall’s trade. The Board rejected a decision by an Administrative Law Judge that because the drywall contractor’s license had expired, he could not be the employer of the workers, finding that it would be wrong to allow the contractor to escape liability simply by letting his license expire.

## 2. Which entity/entities can be held liable as an “employer?”

In 1999, the California legislature passed a law that broadly assigned liability to “joint” employers in a variety of contexts involving multiple employers on a worksite. Labor Code § 6400 assigns particular duties to employers with different relationships both to the workers and to the workplace hazards. At the time of adoption of the statute, an Appeals Board decision had established that only an employer who exposed its own employees to hazards would be liable under the Act. The CalOSHA Director had adopted regulations that assigned liability more broadly. The Amendments confirm the broader regulations.

A general subsection requires that “every employer” furnish employment and a place of employment that is safe and healthful for the employees therein. This duty encompasses a duty to inspect the workplace, to discover and correct dangerous conditions, and to give adequate warning of the existence of a hazard.

Further, Labor Code § 6400 lays out which “employer” is liable for violations, in the following manner:

- (b) On multi-employer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the division:
- (1) The employer whose employees were exposed to the hazard (the exposing employer).
  - (2) The employer who actually created the hazard (the creating employer).
  - (3) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer).
  - (4) The employer who had the responsibility for actually correcting the hazard (the correcting employer).

The law overrules prior decisions of the Appeals Board, and specifies that the “creating,” “controlling” and “correcting” employer may be cited, even if his or her own employees were not exposed to the hazard. It is memorialized in a Division of Occupational Safety and Health Policy on Multi-Employer Worksite Inspections, which explains that the Division can cite an employer who is responsible for a violation of the law, regardless of which employer’s employees are exposed to the violation.<sup>85</sup> It essentially makes certain entities liable to workers whether or not they are the employer of the workers.

...the Division can cite an employer who is responsible for a violation of the law, regardless of which employer’s employees are exposed to the violation. It essentially makes certain entities liable to workers whether or not they are the employer of the workers.

Prior to AB 1127, the Appeals board had established a doctrine of “primary” and “secondary” employers, which it applied in cases involving labor intermediaries such as temporary agencies. The Board had rejected the argument that “primary,” or referring, employers are not liable for



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violations at the workplace. In a case called *Manpower, Inc.*, the Board rejected Manpower's argument that the secondary employer's sole control of the place of employment relieved Manpower of accountability for the violation.<sup>84</sup> The Board found that the duty to provide a safe workplace (in that case a safety program), is nondelegable and applicable to every employer.

The “primary” and “secondary” employer doctrine is also still good law after AB 1127. Under this doctrine, the “primary” employer, usually the temporary agency, must comply with general obligations towards the worker. The “secondary” employer, usually the worksite, may also be liable for hazards to which it exposes a worker.<sup>85</sup> If a four-part test is met, the “primary” employer will not be liable for further violations that occur at the worksite. The test is as follows:

1. The primary employer maintains an accident prevention program that includes training in general hazards and unique hazards that apply to the work its employees will do for the secondary employer;
2. The loaned employee works entirely at the secondary employer's worksite;
3. The loaned employee is supervised solely by management personnel of the secondary employer; and
4. The primary employer is prohibited (either by contract with, or policy of, the secondary employer) from entering the worksite for purposes of supervising the loaned employee.

In one case, where the employer had a detailed safety program, including a personal tour of the worksite, and an overview of the specific job and risks and hazards involved with the worker, the employer was allowed to escape liability.<sup>86</sup>

California's health and safety law appears to offer practical, clearly defined responsibilities between potential joint employers and maximum protection to the worker for workplace safety, without lengthy and conflicting lists of factors for determining joint employer status. It may not be transferable to other circumstances such as workers' compensation or wage and hour laws.

## **E. Discrimination laws**

### **Fair Employment and Housing Act (FEHA)**

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#### **In a nutshell:**

**Purpose of the law:** Protects employees from discrimination based on race, creed, color, national origin, ancestry, physical handicap, medical condition, marital status or sex.

**Who is an employee?** Agency uses Restatement factors. There are legal arguments to both broaden and narrow the test. The anti-harassment section of the law explicitly covers independent contractors, and “applicants” are covered.

*Outcomes for “sharecropper,” “day laborer” and “computer programmer” and “Trucker.” Under agency’s rules, first three would likely be considered employees of labor intermediaries for on the job discrimination. Agency would likely consider trucker as not covered, except under harassment section. Litigation might bring a broader result.*

#### **1. Who is an employee?**

In some circumstances, companies may discriminate on the basis of national origin, race, or sex by selecting labor subcontractors who are more likely to provide workers of a particular national origin, race or gender. Such companies often will argue that they are not liable for the discrimination because it is the subcontractors who control their own work forces. In other situations, employment agencies will refer workers to jobsites where workers suffer discrimination or sexual harassment but, to avoid losing business or being held liable, the agencies hide their heads in the sand about the discrimination and claim they can’t investigate every work site.

The Fair Employment and Housing Act does not contain a specific definition of the term “employ.” No reported California court decision has interpreted the law, but at least two definitions are possible. A general definition in the Code says that an “employer” is one who regularly employs five or more persons, or any person acting as an agent of the employer.<sup>87</sup> The term “independent contractor” is not defined.

Like its federal counterpart, Title VII of the Equal Employment Opportunity Act, FEHA specifies that it protects any “person” from unlawful employment practices.<sup>88</sup> Thus there is an argument that the Act covers a wide range of both employment and contractual relationships.

However, regulations adopted under the law use a variation of the “control” test for establishing the employer-employee relationship.<sup>89</sup> The Fair Employment and Housing Commission, in a precedential decision, used the Restatement of Agency factors.<sup>90</sup> A lower court in an age discrimination case has adopted the regulations.<sup>91</sup> There the federal district court said that the standard in California for determining if an employee-employer or independent contract

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relationship exists is whether the individual or the employer controls the manner and means by which the work is to be performed. “If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established.”

The court also considered the Restatement factors: whether or not the one employed is engaged in a distinct occupation; skill required for the occupation; whether the workman supplies the instrumentalities, tools and the place of work; the length of time the person is employed; the method of payment, by time or result; whether or not the work is part of the regular business of the employer; what is the intent or belief of the parties; and whether the principal is or is not in business, but said these factors are secondary to the prime consideration of “control.” In *Lumia*, the federal court found that an outside salesman was an independent contractor, free from the control of the principal and not protected under FEHA’s age discrimination provisions.<sup>92</sup>

Arguably, the regulations and test adopted by the court in *Lumia* are narrower than the statute allows. If courts hold that this is the case, the agency would be required to adopt a more liberal interpretation of the term “employ.”

A court could have clarified this issue in *Sada v. Robert F. Kennedy Medical Center*.<sup>93</sup> In that case, the nurse obtained temporary positions at hospitals through a “nurses registry,” and was employed as an independent contractor. The nurse did not claim to be an employee of the hospital under any test, but instead left undisputed her status as an independent contractor. The question before the court, therefore, was not the application of any test of “employee” status, but whether FEHA covered independent contractors. The court bypassed this issue by holding that FEHA covered the nurse, who was applying for a permanent job, as an “applicant.”

Applying even the restrictive nine-factor analysis that the FEHC has adopted for determining employee status, it is likely that person employed through a temporary services agency would be considered an “employee” of the worksite employer under the FEHA.

California courts often turn to Title VII authority for guidance in interpreting FEHA.<sup>94</sup> However, it is not likely that any degree of clarity will be achieved by reference to Title VII. Under Title VII, most courts now apply the narrow, common law definition of employment relationships to decide whether a worker is an “employee” or an “independent contractor.” This approach is arguably required after the US Supreme Court’s decision in *Nationwide Mutual Insurance v. Darden*.<sup>95</sup> Generally, if the victimized individual is not an “employee” of someone, the courts conclude that he or she is not entitled to coverage under Title VII.

### **Special rules for particular situations**

In harassment cases, FEHA applies to independent contractors. The sexual harassment section of FEHA is explicitly broader than the agency’s regulations, having been amended in 1999 to protect both employees and independent contractors.<sup>96</sup> That same section defines “employer” as anyone employing one or more persons.

Under FEHA, a supervisor who sexually harasses an employee is personally liable to the employee.<sup>97</sup> There is personal liability as well for harassment of co-workers.

The sexual harassment section of FEHA is explicitly broader than the agency's regulations, having been amended in 1999 to protect both employees and independent contractors.

## 2. Which entity/entities can be held liable as an “employer” or “joint employer?”

There is no reported case law under FEHA that determines whether or not a joint employer theory is possible under the law. Experience under Title VII shows that it would be difficult for discrimination victims to hold more than one company responsible for violations of Title VII. At the federal level, several theories have been employed.

*Integrated businesses.* In the rare instance where two or more entities have decided to integrate their ownership and operations, the entities may be viewed as a single employer under Title VII. Courts generally look at four factors: (1) functional integration of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. In analyzing the relationship between the companies, the courts place emphasis on the second factor, and generally demand evidence of control over the day-to-day employment practices.<sup>98</sup>

Two or more entities that are not integrated into a single enterprise may be held to be the joint employers of a worker. Courts generally have required Title VII plaintiffs to prove that both companies maintain substantial control over employment practices, including hiring and firing; compensation, benefits, hours and other terms of employment; supervision, issuance of work rules and discipline.

Other courts refuse to find a joint employer relationship unless both companies knew of the discrimination or should have known of it and failed to take corrective measures within its control.

*Agency theory.* There may be a theory separate from the joint employer concept to make a company responsible for discriminatory actions taken by its subcontractors. Both Title VII and FEHA prohibit discrimination by an “employer” and any “agent” of the employer. Under the common law definition of agency, a separate entity, such as a temp agency, may be considered an agent and the agent's conduct could create liability for the worksite employer.

*Interference theory.* Some courts have held that a worker may sue a person or company that is not his or her employer for interfering with the worker's employment opportunities based on discrimination that is illegal under Title VII. In one case, a trucking company employed a worker to weigh trucks at a turkey processing plant. Sex discrimination by officials of the turkey plant, which was *not* the worker's employer, led to the loss of the worker's job at the trucking company. The court held that the worker might be entitled to sue the turkey plant for violating Title VII even though it did not employ the worker.<sup>99</sup> The future of this theory and the specific requirements of it are in some doubt.<sup>100</sup>

Under FEHA, there is a rebuttable presumption that the “employer” is whoever gives a worker his or her W-2 form.<sup>101</sup> No reported California decision has analyzed this provision.

**Special rules for particular industries**

Regulations under FEHA establish special rules for individuals employed by temporary services agencies: An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency may be considered an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.<sup>102</sup>

As with Title VII, harassment by employment agencies is prohibited under FEHA.<sup>103</sup> Employment agency is defined in Cal. Gov't Code § 12926, 2 CCR § 7286.5(c) as those operating for compensation. No reported case law interprets this provision.

## **F. California Family Rights Act (CFRA)**

### **In a nutshell:**

**Purpose of the law:** Provides for unpaid leave where necessary to care for sick family members, because of the employee's own serious health condition, and for parental leave for newborn, adopted and foster children. Employee must have worked at least 1,250 hours in the previous twelve months for the employer, and the employer must have employed fifty or more individuals.

**Who is an employee?** Suffer or permit test by analogy to Federal Family and Medical Leave Act (FMLA) and Fair Labor Standards Act (FLSA)

**Which entity/entities can be held liable as an employer/joint employer?** Joint employment by analogy to FMLA/FLSA.

*Outcomes for "sharecropper," "day laborer" and "computer programmer" Likely that workers would be considered employees of both entities, but not without significant efforts devoted to litigation. "Trucker" would be considered an employee.*

Leave under CFRA can help low-income workers stay connected to their jobs. With California's new Paid Family Leave law, it is paid for most workers.<sup>104</sup> Under CFRA, employers must guarantee workers their jobs on their return from leave, and may not count CFRA leave as an employee's absence under progressive absenteeism policies. However, employers may seek to avoid allowing their employees to take time off in order to care for sick family members (or other covered reasons), by claiming either that employees, such as domestic or home care workers, are "independent contractors," or by claiming that they are exempt from the statute because they do not "directly employ" a worker who is outsourced and paid through a temporary services or payroll agency.

### **1. Who is an employee?**

Like FEHA, the California Family Rights act contains no direct definition of the term "employ." Unlike FEHA, CFRA regulations specifically incorporate regulations adopted under its federal counterpart, the Family and Medical Leave Act (FMLA), as long as these are not inconsistent with CFRA.<sup>105</sup> The Family and Medical Leave Act specifically refers to the Fair Labor Standards Act definition of "employ," the "suffer or permit" standard.<sup>106</sup> By analogy to FMLA and FLSA, the standard under CFRA should be the FLSA "suffer or permit" to work standard.

CFRA defines "employer" as any person who "directly employs" at least 50 employees at the site or within 75 miles of the site.<sup>107</sup> California regulation defines "directly employs" as "on its payroll."<sup>108</sup> The language is nearly identical to FMLA language.<sup>109</sup>

Only one court has ruled on the definition of "employ" under CFRA, in a joint employment case. In *Moreau v. Air France*, the court found that an employee of Air France was not the joint

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employer of workers doing ground service for companies with whom it held contracts, and that the employee thus could not take advantage of the employees in the count of 50 persons required for coverage.<sup>110</sup> The court chose a restrictive list of factors in applying the “economic realities” test.

### **2. Which entity/entities can be held liable as an “employer” or “joint employer?”**

Because CFRA incorporates the FMLA regulations, “covered employer” includes joint employers. FMLA regulations are incorporated by reference as long as they are not inconsistent with CFRA.<sup>111</sup> Under regulations promulgated by the Department of Labor implementing the FMLA, joint employers, such as temp agencies, are covered by the FMLA if they share control of the employee’s job or share an employee’s services.<sup>112</sup> The federal regulations state that “joint employment,” where two or more businesses exercise some control over the work of the employee, is found by viewing the entire employment relationship in its totality, and not by applying any single criterion.

The federal regulation states in relevant part, “[f]or example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.” Temp agencies and worksite employers are typically found to jointly employ plaintiffs in FMLA cases.<sup>113</sup> FMLA, and likely CFRA as well, incorporate a concept of “primary” and “secondary” employer. Both employers have to count employees for purposes of meeting employer definition, but “primary” employer, the one who has authority and responsibility to hire, fire, and make payroll, has responsibility to provide leave. The “secondary” employer’s responsibility is limited to reinstating the worker, and the secondary employer may not impede the right to take leave.<sup>114</sup>

## **G. Agricultural Labor Relations Act**

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Agricultural employees are statutorily excluded from coverage under our nation's collective bargaining law, the National Labor Relations Act. California is one of three states that have enacted a state Agricultural Relations Act, and the only state in which such a law is favorable to collective bargaining. Early on, agricultural employers tried to distance themselves from violations of the law committed by farm labor contractors, but litigation has solved that question through use of an agency theory of liability.

### **1. Who is an employee?**

Like the Wage and Hour laws, the Agricultural Labor Relations Act does not define the term "employ," but defines the term "employer" to include anyone acting directly or indirectly in the interest of the employer. Unlike the wage and hour laws, the ALRA specifically excludes a farm labor contractor from the definition of "employer."<sup>115</sup>

### **2. Which entity/entities can be held liable as an employer/joint employer?**

The ALRA does not leave much argument for a farm labor contractor/grower joint employment theory, since a farm labor contractor is specifically excluded from the definition of "employer." Section 1140.4 says that an employer engaging a labor contractor is the employer for all purposes under the Act.

However, case law has established that an employer is liable for the acts of its agents, including a farm labor contractor, at least where employer "impliedly ratified" the contractor's conduct.<sup>116</sup> In this case, a farm labor contractor and his foreman threatened union organizers and interfered with their access to workers on the day of their union election. The farm's agent was present while the foreman brought in sheriffs to have union organizers arrested.<sup>117</sup>

Finally, California courts have found joint liability between management company and a successor owner of a vineyard, and joint liability on the part of two entities on an "integrated enterprise" theory.<sup>118</sup>

#### **A WORD ABOUT: FARMWORKER MEDIATION BILLS**

On September 30, 2002, Governor Davis signed a historic pair of bills that require mandatory mediation of certain contract disputes in agriculture. The collective bargaining system passed in 1975 has left workers without contracts, as employers find it easy to simply fail to agree on contract content. The new laws require mandatory mediation of up to 75 contract disputes between the union and employers over a five year period, so that workers are more likely to see the fruits of their organizing drive in a written labor agreement.



## **CHAPTER THREE: ANALYSIS OF EMPLOYMENT-RELATED LAWS**

This section of the paper will briefly cover two other laws that have been important to advocates working to improve the treatment of low-wage workers, the California Business and Professional Code and the California Employment Agency Regulation law. This section will simply summarize the laws. These laws do not fit easily within the format of the rest of the paper, because they are not dependent upon proof of an employment relationship.

### **A. Unfair Competition Law**

Through the unfair competition law (UCL) a person may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition.<sup>119</sup> The law applies to any person and is therefore not dependent on an employer-employee relationship. Advocates in California have been successful at using the UCL to enforce the labor rights of workers whose ability to prove an employer-employee relationship might be challenged.

#### **Brief overview of the law**

Unlawful, unfair or fraudulent business practices violate the UCL. Unlawful business activities encompass anything that might be done by a business and that is unlawful.<sup>120</sup> It applies both to individual illegal acts and to unlawful acts that form a pattern or practice.<sup>121</sup>

The Act provides equitable remedies, under sections 17202 and 17203. These include injunctive relief, preventative relief that may be granted to enforce a penalty, forfeiture or a penal law, and restitution. The plaintiff may obtain restitution against unfair or unlawful practices in order to protect the public and restore to parties any money or property taken by means of unfair competition, including disgorgement of wrongfully obtained profits. Because the act may be enforced by “any person acting for the interests of . . . the general public,” it allows one worker to sue on behalf of an entire workforce, and does not require that workers seek class certification.<sup>122</sup>

The UCL has provided a streamlined, low-cost and effective remedy for low-wage workers in California to recover unpaid wages. California Rural Legal Assistance (CRLA), which represents low-wage workers in labor and employment cases, has lengthy and extensive experience litigating under the UCL. CRLA has filed a number of cases seeking restitution for failure to pay wages, wages paid with NSF checks, failures to comply with minimum wage and with overtime laws, illegal deductions from wages and illegal employer requirements that employers provide their own tools and equipment. Courts have agreed that the UCL protects labor rights, in *Cortez v. Purolator Air Filtration Products Co.*<sup>123</sup> (unpaid overtime wages); *Hudgins v. Neiman-Marcus Group, Inc.*,<sup>124</sup> (unlawful rebates of wages); *People v. Lons Angeles Palms, Inc.*,<sup>125</sup> (failure to comply with minimum wage requirements).

## **B. Employment Agency, Employment Counseling, and Job Listing Services Act.**

California is one of many states with a detailed law on the books that strictly regulates “employment agencies.” The law was adopted many years ago to curb abuses associated with temporary job placement firms, including excessive placement fees charged to jobseekers and fraudulent promises of job security. However, due to major gaps in the California law, the statute effectively exempts most temporary help agencies from regulation.

What follows is a brief summary of California’s employment agency law (the “Employment Agency, Employment Counseling, and Job Listing Services Act”). Although no longer covering most temporary placement jobs, the law addresses many of the same abuses that continue to plague all temporary workers, including fraudulent recruitment practices and misrepresentations related to a temp assignment and other key conditions of employment. Thus, it could serve as a starting point to begin regulating those temporary agencies not now covered by the law. The summary also describes those elements of the law that still apply to selected sectors of the temp industry, including domestic services.

### **Brief Overview of the Law**

#### **Agencies and Employers Covered by the Law**

The term “employment agency” only covers those firms that charge a fee to be paid “directly or indirectly by a jobseeker,” thus excluding most temporary help agencies that now only charge placement fees to the client company, not to individual workers.<sup>126</sup> Those agencies that place workers engaged in babysitting and domestic services in a private home are specifically covered by the law without regard to whether the worker or the client pays the placement fee.<sup>127</sup>

#### **Bonding Requirements and Enforcements**

The law requires all employment agencies to post a \$3,000 bond with Secretary of State to operate in California. Significantly, the law no longer designates a central state agency to monitor compliance with the law, to take complaints from workers and otherwise enforce the law. Instead, the law simply allows workers to refer complaints to state or local law enforcement agencies.<sup>128</sup>

Under California law (Business & Professional Code, Section 17200), individuals can also sue in state court for “equitable relief” (e.g., expected wages, an unrecovered placement), which would be available to workers denied their rights under the employment agency law as well. In addition, the State Attorney General and the local District Attorneys have the right to seek civil penalties of up to \$2,500 for each violation of a California law, including the employment agency statute.

#### **Recruitment and False Advertising Protections**

The law provides that “No employment agency shall make, or cause to be made, any false,

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misleading, or deceptive advertisements or representations concerning the services that the agency will provide to jobseekers.<sup>129</sup>” The law goes on to impose several specific requirements on information furnished the public, including information that clearly indicates if the worker will be responsible for the placement fee, the amount of all fees, whether the location of the job is more than 50 miles from the employment agency, and the starting salary of the job order.

### **Record Keeping, Posting & Worker Contract Requirements**

All agencies covered by the law are required to provide jobseekers charged a fee with a written contract covering a range of conditions. For example, the contract must provide the contact information for the agency, the contact information of the client employer seeking the worker’s services, the amount of the fee charged the jobseeker, the fee paid by the prospective employer, the kind of work to be performed, the daily hours of the work, the wages, salary and benefits, and specific notice of any “labor trouble” with the employer. In addition to the contract, agencies are required to post in a conspicuous place the fee schedules established for different categories of work and all other charges of any kind imposed by the agency. No fees may be collected in excess of the those posted by the agency.

### **Placement Restrictions and Legal Limits on Agency Fees**

The law also places certain limits on fees that can be charged by the employment agency. For example, if the worker leaves the placement within 90 days for “just cause” (after 90 days, the placement is considered “permanent”), he or she is entitled to a refund of part or all of the placement fee. “Just cause” is defined to include a change in the wages or salary agreed to by employer, a significant change in the hours or shift of employment, a substantial change in the job assignment, and a lockout or strike at the job.<sup>130</sup>

### **Domestic Worker & Babysitting Provisions**

As described above, those placement firms that provide domestic and babysitting services are covered by the law without regard to whether the agency charges the worker or client the placement fee. A special provision of the law applies to agencies that place domestic workers.<sup>131</sup>

The domestic worker provision limits those circumstances where the employment agency will be considered the “employer” of the domestic worker. The law also states that the worker must be informed in writing that he or she is not entitled to unemployment benefits and other benefits through the employment agency. In addition, the agency is also required to verify the worker’s “legal status or authorization to work” before providing a referral. Violations of the domestic worker provisions of the law will constitute “unfair competition” which are subject to a civil penalty of up to \$2,500 per violation.<sup>132</sup>

As can be seen from this description, the substantive provisions of the California Employment Agency law could be useful to workers in many sectors if it were amended to fit today’s employment agencies’ method of doing business. California should consider an amendment that would apply the law whether or not the agency directly charged workers for

the employment with which it matched them, that would house enforcement within a particular agency, and that would give domestic workers and babysitters equal protection with other workers.

Law	Special provision concerning employment agencies
<b>Wage and Hour</b>	No specific rule, but joint employment potential.
<b>Unemployment Insurance</b>	<b>Temporary Service agency is the employer of workers if:</b> the temporary agency 1) negotiate with the client over time, place, type of work, working conditions, quality and price of services; 2) determines the assignment of the workers; 3) retains authority to assign or reassign a worker who is determined unacceptable; 4) assigns or reassigns the worker; 5) sets the rate of pay for the worker; 6) pays the worker from its own account; and 6) retains the rights to hire and terminate workers
<b>Workers' compensation</b>	<b>Concept of "special employer"</b> means that certain unskilled workers performing work that is part of the employer's regular business, for a lengthy period of time, and where the worksite employer provides tools, means that the worksite employer is liable, along with the employment agency, for accidents.  New law assigns worksite employer's rate to the employment agency in construction industry.
<b>Health and Safety</b>	<b>"Concept of "primary employer:"</b> Primary employer escapes violations occurring at the worksite if: 1) maintains an accident prevention program; 2) work is done exclusively at the secondary employer's worksite; and 3) the primary employer is not allowed to supervise workers.
<b>Discrimination (FEHA)</b>	<b>Each "employer"</b> is liable for terms, conditions and privileges of employment that are under the control of that entity.
<b>California Family Rights Act</b>	<b>Concept of "primary" and "secondary" employer:</b> Primary employer, the one who has authority and responsibility to hire, fire and make payroll, has responsibility to provide leave. The "secondary" employer's responsibility is limited to reinstating the worker and to not impede the right to take leave.

## **CHAPTER FOUR: RECOMMENDATIONS FOR CALIFORNIA**

Given the huge number and percentage of Californians now employed in the nonstandard or contingent workforce, California must be at the forefront in protecting these workers' rights. While the state has made many advances that make it a model for the rest of the country, it faces tremendous challenges in its attempts to stop the growth of contingent labor and the abuses that are associated with it. This paper has outlined several recommendations for policy changes, which will be summarized here.

### **Comprehensive approaches:**

We return to the two questions that are the subject of this paper's legal analysis. With respect to first question, "who is the employee?" Complex industrial relationships and complicated, sometimes conflicting, legal rules about who is the employer leave some degree of uncertainty. Employers have often taken advantage of this uncertainty to deny legal rights even to workers clearly entitled to the protection of the law. With respect to the second question, "what entities can be considered the employer?" the party who is shirking responsibility might change from industry to industry. For example, as shown by our hypothetical situations, permatemps fare well under the control test, because that makes the worksite employer liable for compliance with workplace laws. On the other hand, under the "control" test, janitors and sharecroppers may be left making claims against a judgment-proof labor contractor who happens to supervise them on the job.

It is critical that advocates consider whether there is one definition of "employee" that would protect all workers, in order to harmonize the state laws and deter employers from setting up sham legal relationships. For questions one, the "suffer or permit" test is worthy of consideration. For our second question, a number of other possibilities for describing and protecting joint employment situations should be considered. These include, a simple definition of "joint employer" borrowed from the Fair Labor Standards Act, and applicable to all state labor protective laws, that where two employers are not completely disassociated with respect to a worker, they are that workers' employer. This is the definition currently applied under the California Family Rights Act.

An additional possibility could specify that where workers are performing a job that is integral to the employer's overall operation, on the employer's premises, and the employer provides capital and instruction to the labor intermediary, the presence of an intermediary does not relieve the worksite employer of the duty to comply with state labor laws. This definition would place responsibility on the worksite employer in cases where that has often been contracted away.

A final possibility would be to specify in state law that the worksite employer may not misclassify, limit the work term, or terminate an employee in order to avoid obligations to comply with state labor laws. A specified penalty, and private right of action could make such a law more effective, but would not change the underlying definitions now in each state law.

The test of “joint employment” might need to be different for tax rates. There, an added dimension to this issue, that of the effect of a particular decision on an experience rated system, must be considered. Two approaches are possible: first, specifying that the worksite employer’s experience rating is the applicable rate for payment of workers compensation and unemployment insurance premiums, and second, specifying that the worksite employer is always liable for the premiums, regardless of the presence of a labor intermediary. Two bills were presented in the 2002 legislative session: one, in the unemployment system, failed; one was adopted for workers’ compensation in the construction industry. Any approach in the experience-rated UI and workers’ compensation systems must take into consideration not only the effect on laid off or injured workers under the two programs, but the effect on the experience rated systems and the premiums of traditional employers who are playing by the rules.

California should also consider pay equity legislation that would make it illegal to pay less in wages and benefits after a worker has been employed for a specific period of time and include automatic conversion to permanent work.

### **Approaches for particular labor –protective laws covered in this paper:**

#### **Wage and Hour laws:**

California advocates have made advances in recent years in particular industries, such as garment, agriculture, home health care and janitorial work. Monitoring the efficacy of these new laws will tell what additional measures are necessary. Advocates may also do well to continue to focus on particular problem industries.

Advocates should seek additional opportunities to litigate the application of suffer or permit test as is used in the California wage orders.

**UI system:** Advocates should continue their efforts to equalize access to the UI system for temporary workers, including eliminating the more onerous work search requirements now placed on them, and revising the tax burdens now shifted from worksite employers to temporary agencies. They should also continue efforts to harmonize the definition of employer with that used in other industries. Additional research and advocacy should expand on the findings of the Planmatics study of extensive misclassification in California. The work of the Employment Enforcement Task Force should continue.

**Workers’ compensation:** California’s workers’ compensation system suffers from the same problems that are present in the unemployment compensation system, in that use of labor intermediaries can upset the experience-rated nature of the system. In enacting AB2816, California took a step toward rebalancing this system. It should consider expanding AB2816 (regarding payment of workers’ compensation premiums in the construction industry) beyond that industry in order to insure that premiums are being properly collected and companies are being properly assessed based on their true safety records. Expand misclassification studies, such as the one currently being conducted in the taxi industry, to other industries that are frequent misclassifiers of workers.

## Contingent Rights: The Legal Landscape for Nonstandard Workers in California

**CalOSHA:** California’s health and safety laws appear to offer a practical, inclusive approach to employer responsibility for health and safety violations. However, since the new laws have not allowed for extensive case development, advocates should continue to monitor in order to determine if gaps remain.

**FEHA:** Under the Fair Employment and Housing Act, the agency appears to have adopted rules for determining employer status that differ from the language of the statute. Case law may yet establish that a broader definition is appropriate, as well as provide clear guidelines on the issue of joint employment.

**CFRA:** California’s family leave law uses the most liberal standard for the definition of who is an employer, the “suffer or permit” to work standard. However, in the only reported case, the court chose a restrictive list of factors in applying the “economic realities” test to a joint employer situation. Further case law developments may make this point clearer.

### **Approaches for particular sectors of industry:**

California advocates have frequently employed industry-specific legislative approaches to issues of nonstandard employment, often with success. In recent years, specialized laws have been passed that affect construction, taxicabs, agriculture, garment, and home health care workers. Advocates may wish to look at other gaps in the law and particular sectors of industry that are frequent misclassifiers of workers and users of labor intermediaries, even as they monitor the results obtained under the new laws.

### **Re-regulation of the temp industry:**

At a minimum, the employment agency law should be amended to require the Department of Industrial Relations, Division of Labor Standards and Enforcement, or another appropriate state agency to be specifically charged with monitoring and enforcing the employment protections provided jobseekers. In addition, jobseekers should be provided with the right to file administrative complaints to enforce the law with a central state agency, and be entitled to collect appropriate damages.

Because most temporary agencies no longer charge fees to jobseekers, the employment agency law should be amended to cover all employment agencies without regard to whether they charge a fee to the client company or the worker. The framework of the employment agency law – including bonding requirements, record keeping mandates, agency fee limitations, and other industry standards – should apply to all temporary placement firms and be expanded as necessary to respond to current abuses.

Selected provisions that apply strictly to domestic workers -- including the rules limiting access to unemployment and other benefits and the work-authorization screening requirements -- should be repealed to prevent exploitation of an especially vulnerable population of domestic workers.

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## ENDNOTES

<sup>1</sup> Alexandra Cox Edwards and Lisa Grobar, *Contingent Workers and Alternative Employment Arrangement*, Department of Economics, California State University (2001), 41 available at [http://www.csus.edu/calst/Government\\_Affairs/Reports/contworkers.pdf](http://www.csus.edu/calst/Government_Affairs/Reports/contworkers.pdf). (“*Contingent Workers*”).

<sup>2</sup> *Contingent Workers*, 39.

<sup>3</sup> *Working on the Margins: California’s Growing Temporary Workforce*, Center for Policy Initiatives, January 2001, vi. (“*Working on the Margins*”).

<sup>4</sup> Planmatics Inc., for US Department of Labor, *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, (2000) (“*Independent Contractors*”).

<sup>5</sup> The harassment section of the law also protects independent contractor. *See infra*, section E.3

<sup>6</sup> Day Labor/Contingent Work Committee National Campaign for Jobs and Income Support, *Permanent Struggle, Temporary Solutions: Contracting Out America*, (February 2002), 12 (“*Permanent Struggle*”).

<sup>7</sup> *Permanent Struggle*, 14.

<sup>8</sup> *Contingent Workers*, 41.

<sup>9</sup> *Contingent Workers*, 39.

<sup>10</sup> *Working on the Margins*, vi.

<sup>11</sup> *Contingent Workers*, Tables 19, 20, 22.

<sup>12</sup> *Working on the Margins*, 35, 43.

<sup>13</sup> *Contingent Workers*, 23.

<sup>14</sup> *Working on the Margins*, 21-22.

<sup>15</sup> *Contingent Workers*, 5, 28.

<sup>16</sup> *Working on the Margins*, 25.

<sup>17</sup> *Working on the Margins*, 25.

<sup>18</sup> *Working on the Margins*, 25.

<sup>19</sup> *Contingent Workers*, 60.

<sup>20</sup> *Working on the Margins*, 27.

<sup>21</sup> *Contingent Workers*, 63.



- <sup>22</sup> For an analysis of federal law, see, Cathy Ruckelshaus and Bruce Goldstein, *The Legal Landscape for Contingent Workers*, available at <<http://www.nelp.org>>
- <sup>23</sup> *S.G. Borello & Sons v. Department of Industrial Relations*, 48 Cal. 341, 355 (1989)
- <sup>24</sup> UI Reg. 22.4304-1.
- <sup>25</sup> Cal. Labor Code Sections 1173, 1178.5, 1182.
- <sup>26</sup> See e.g., for agriculture: IWC 14-80, 8 CCR § 11140, Cal. Labor Code § 1140.4(c); for manufacturing, IWC 1-2001, 8 CCR § 11010.
- <sup>27</sup> *Bureerong v. Uvawas*, 922 F.Supp.1450 (C.D. Cal. 1996).
- <sup>28</sup> Cal. Labor Code § 2650.
- <sup>29</sup> 8 CCR § 13600.
- <sup>30</sup> *Independent Contractors*, 50. (2000)
- <sup>31</sup> Cal. Labor Code § 2652.
- <sup>32</sup> Cal. Labor Code § 2658.
- <sup>33</sup> 8 CCR § 13620.
- <sup>34</sup> Cal. Labor Code § 350.
- <sup>35</sup> 8 CCR § 13633-13639.
- <sup>36</sup> Cal. Labor Code § 1682 *et. seq.*.
- <sup>37</sup> Cal. Labor Code 2650(b) .
- <sup>38</sup> UI Code § 621.
- <sup>39</sup> UI Code § 621(b).
- <sup>40</sup> UI reg. 22.4304-1.
- <sup>41</sup> *Tieberg v Unemployment Insurance Appeals Board*, 88 Cal.Rptr. 175 (1970).
- <sup>42</sup> *Max T. Grant v. Woods*, 71 Cal.App.3d 647 (1977).
- <sup>43</sup> UI Code § 621 (2).
- <sup>44</sup> UI Code § 656.
- <sup>45</sup> UI Code § 640.
- <sup>46</sup> UI Code §§ 629, 639, 630, 642, 645, 649 and 651.
- <sup>47</sup> *Independent Contractors*.
- <sup>48</sup> *Id.*, at p 63.
- <sup>49</sup> *Id.*, Fig. 5.1.

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<sup>50</sup> *Id.*, Fig. 5.2.

<sup>51</sup> *Id.*, 78.

<sup>52</sup> *Id.*, 81, 83, 84

<sup>53</sup> 2000 Annual Report, Joint Enforcement Strike Force on the Underground Economy: A Report to the California Legislature (February 1, 2001).

<sup>54</sup> UI Code § 606.5.

<sup>55</sup> UI Code, § 606.5(b).

<sup>56</sup> Mehta, Chirag and Theodore, N. *The Temporary Staffing Industry and US Labor Markets: Implications for the UI System.*, Chicago, University of Illinois Center for Urban Economic Development. (2001) (“Mehta study”).

<sup>57</sup> National Foundation for Unemployment Compensation & Workers’ Compensation, *Highlights of State Unemployment Compensation Laws*, (Jan. 2002), 33.

<sup>58</sup> Labor Market Information Division, EDD, *Unemployment Insurance Tax Rates for Temporary Help Agencies in California*, (2001).

<sup>59</sup> Mehta study, 16.

<sup>60</sup> UI Code § 606.

<sup>61</sup> DE Tax Manual, par. 3005.00, 9/1/43.

<sup>62</sup> *In re Gower, Bankrupt*, DC, Cal., 7/30/41.

<sup>63</sup> UI Code § 683.

<sup>64</sup> UI Code § 687.2

<sup>65</sup> Cal Labor Code § 3351.

<sup>66</sup> Cal. Labor Code § 3353.

<sup>67</sup> 48 Cal.3d 341 (1989).

<sup>68</sup> 226 Cal. App.3d (1991)

<sup>69</sup> 227 Cal.App.3d 756 (1991)

<sup>70</sup> 92 Cal.App.4<sup>th</sup> 508.

<sup>71</sup> 54 Cal.App.4<sup>th</sup> 1584.

<sup>72</sup> Cal. UI Code §§ 3351 and 3352(h).

<sup>73</sup> Cal. Labor Code § 3715.

<sup>74</sup> 86 Cal. App. 2d 861 (1948); Labor Code § 3360

- <sup>75</sup> Labor Code § 2750.5.
- <sup>76</sup> 199 Cal.Rptr. 697 (1984).
- <sup>77</sup> 69 Cal. Rptr.2d 501 (1997).
- <sup>78</sup> Cal Labor Code § 3351.5.
- <sup>79</sup> Cal. Labor Code § 6304.1.
- <sup>80</sup> See e.g., *Commercial Diving*, No. 18,529R (1994).
- <sup>81</sup> See also Labor Code § 2750.5.
- <sup>82</sup> OSHAB 93-489, Decision After Reconsideration (Mar. 23, 1999).
- <sup>83</sup> available at <<http://www.dir.ca.gov/doshpol/pppercent26pcpercent2D1c.htm>>
- <sup>84</sup> OSHAB 78-533, Decision After Reconsideration (Jan. 8, 1981).
- <sup>85</sup> See Division of Occupational Safety and Health Policy and Procedures Manual, “Dual Employer Inspections,” available at <<http://www.dir.ca.gov/doshpol/pppercent26pcpercent2D1d.htm>>
- <sup>86</sup> *The Office Professionals* (1995).
- <sup>87</sup> Cal. Gov’t Code § 12940(j)(4)(A); § 12926(d).
- <sup>88</sup> Cal. Govt. Code § 12940.
- <sup>89</sup> 2 CCR § 7286.5(b).
- <sup>90</sup> *Dept. Fair Empl. & Hous. V. Children’s Hospital and Health Center*, (1987), No. 87-24, FEHA Precential Decs. 1986-87, CEB 10, p. 4, available at <1987 WL 114872.>
- <sup>91</sup> *Lumia v. Roper Pump Co.*, 724 F. Supp 694 (N.D.CA. 1989).
- <sup>92</sup> *Id.*, 724 F.Supp. at 697.
- <sup>93</sup> 65 Cal. Rptr. 112 (1997).
- <sup>94</sup> *Price v. Civil Service Commission*, 26 Cal 3d. 257, 271 (1980).
- <sup>95</sup> 503 U.S. 318 (1992).
- <sup>96</sup> Cal Gov’t Code § 12940(j)(5).
- <sup>97</sup> *Fiol*, 50 Cal. App. 4<sup>th</sup> 1327.
- <sup>98</sup> *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965)
- <sup>99</sup> *Moland v. Bil-Mar Foods*, 994 F. Supp. 1061 (N.D. Iowa 1998).

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<sup>100</sup> *Alexander v. Rush North Shore Medical Center*, 101 F.3d 487 (7<sup>th</sup> Cir. 1996) (reversing prior case).

<sup>101</sup> Cal Gov't Code § 12928.

<sup>102</sup> 2 CCR § 7286.5(b)(5).

<sup>103</sup> Cal. Gov't Code § 12940(j)(1). *See also*, these references under Title VII: *available at* <<http://www.eeoc.gov>> *Enforcement Guidance: Application Of The ADA To Contingent Workers Placed By Temporary Agencies And Other Staffing Firms* December, 2000; *Questions and Answers: Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms* and *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms* December, 1997.

<sup>104</sup> California recently became the first state in the nation to adopt a paid family leave law, which replaces a part of lost wages for up to six weeks while a person is on leave to care for a new child or a sick family member. That leave is paid through California's Temporary Disability Insurance law. The Temporary Disability Insurance law and Paid Family Leave provisions use the same definitions of "employment" as are used under the unemployment compensation system. Cal. Labor Code §§ 2602, 2606.

<sup>105</sup> 2 CCR § 7297.0.

<sup>106</sup> 29 U.S.C. § 2611(2).

<sup>107</sup> Cal. Gov. Code § 12945.2(b)(2).

<sup>108</sup> 2 CCR § 2 7297.10.

<sup>109</sup> 29 CFR § 825.105(b) and elsewhere.

<sup>110</sup> No. C-99-4645 (N.D. Cal.) 2002),

<sup>111</sup> 2 CCR § 7297.0.

<sup>112</sup> 29 C.F.R. 825.106.

<sup>113</sup> *Miller v. Defiance Metal Products, Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997).

<sup>114</sup> *Salgado v. CDW Computer Centers, Inc.*, 1998 U.S. Dist. LEXIS 1374.

<sup>115</sup> Cal. Labor Code § 1140.4(c)

<sup>116</sup> *Vista Verde Farms v. ALRB*, 29 Cal. 3d 307 (1981).

<sup>117</sup> Cal. Labor Code § 1165.4.

<sup>118</sup> *Rivcom Corporation v. ALRB*, 34 Cal. 3d 743 (1983); *Perry Farms, Inc. v. ALRB*, 86 Cal. App. 3d 448 (1978).

<sup>119</sup> [West's Ann.Cal.Bus. & Prof.Code § 17200](#) et seq. *Kraus v. Trinity Management Services, Inc.*

96 Cal.Rptr.2d 485, Cal.,2000.

<sup>120</sup> *Barquis v. Merchants Collection Assn.*, 7 Cal 3d 94 (1972)

<sup>121</sup> Cal. Bus. & Prof. Code § 17200.

<sup>122</sup> *Id.*, at § 17204.

<sup>123</sup> 96 Cal.Rptr.2d 518 (2000).

<sup>124</sup> 41 Cal.Rptr.2d 46 (1995).

<sup>125</sup> 175 Cal.Rptr. 257 (1981).

<sup>126</sup> Section 1812.501(a)(1).

<sup>127</sup> Section 1812.501(a)(3).

<sup>128</sup> Section 1812.508(b)(6).

<sup>129</sup> Section 1812.508(a).

<sup>130</sup> Section 1812.506.

<sup>131</sup> Section 1812.5095.

<sup>132</sup> Section 1812.5095(k).