INSIDE THE MINDS

Complying with Employment Regulations

Leading Lawyers on Analyzing Legislation and Adapting to the Changing State of Employment Law

2015-2016 EDITION

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Protecting Clients from Liability in a Significantly Shifting Employment Landscape

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Introduction

Companies currently are facing considerable shifts in the employment landscape. This chapter focuses on four areas of emerging developments in employment law: unpaid internships, worker classification in the "on-demand economy," state and local government minimum wage increases, and the expansion of employees' rights under the National Labor Relations Act (NLRA).[1] To conclude, this chapter discusses general compliance strategies companies should consider to protect their organizations from liability.

Internships – To Pay or Not To Pay?

Many people have worn the title of "intern" at some point in their professional lives. In movies, interns rush from task to task, juggling trays of coffee, phones, and a to-do list a mile long. In the real world, however, unpaid interns working on actual movie sets have sued, claiming they should have been classified as employees and compensated accordingly. The first major lawsuit brought by an intern hit the headlines in 2011. Since that time, interns for several major companies have filed class actions seeking unpaid wages. This section discusses the inaugural lawsuits and legal framework used to analyze them, and then briefly summarizes a selection of other intern lawsuits and the resulting settlements. This is followed by a discussion of practical considerations for companies seeking to implement a compliant internship program.

Legal Developments Involving Unpaid Interns

In 2011, two unpaid interns who worked on the set of *Black Swan* filed a lawsuit against Fox Searchlight Pictures seeking back pay for work performed during the internship. A federal district court in the Southern District of New York granted summary judgment for the plaintiffs in 2013. The court held the interns were entitled to payment under the Fair Labor Standards Act (FLSA)[2] as a matter of law.[3] In reaching this holding, the

[1] National Labor Relations Act (NLRA), 29 U.S.C.A. §§ 151 et seq.
[2] Fair Labor Standards Act (FLSA), 29 U.S.C.A. §§ 201 et seq.
[3] *Glatt v. Fox Searchlight Pictures Inc.,* 293 F.R.D. 516 (S.D. N.Y. 2013), *on reconsideration in part,* 2013 WL 4834428 (S.D. N.Y. 2013) *and motion to certify*

court applied a six-part test used by the Department of Labor (DOL) to determine whether a worker is properly classified as an unpaid intern or is an employee protected by the FLSA.

The Supreme Court first articulated this six-part test in *Walling v. Portland Terminal Co.* There, the Court held that an individual was not protected by the FLSA if the individual's work did not provide an immediate benefit to the company and instead served only the worker's interests.[4] Building from this general standard, the DOL's current formulation dictates that an unpaid internship must meet all of the following six criteria:

1. The internship program is similar to training that would be given in an educational environment;
2. The internship program is designed to benefit the intern;
3. The intern does not displace regular employees, but is closely supervised by regular staff;
4. The company derives no immediate advantage from the intern's activities, and may actually be hindered by running the internship program;
5. The intern is not automatically entitled to a job upon completion of the internship; and
6. The company and the intern understand the intern is not entitled to wages for the duration of the internship.

When applying these six criteria to the *Black Swan* interns, the district court focused on the lack of training received by the plaintiffs. According to the court, the extent of the company's training related to how the specific office functioned (including lessons on operating the coffee machine).[5] The court also noted the mere benefit of listing an internship on a resume does not show the interns received direct benefits from their work on the film.[6] At several points in the opinion, the court emphasized that the plaintiffs

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appeal granted, 21 Wage & Hour Cas. 2d (BNA) 557, 2013 WL 5405696 (S.D. N.Y. 2013) *and vacated and remanded,* 24 Wage & Hour Cas. 2d (BNA) 1665, 2015 WL 4033018 (2d Cir. 2015).

[4] *Walling v. Portland Terminal Co.,* 330 U.S. 148, 152-153, 67 S. Ct. 639, 91 L. Ed. 809 (1947).

[5] *Glatt*, 293 F.R.D. at 532.

[6] *Glatt*, 293 F.R.D. at 533.

performed tasks that would have otherwise required the studio to hire additional employees or give overtime work to current employees.[7] The court concluded by noting the plaintiffs' understanding that they would not be paid was not determinative because employees cannot waive the right to payment of wages under the FLSA.[8] The court explicitly rejected use of the "primary benefit test," an alternative test that looks at the totality of the circumstances (including the six criteria previously discussed) to determine whether an internship primarily benefitted the intern or the employer.

In a case decided only one month earlier than the *Black Swan* case, however, another federal district court in the Southern District of New York rejected the argument that the DOL's six-part test should control and applied the "primary benefit test" instead.[9] The interns in this case worked for *Harper's Bazaar* and *Cosmopolitan* magazines. The court denied the interns' motion for summary judgment. In reaching this decision, the court noted the company provided some educational training and supervision to the interns, and the company also proved the regular operations of the office were at least somewhat hindered by the interns' presence.[10]

Both cases were appealed to the Second Circuit Court of Appeals. On July 2, 2015, the Second Circuit vacated the order granting partial summary judgment to the *Black Swan* interns.[11] In reaching this decision, the court rejected the DOL's six-part test in favor of the "primary beneficiary test."[12] The court looked with disapproval upon the rigidity of the DOL's six-part test, which it noted attempts to fit the facts of *Portland Terminal* to all workplaces.[13] In contrast, the court noted that the "primary beneficiary test" appropriately focused on the benefits received by an intern in exchange for his or her work, while still allowing courts "flexibility to

[7] *Glatt*, 293 F.R.D. at 533.
[8] *Glatt*, 293 F.R.D. at 534.
[9] *Xuedan Wang v. Hearst Corp.,* 293 F.R.D. 489 (S.D. N.Y. 2013), *motion to certify appeal granted,* 2013 WL 3326650 (S.D. N.Y. 2013) *and aff'd in part, vacated in part, remanded,* 24 Wage & Hour Cas. 2d (BNA) 1700, 2015 WL 4033091 (2d Cir. 2015).
[10] *Xuedan Wang*, 293 F.R.D . at 494.
[11] *Glatt v. Fox Searchlight Pictures, Inc.,* 24 Wage & Hour Cas. 2d (BNA) 1665, 2015 WL 4033018 (2d Cir. 2015).
[12] *Glatt v. Fox Searchlight Pictures, Inc.,* 791 F.3d 376, 383, 2015 WL 4033018 at **6, 24 Wage & Hour Cas. 2d (BNA) 1665 (2d Cir. 2015).
[13] *Glatt v. Fox Searchlight Pictures, Inc.,* 791 F.3d 376, 383, 2015 WL 4033018 at **5, 24 Wage & Hour Cas. 2d (BNA) 1665 (2d Cir. 2015).

examine the economic reality as it exists between the intern and the employer."[14] The Second Circuit offered the following as a non-exhaustive list of factors to consider in applying the "primary beneficiary test":

- Both the intern and employer expect that the intern will not receive compensation;
- The internship program provides training similar to that received in an academic environment;
- The internship program is tied to the intern's academic program through the receipt of academic credit or through integrated coursework;
- The internship program corresponds to the academic calendar to accommodate the intern's academic commitments;
- The internship program is limited to the time period during which the internship provides the intern with beneficial learning;
- The intern's work complements, rather than displaces, the work of paid employees; and
- Both the intern and employer understand that the internship will not necessarily lead to a paid job.[15]

Since *Glatt* was filed, a flood of class actions brought by unpaid interns has followed—many of which have since settled. A sampling of more notable settlements includes the following:

- NBCUniversal, Inc settled a lawsuit for $6.4 million in October 2014 and implemented a new policy of paying its interns;
- Conde Nast took a different approach and shut down its internship programs in 2013 after it settled a lawsuit brought by former interns for $5.85 million;
- Viacom recently settled for $7.2 million with 12,500 former interns who participated in its unpaid semester-long internship program; and
- Warner Music Group settled with 4,500 former interns for $4.2 million.

[14] *Glatt v. Fox Searchlight Pictures, Inc.,* 791 F.3d 376, 383-84, 2015 WL 4033018 at **6, 24 Wage & Hour Cas. 2d (BNA) 1665 (2d Cir. 2015).
[15] *Glatt v. Fox Searchlight Pictures, Inc.,* 791 F.3d 376, 384, 2015 WL 4033018 at **6, 24 Wage & Hour Cas. 2d (BNA) 1665 (2d Cir. 2015).

Given the potential liability exposure, companies must consider whether to discontinue their unpaid internship programs or retool them consistent with applicable laws. Meanwhile, public sentiment may have turned against unpaid services. For example, Lena Dunham originally planned not to pay the opening acts for her book tour, but faced public outcry. She later announced she would compensate those individuals.[16]

Reducing the Risks of Unpaid Internships in the Age of the FLSA Lawsuit

Courts dealing with intern lawsuits apply a variety of tests (most derived from either the DOL's six-part test or the "primary benefit test") to determine whether interns qualify as employees under the FLSA. As a result, companies (particularly outside the Second Circuit) lack clarity on how best to structure their internship programs. Because the DOL's test is currently the most stringent, a company whose internship program satisfies this test stands a greater likelihood of satisfying any court-applied test. To satisfy the DOL's test, employers should consider incorporating the following characteristics:

First, the internship should closely resemble an educational experience, with a focus on training that is not specific to the company, but is transferable to other companies within the industry. Companies should plan this training to resemble classroom training as closely as possible, structured around specific objectives laid out syllabus-style. Interns should also spend time shadowing regular employees to gain a better understanding of the industry. Training and shadowing regular employees should occupy at least 50 percent of an intern's time during the program. In addition, companies that wish to have unpaid interns should seriously consider partnering with a college or university to offer school credit to interns. Indeed, in light of the Second Circuit's ruling in *Glatt*, companies should expressly tie their internship programs to the intern's academic program through the receipt of academic credit or through integrated coursework.

Second, companies should structure their internship programs in a way that primarily benefits the interns, not the company. This pertains to the second

[16] Alexandra Alter, *Lena Dunham's About-Face: She'll Share the Wealth with Tour Acts*, ArtsBeat (Sept. 29, 2014), http://artsbeat.blogs.nytimes.com/2014/09/29/lena-dunhams-about-face-she-will-share-the-wealth-with-tour-acts/?_r=0.

and fourth factors in the DOL test. Although interns invariably will provide some benefit to a company, the company's burden in running the program should be greater than any benefit garnered from the intern's work. Showing the program actually hinders operations in some way can help establish the intern was the primary beneficiary.

Third, companies should never use unpaid interns to avoid hiring more employees or avoid giving existing employees more work. In addition, companies should require their staff to take time away from their regular work to closely supervise interns. Ensuring interns receive direct supervision and feedback is an important piece of an educational internship program. Substantial supervision over tasks performed by an intern ensures the task is a learning tool and not meant to benefit the company. Further, time spent by regular employees on supervision is a cost to the company that helps offset any benefit to the company resulting from the services of the intern.

Finally, the company and the intern should sign an agreement specifying the intern is not entitled to payment nor to an employment offer after the internship. This pertains to the fifth and sixth factors in the DOL test. While such an agreement is not conclusive evidence of a no-employment relationship, it is evidence that the six-part test has been met. Further, this agreement does not mean a company cannot later hire an intern after the program concludes.

Some internship programs include stipends paid to interns in recognition of living expenses during the internship. The DOL has stated that stipend payments do not necessarily create an employment relationship, as long as the amount paid does not exceed a reasonable estimation of expenses for the duration of the internship program. In questionable cases, the prudent approach is simply to pay interns and avert any potential claims.

The Challenges of Classifying Workers in the On-Demand Economy

Companies that facilitate on-demand, peer-to-peer transactions via sophisticated applications, such as Uber and Lyft, have relied on a large freelance workforce to achieve scale and success at exponential rates. While

these companies face a bevy of legal issues, workforce classification currently is perhaps the most substantial issue.

Background

The so-called on-demand economy is fueled by the economic activity generated from companies that fulfill consumer demand via the immediate provisioning of goods and services.[17] This new-age economy is considered by many to be a subset of (or synonymous with) the "sharing economy"—where companies such as eBay, Airbnb, and Zipcar facilitate direct access to assets that are not fully utilized by the owner. A major difference between the two economies relates to reliance on a large freelance workforce to facilitate fast, convenient, and affordable peer-to-peer transactions.

Companies operating in the on-demand economy provide services ranging from food and grocery delivery to housekeeping services and furniture assembly. Currently, transportation network companies (TNC)[18] represent the most popular on-demand service. TNCs utilize smartphone-based applications (apps) to instantly facilitate a peer-to-peer transaction between a consumer and a nearby driver at an affordable, predetermined rate with payment processed electronically. Financially, the business model used by TNCs is both lucrative and attractive, in part because technological advances and the ability to easily access freelance labor keeps operational costs low, which deflates the cost of fares for consumers. Uber and Lyft, the two most popular TNCs, have achieved historic valuations and exponential growth in operations and revenue-generation. For example, consumers reportedly paid Uber "driver-partners" $656.8 million in fares

[17] Mike Jaconi, *The "On-Demand" Economy is Revolutionizing Consumer Behavior—Here's How* (July 13, 2014) http://www.businessinsider.com/the-on-demand-economy-2014-7.

[18] The term "transportation network company" was created and defined by the California Public Utilities Commission in 2013 in an attempt to create a new category of transportation providers separate from limousines and taxicabs. At the same time it proposed this new terminology, the Commission proposed new regulations for TNC services such as background checks, driver training, minimum insurance coverage, and licensing. Tomio Geron, *California PUC Proposes Legalizing Ride-Sharing from Startups Lyft, SideCar, Uber* (July 30, 2013) http://www.forbes.com/sites/tomiogeron/2013/07/30/california-puc-proposes-legalizing-ride-sharing-companies-lyft-sidecar-uber/.

during the last three months of 2014 alone.[19] Legally, however, TNCs face risks to their business model—in fact, TNCs sit at the vanguard of worker classification challenges facing the on-demand economy.

Consumers of TNC services are able to enjoy such low fares in large part because TNCs classify drivers as independent contractors. Independent contractors do not receive the same benefits and on-the-job protections as employees. For example, independent contractors are not guaranteed a minimum wage, nor are they eligible for overtime pay, meal and rest periods, expense reimbursement, unemployment benefits, retirement account matching, workers' compensation coverage, or other insurance benefits and protections. In contrast, companies using a traditional, employee-centric business model theoretically pass certain of these labor and regulatory costs on to consumers. Employers also face other potentially costly issues such as the threat of unionization and compliance with anti-discrimination, sexual harassment, and other employment laws.

Stakeholders are split over whether TNC drivers should be classified as independent contractors or employees. State and local governments would prefer to collect the payroll taxes and regulatory fees owed for employees.[20] Taxicab companies also would prefer TNCs pay the costs associated with having employee-drivers, which would make pricing more competitive. Some argue society would benefit from a rational apportionment of liability if TNC drivers were classified as employees. As it stands, if a TNC driver injures someone while driving, the TNC might not be liable if the driver is classified as an independent contractor, and the driver may lack adequate resources to satisfy claims. Alternatively, if a TNC driver is injured on the job and disabled, he or she does not qualify for certain government- or employer-sponsored insurance protections such as workers' compensation coverage and short- and long-term disability benefits.

Conversely, consumers enjoy the low-cost transportation the current classification scheme offers. TNC drivers also enjoy the flexibility and

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[19] Jonathan V. Hall, Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 1 (January 22, 2015).

[20] Houston proposed a city ordinance to allow Uber and Lyft to continue operating, but charging them 2 percent of gross receipts to be paid to the city. Houston, Texas, City Ordinances, No. 2014-754, ch. 46 (2014),https://www.houstontx.gov/ara/2014-754.pdf.

control regarding the hours they work. Indeed, in a report prepared for Uber, out of 601 Uber "driver-partners" surveyed, 73 percent said they would prefer to make their own schedule rather than have a 9-to-5 job.[21] Disagreements among stakeholders may be contributing to legislative inaction. Regardless, the courts are now faced with the responsibility of clarifying the proper classification of on-demand workers.

Are the Traditional Tests "Outmoded" for Determining TNC Drivers' Classification?

There are a multitude of tests for determining whether a worker is an independent contractor or an employee. Some jurisdictions follow the three-part ABC Test,[22] some follow the IRS Independent Contractor Test,[23] and others follow common law tests or state workers' compensation tests. Putative class action challenges to the classification of TNC drivers as independent contractors now pending in California are testing the limits of the traditional fact-intensive, common law right-of-control test. A determination that on-demand workers are properly classified as independent contractors in California courts could influence other jurisdictions with similar or less stringent classification tests.

California's test requires a fact-finder to consider many factors in determining whether a worker is an employee or an independent contractor,

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[21] Jonathan V. Hall, Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United State*, 11 (January 22, 2015).

[22] The ABC test elements include: "(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; (B) Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business."

[23] There are three categories of facts to look at when determining if a worker is an employee or an independent contractor under the IRS test: behavioral—does the company control or have the right to control what the worker does and how the worker does his or her job?; financial—are the business aspects of the worker's job controlled by the payer? (factors include how the worker is paid, whether expenses are reimbursed, and who provides tools/supplies); and type of relationship—are there written contracts or employee type benefits (for example, a pension plan, insurance, or vacation pay)? Will the relationship continue and is the work performed a key aspect of the business? *Independent Contractor (Self-Employed) or Employee?*, Internal Revenue Service, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee.

but the primary element focuses on the extent to which a company exercises the "right to control the manner and means of accomplishing" the desired result.[24] Other secondary factors include whether the one performing the service offers a specialized skill, the nature of the job, the level of skill required, who supplies the instrumentalities, the length of time the relationship exists, whether the work is part of the regular business of the principal, and whether the parties believe they are forming an employer-employee relationship.[25] A fact-finder must consider these factors together, and none is dispositive on its own. This creates a fact-intensive inquiry a judge typically reserves to a jury determination.

Thus far, courts and agencies have demonstrated reluctance in accepting that TNC drivers are properly classified as contractors. On June 3, 2015, a California labor commissioner's office ruled that one former Uber driver was misclassified, and ordered Uber to reimburse the former driver for mileage and toll charges incurred during the approximately two-month period that she worked for Uber.[26] The labor commissioner found that Uber's extensive control over each transaction, from car requirements to software usage, illustrated control over the driver. Further, the labor commissioner noted that Uber vets prospective drivers by requiring them to supply their personal information and pass background investigations, sets fare prices, and pays drivers a non-negotiable service fee—additional examples of how the company exerts control over its drivers. While the ruling applies to only one employee, its reasoning could be applied to future litigants.

Uber and Lyft have also been unsuccessful at the summary judgment stage in convincing courts that drivers are properly classified as contractors as a matter of law. In a California federal court case involving Lyft, *Cotter v. Lyft, Inc.*, the company argued it is simply an uninterested bystander providing a technology platform for drivers to connect with passengers. In rebutting this argument, the plaintiff-drivers argued they are integral to Lyft's business model and one could not exist without the other. Furthermore, the drivers argued Lyft exerts

[24] *S. G. Borello & Sons, Inc. v. Department of Industrial Relations,* 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399 (1989).
[25] *S. G. Borello & Sons, Inc. v. Department of Industrial Relations,* 48 Cal. 3d 341, 351, 256 Cal. Rptr. 543, 769 P.2d 399 (1989).
[26] *Barbara Ann Berwick v. Uber Techs.*, et al, Case No. 11-46739 EK, 14-16 (June 3, 2015).

significant control in every aspect of the operation. Lyft's "Rules of the Road"—which address how to treat passengers, maintain vehicles, and operate vehicles in a professional manner—served as evidence of such control, with the plaintiff-drivers urging they can be fired for not following these rules. Lyft countered its "Rules of the Road" were mere suggestions and not commands or prohibitions. The court denied cross-motions for summary judgment, finding that California's "outmoded" test "provides nothing remotely close to a clear answer" on whether Lyft's drivers are properly classified.[27] Accordingly, the court indicated this case will require a fact-intensive inquiry suitable for a jury, and stated "the jury will be handed a square peg and asked to choose between two round holes."[28]

Similarly, a California federal court denied Uber's motion for summary judgment that it had properly classified its drivers as contactors.[29] The court disagreed with Uber's general premise that it is merely an intellectual property company and not a transportation company, stating that Uber sells rides instead of software and that Uber would not be a viable business entity without the services its drivers perform. Indeed, the court identified several facts favoring employee status, including Uber's control over setting fares, monitoring of driver performance, right to terminate drivers at-will for violating company policy, and the use of a "Driver Handbook" which instructs drivers about dress code expectations, communicating with clients, use of the car radio, and keeping an umbrella handy, among other things. Other facts favored classifying Uber drivers as contractors, according to the court, such as drivers' control over schedules and routes, use of their own vehicle, and the ability to use subcontractors or agents to drive Uber passengers. Nonetheless, the court stated the numerous factors bearing on worker classification under California's multifactor test did not yield an unambiguous result under the facts and circumstances presented at the summary judgment stage, which demonstrated that the case should be heard in front of a jury.

[27] *See Cotter v. Lyft, Inc.,* 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *see also O'Connor v. Uber Technologies, Inc.,* 80 Cal. Comp. Cas. (MB) 345, 24 Wage & Hour Cas. 2d (BNA) 975, 2015 WL 1069092 (N.D. Cal. 2015).
[28] *Cotter*, 2015 U.S. Dist. LEXIS 30026, at *35.
[29] *See O'Connor*, 2015 U.S. Dist. LEXIS 30684, at *54.

Class certification is the next key stage in the Uber and Lyft driver classification lawsuits. On July 9, 2015, Uber filed a motion to oppose class certification arguing, among other things, that the plaintiffs' claims would require individualized inquiries into each driver's relationship with Uber, making class certification improper under the Federal Rules of Civil Procedure 23(a)(2)[30] commonality requirement and Rule 23(b)(3)[31] predominance requirement. Additionally, Uber submitted declarations from more than 400 of its drivers, which generally demonstrated that drivers enjoy the flexibility that Uber provides and wish to remain independent contractors. These declarations were designed to bolster Uber's argument that the named plaintiffs are not adequate class representatives under Rule 23(a)(4)[32] and that the named plaintiffs' claims are atypical under Rule 23(a)(3)[33] of the Federal Rules of Civil Procedure. Uber also alleged credibility and trustworthiness issues as further evidence that the named plaintiffs are inadequate representatives with atypical claims. As an example, Uber alleged that named plaintiff Matthew Manahan conceded that he fraudulently manipulated Uber's driver referral program and collected more than $25,000 by arranging sham rides.

Unpersuaded by Uber's arguments, on September 1, 2015, the district court granted class certification to a putative class of approximately 160,000 Uber drivers with respect to the threshold worker classification claim, and the drivers' claim that Uber uniformly failed to remit gratuity owed. The court denied certain of plaintiffs' request for class certification without prejudice, including without limitation the request to certify substantive law claims for Uber's alleged failure to reimburse drivers for necessary business-related expenses such as gas, phone, and maintenance costs. With respect to this denial, the court found that the plaintiffs had failed to satisfy Rule 23(a)(3)'s adequacy requirement to the extent that they seek to fulfill the tests of commonality and predominance by using the IRS reimbursement rates as the exclusive measure of damages for class members. Notwithstanding, the court noted that the plaintiffs may be capable of making a sufficient showing to warrant certification of certain additional claims (including the expense reimbursement claim) and/or subclasses; thus, the final parameters of the class remain subject to change.

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[30] Fed. R. Civ. P. 23(a)(2).
[31] Fed. R. Civ. P. 23(b)(3).
[32] Fed. R. Civ. P. 23(a)(4).
[33] Fed. R. Civ. P. 23(a)(3).

Uber has since filed an interlocutory appeal with the Ninth Circuit Court of Appeals, requesting a reversal of the district court's class certification order. In the appeal, Uber argues that the district court should not have risked committing the fate of an entire industry to a single jury "in the face of such novel and difficult questions of law, stark differences between putative class members, and staggering potential consequences."

The Future for On-Demand Workforces

Because of the uncertainty in the courts, some local legislatures are taking it upon themselves to create their own regulatory structures for TNCs. For example, Connecticut passed a bill in January 2015 providing that TNC drivers are not employees because they drive their own personal vehicles and do not accept street hails.[34] Other cities and states are contemplating bills that put restrictions and regulations on TNCs that are different from cab and limousine companies without defining exactly what category of work drivers fall into.[35]

As suggested by Judge Chhabria in *Cotter*, lawmakers might be tasked with creating a third model of worker to keep up with emerging technology. Some countries have a category of worker called "dependent contractors"—a concept that does not yet exist in U.S. law. In these jurisdictions, dependent contractors enjoy more protections than independent contractors, but are distinct from full-time employees.[36]

Actions taken by Uber, Lyft and certain insurance industry groups also may generate legislation favorable to on-demand companies. In a bid for uniformity in how states approach insurance for TNCs, Uber, Lyft, and a group of insurance companies developed a "TNC Insurance Compromise Model Bill" in March 2015.[37] The Property-Casualty Insurance Committee of the National Conference of Insurance Legislators is also working on a

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[34] H.B. 6683, Gen. Assemb., Reg. Sess. 2015 (Conn. 2015).

[35] *See* Houston, Texas, City Ordinances, No. 2014-754, ch. 46 (2014), https://www.houstontx.gov/ara/2014-754.pdf.

[36] Christopher Mims, *How Everyone Gets the "Sharing" Economy Wrong*, Wall St. J. (May 24, 2015), http://www.wsj.com/articles/how-everyone-gets-the-sharing-economy-wrong-1432495921.

[37] Lawrence R. Hamilton, *Interest in Ride-Sharing is Revving Up*, LAW360 (April 15, 2015), http://www.mayerbrown.com/interest-in-ride-sharing-insurance-is-revving-up-04-15-2015.

model insurance plan for TNCs.[38] As of this writing, no jurisdiction yet has adopted or endorsed either model plan; however, if insurance companies are creating new insurance products specifically tailored to this new type of worker, industries and possibly state and local legislatures may follow suit and adapt to allow this successful and rapidly growing business model to survive and thrive.

How Can a TNC Protect Itself Given the Uncertainty Surrounding Driver Classification?

So what can a start-up or existing TNC do to protect itself, given the uncertainty currently associated with classifying drivers? Of course, some TNCs may consider classifying drivers as employees rather than independent contractors. Those wishing to use an independent contractor model, however, should consult legal counsel for assistance with assessing their risks under all applicable tests for independent contractor status in the relevant jurisdictions. At a minimum, companies should, wherever possible, avoid potential indicia of control over the manner and means of their drivers' performance and focus, instead, on their results.

The Legal Ripple Effect of Minimum Wage Increases

From employee protests to state and local government action, the movement to increase minimum wages has maintained high visibility in 2015 and shows no signs of fading. While the direct financial ramifications of minimum wage hikes are obvious, employers cannot afford to overlook the indirect effects of such wage increases when making business decisions. This section first examines the grassroots movement to increase minimum wages and the state and local legislative response that followed. Next, this section briefly discusses the arguments for and against increased minimum wages. Finally, this section highlights some practical implications of minimum wage hikes for employers.

The Escalating Trend of State and Local Wage Hikes

The rapid escalation in laws raising minimum wages at the state and local level has fueled, and appears fueled by, a national grassroots movement

[38] http://www.mayerbrown.com/interest-in-ride-sharing-insurance-is-revving-up-04-15-2015/.

advocating a minimum wage of $15 per hour. Throughout 2013, non-union fast-food workers, Walmart employees, childcare workers, and other supporters staged walkouts and protests to raise public awareness that the minimum wage does not provide a living wage. The protests continued into 2015, with workers in more than 200 cities participating in highly visible demonstrations in April. These protests seem to have influenced public opinion. In 2015, the National Employment Law Project released survey results showing 63 percent of Americans agree with raising the minimum wage to $15 per hour during the next five years.[39] When asked if they agree with raising minimum wage to $12.50 per hour, 75 percent of those polled voiced approval.[40]

Despite the public support for this movement, the federal minimum wage remains unchanged at $7.25 per hour since 2009. Congress has repeatedly voted against raising the federal minimum wage, most recently blocking a 2014 Senate bill that would have gradually raised the minimum wage to $10.10 per hour. In contrast, minimum wage legislation has been successful at the state and local level. More than half of states have a minimum wage that exceeds the federal requirement.[41] For example, in July 2014, California increased its minimum wage from $8 to $9 per hour, which increases to $10 per hour on January 1, 2016.[42]

[39] Memorandum from Guy Molyneux to Interested Parties (January 14, 2015), http://www.nelp.org/content/uploads/2015/03/Minimum-Wage-Poll-Memo-Jan-2015.pdf
[40] http://www.nelp.org/content/uploads/2015/03/Minimum-Wage-Poll-Memo-Jan-2015.pdf
[41] Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota (for large employers only), Missouri, Montana (for large employers only), Nebraska, Nevada (only for employees not offered health insurance), New Jersey, New Mexico, New York, Ohio (only for large employers), Oregon, Rhode Island, South Dakota, Vermont, Washington, and West Virginia all have minimum wages higher than the federal minimum wage. *State Minimum Wage: 2015 Minimum Wages by State*, National Conference of State Legislatures, http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx (last updated June 1, 2015).
[42] On June 1, 2015, the California Senate passed a bill (SB 3) that would increase the state minimum wage to $11 per hour by 2016, superseding the previous measure raising the minimum wage to only $10 per hour by January 2016. The Senate bill proposes an additional minimum wage increase to $13 per hour by 2017 and annual minimum wage increases tied to inflation beginning in 2019. This bill must pass the California State Assembly and garner Governor Jerry Brown's approval prior to enactment. The bill was re-referred to committee by the Assembly on July 9, 2015.

Local governments have set the wage floor even higher. In June 2015, the mayor of Los Angeles signed an ordinance increasing the city's minimum wage to $15 per hour by 2020. Los Angeles followed Seattle and San Francisco to become the third major city to do so.[43] Under the Los Angeles ordinance, annual wage increases reaching $15 per hour by 2020 will begin on July 1, 2016 for all employers with more than twenty-five employees.[44] Employers with twenty-five or fewer employees have until July 1, 2017 to begin increasing wages and must reach $15.00 per hour by 2021.[45] On September 29, 2015, Los Angeles County similarly approved an ordinance that gradually increases the minimum wage to $15 per hour by 2020 (and by 2021 for those employers with fewer than twenty-five employees) with annual increases starting in 2022 based on the Consumer Price Index. Seattle likewise began implementing annual wage increases on April 1, 2015, and will continue until the minimum wage hits $15 per hour in 2017 for employers with more than 500 U.S. employees. Employers in Seattle with 500 or fewer U.S. employees have until 2021 to reach $15 per hour. Similarly, increases in San Francisco began on May 1, 2015 and will be phased in until the minimum wage reaches $15 per hour in 2018.

National chains have responded by raising the wages paid to their employees, as well. In February 2015, Walmart agreed to raise wages to at least $9 per hour in 2015, and at least $10 per hour by 2016. Where the nation's largest private employer goes, other companies tend to follow. Target has since followed Walmart's lead, agreeing to raise wages for all employees to at least $9 per hour in 2015. Likewise, McDonald's has

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[43] Oakland, California; San Diego, California; Santa Fe, New Mexico; Albuquerque, New Mexico; and Chicago, Illinois also have passed legislation increasing minimum wage above their respective state minimum wage law. Jennifer Medina, *Los Angeles Labor Group Backs Minimum Wage Increase, then Seeks Exemption*, N.Y. Times (May 29, 2015), http://www.nytimes.com/2015/05/30/us/los-angeles-minimum-wage-increase-backed-by-federation-of-labor-group-that-now-seeks-exemption.html?_r=0. New York City and Washington, D.C. have proposed legislation that will increase their minimum wages beyond their states' minimum wage. *Id.*

[44] The increased minimum wage applies to any employee who spends more than two hours per week working in Los Angeles. This provision means employers located outside Los Angeles could still be impacted by the increases. Seattle has adopted a similar provision with more explicit limits: employees passing through Seattle are not entitled to the higher minimum wage unless they make job-related stops.

[45] Certain exemptions to the increase are still being considered by the Council. For example, labor unions hope to receive exceptions to the increase for their workers to preserve the generous benefit packages received by union members.

promised to raise the wages of all employees in company-owned restaurants to at least $1 more than the local minimum wage. Although this increase ultimately affects only a small percentage of McDonald's stores (90 percent of McDonald's restaurants in the United States are owned by franchisees), the result is that more than 90,000 employees will receive higher wages.

Minimum Wage Critics Respond

As the minimum wage movement gains momentum, critics have responded with arguments against large-scale increases. Critics label the increases "job killers," arguing employers will be forced to cut jobs and/or work hours. They postulate this will then lead to higher unemployment rates and reduced availability of minimum wage jobs. Individuals hoping to land a starter job to gain work experience and prepare for a better position will be unable to find these positions moving forward, critics argue. Critics also speculate that cities will create "wage islands," where commerce dries up due to an exodus of businesses fleeing a city's higher minimum wage.

Advocates of minimum wage increases counter these criticisms by arguing the increases will actually stimulate the economy by allowing greater consumer spending from minimum wage earners—and this spending will not be dampened by the small price increases some companies may implement to offset higher wages. Additionally, advocates argue a substantial increase in the minimum wage will combat low-wage workers' reliance on public assistance programs to supplement their pay. Advocates argue that businesses may also benefit from minimum wage increases as job turnover naturally decreases as wages increase, which saves businesses money and time in training new employees.

As interest in a potential federal minimum wage hike grows, critics voice concerns about such a wide-scale change. States and local municipalities have widely varying costs of living and existing minimum wage laws. Employers in states with lower costs of living could be dramatically affected by minimum wage increases in a way that employers in other states would not. In fact, a federal minimum wage hike would cause little, if any, change in many states (and cities) with mandatory higher minimum wages currently in effect.

Finally, some critics have attempted legally to fight the minimum wage increases. In June 2014, the International Franchise Association and five franchisees sought a preliminary injunction in federal court against Seattle's minimum wage increase, arguing the ordinance treated franchisees unfairly. The argument focused on the treatment of franchisees of large companies. These franchisees, despite otherwise operating as small, independent businesses, must increase wages to $15 per hour by 2017, rather than 2021 as required of other small businesses. The court denied the injunction, and the franchisees have appealed this decision to the Ninth Circuit. In Louisville, Kentucky, where an ordinance raising the minimum wage to $9 per hour passed in 2014, business organizations have filed a lawsuit challenging the city's authority to raise the minimum wage beyond the state-mandated minimum wage. As of this writing, the lawsuit is still pending.

Preparing for an Increased Minimum Wage: Legal Considerations

As employers in cities and states with increasing minimum wages prepare for the expense, they should also consider the ripple effects of such increases.

Watch Out for the Worker Adjustment and Retraining Notification Act and State Analogs

Some employers facing increased minimum wages may choose to relocate operations to areas with lower minimum wage requirements. If doing so requires laying off employees or closing plants, employers may need to comply with the requirements of the federal Worker Adjustment and Retraining Notification Act (WARN Act).[46] Employers covered by the WARN Act include those with one hundred or more full-time employees, and those that have one hundred or more full-time and part-time employees who collectively work at least 4,000 hours per week (excluding overtime).[47] Under the WARN Act, covered employers must provide sixty days' advance written notice to employees affected by either the closing of a plant

[46] Worker Adjustment and Retraining Notification Act (WARN Act), Pub. L. No. 100-379, 102 Stat. 890.

[47] "Part-time employees" are defined as: those employees who worked an average of fewer than twenty hours per week in the shorter of the employee's full employment or the most recent 90 days; or those employees who worked fewer than six (6) of the 12 months prior to the date when notice is required to be given.

or a mass layoff that meets certain numeric thresholds. A plant closing is covered when it will result in a loss of employment within a thirty-day period for fifty or more full-time employees at a single site or operating unit within a single site. A mass layoff is covered by the WARN Act when it will result in a loss of employment for fifty to 499 full-time employees who constitute at least one-third of all full-time employees at a single site or at least 500 full-time employees at a single site of employment within a thirty-consecutive day period.

Employers must also remain cognizant of state or local "mini-WARN Acts," which often have different requirements than the federal WARN Act.[48] For example, California's state WARN Act covers more employers and more triggering events than its federal counterpart. It requires companies with at least seventy-five employees (both full-time and part-time) to provide sixty days' advance notice to employees in the following circumstances: layoff of at least fifty employees within a thirty-day period; relocation of all or substantially all of a company's operations to a new location at least one hundred miles away from the present location; or termination of all or substantially all of a company's industrial or commercial operations.

<u>Be Mindful of the Minimum Wage's Impact on Overtime Exemptions</u>

If and when states increase their minimum wage, it may also affect overtime pay exemptions under state law. In California, for example, exempt administrative, managerial, or professional employees must receive a salary of at least twice the state minimum wage for full-time employment (forty hours per week) and spend more than 50 percent of their time performing exempt duties. When California's minimum wage increases from $9 to $10 per hour in January 2016, the salary threshold for exempt classification will increase accordingly from $37,440 to $41,600. If California follows the lead of cities such as San Francisco and Los Angeles by increasing the state minimum wage to $15 per hour, the salary threshold will become $62,400. Therefore, employers in California (and other states with exemptions tied to

[48] California, Connecticut, the District of Columbia, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Tennessee, Vermont, and Wisconsin all currently have "mini-WARN" laws (or some other notice requirement) in place.

state or local minimum wage) must be aware of any planned increases in minimum wages when reviewing the salaries of exempt employees to classify their workforces and budgets accordingly.

Increased Consequences for Noncompliance

Finally, employers should be aware that increased minimum wages also will lead to increased penalties for failure to comply with labor laws and regulations. These requirements include not only maintaining adequate salary levels for overtime exemptions and paying overtime premiums for non-exempt employees, but providing meal and rest breaks for non-exempt employees and prompt payment of final wages. The penalties for violating such requirements typically are based on an employee's hourly wage, and may include interest.

How Can Employers Prepare Themselves?

Minimum wage increases are more than a newspaper headline or trending debate topic on Twitter. What began as a social movement has been embraced by a number of corporations and local and state governments. Employers must watch minimum wage laws in their cities and states to prepare for increases. Further, employers must look beyond their financial statements to understand the other legal implications of minimum wage increases on their particular workforce and employment practices.

Expanding Section 7 Rights under the National Labor Relations Act

Despite historically low union membership rates, the National Labor Relations Board (NLRB) remains relevant in today's workplace, in part by continuously enforcing and expanding protections of non-unionized employees found in the NLRA. Section 7 of the Act[49] protects, among other things, both unionized and non-unionized workers' rights to engage in concerted activity for the purpose of mutual aid or protection. Since roughly 2010, the NLRB has increasingly invoked Section 7 to challenge certain employer policies—especially those relating to confidentiality of information and use of social media and employer technology systems. This trend has escalated since 2014 with the board's decision in *Purple*

[49] National Labor Relations Act § 7.

Communications[50] and the Office of the General Counsel's increased scrutiny of employer handbook policies.

Evolution of NLRB

On July 5, 1935, President Franklin D. Roosevelt enacted the NLRA at a time of increasingly volatile labor strikes and union unrest. The Act was intended to govern the relations between labor unions and employers, especially with respect to workers' right to organize. Congress created the NLRB to administer and enforce the Act. The NLRB was originally composed of three board members appointed by the president and subject to Senate approval. In 1947, the Republican chairmen of the Senate Labor Committee and the House Education and Labor Committee worked to amend the NLRA. The result of this effort was the Taft-Hartley Bill, which among other things, created an independent NLRB General Counsel to serve as the prosecutorial arm, separate and independent of the board. Meanwhile, the board itself grew from three members to five. Overall, Taft-Hartley represented a move toward more employer-friendly policies, but Section 7[51] protections still remained the heart of the NLRA.

Since then, the NLRB has kept this basic structure: a quasi-judicial arm led by a five-member board appointed by the president (with Senate consent) to a five-year term, and an investigative and prosecutorial arm led by the General Counsel, appointed by the president to serve a four-year term. Both arms have been active recently in expanding workers' rights, particularly in the areas of email, confidentiality, and social media.

Recent Board Decisions Finding Activity Protected under Section 7

A recent NLRB decision regarding use of employer-provided email for concerted activities represents a shift away from prior board decisions. The NLRB decided in *Purple Communications* that an employer could not ban all non-work-related communications on employer-provided email systems—a significant shift that places employees' rights to organize as a higher priority

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[50] *Purple Communications, Inc.*, 201 L.R.R.M. (BNA) 1929, 2014 WL 6989135 (N.L.R.B. 2014).
[51] National Labor Relations Act § 7.

than employers' property rights.[52] Under *Purple Communications*, employees who have already been granted access to their employer's email system for work purposes have a presumptive right to use the email system to communicate about their terms and conditions of employment during non-working time. Employers can rebut this presumption by demonstrating that a ban on non-work-related use of company email systems is justified by special circumstances necessary to maintain workplace productivity or discipline. While the board explicitly limited *Purple Communications*' holding to email systems, its reasoning shows the potentially broad implications for other company electronic communication systems.

The board also has issued several decisions protecting employees in their use of social media for Section 7[53]-related activities, including several instances of Facebook posts where employees were highly critical of their supervisors or the conditions of their workplaces. In one such decision, *Pier Sixty, LLC*,[54] an employee had gone on a break during his shift and used his iPhone to post profane statements about his boss and his boss's family; however, the employee ended his four-sentence rant with, "Vote YES for the UNION!!!!!!!" The board found the employee's post constituted protected concerted activity based on the totality of the circumstances. Among the factors the board considered were the manager's general tolerance of profanity in the workplace, the employee was on a break when he posted his comments, and a portion of the content—encouraging coworkers to vote in favor of a union—constituted protected content, even if the balance of the post did not. The ruling suggests there is little an employee could say, in the board's view, that would be "over the line" as long as it relates to protected areas such as working conditions or union membership.

The Office of the General Counsel Focus on Employer Policies

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[52] *Purple Communications* overruled the 2007 decision in *In re The Guard Publishing Co.,* 351 N.L.R.B. 1110, 183 L.R.R.M. (BNA) 1113, 2007 WL 4540458 (2007), *opinion supplemented*, 191 L.R.R.M. (BNA) 1039, 2011 WL 3151776 (N.L.R.B. 2011) (*Register Guard*), holding employees did not have a right to use employer e-mail systems for Section 7 activities. Note that *Register Guard* was decided at a time when a Republican President held office and appointed a majority Republican Board.

[53] National Labor Relations Act § 7.

[54] *Pier Sixty, LLC*, 203 L.R.R.M. (BNA) 1008, 2014-15 NLRB Dec. (CCH) P 15944, 2015 WL 1457688 (N.L.R.B. 2015).

The Office of the General Counsel also has issued rulings recently expanding employee protections in response to changes in technology, and, specifically, increased employee presence on social media. Employer handbook policies that could reasonably be read to restrict employees' rights to communicate with the media or third parties about the terms and conditions of their employment are increasingly considered a violation of Section 7 rights.[55] The General Counsel released a guidance memorandum in March 2015 listing examples of lawful and unlawful handbook policies on employees' use of social media, among other things.[56] In general, the General Counsel found unlawful those policies that were overly broad. The policies deemed "lawful" tended to give specific examples of prohibited conduct rather than blanket prohibitions on contact with the media.[57] One handbook passage that was deemed "lawful" consisted of cautionary guidelines, not outright prohibitions, relating to the manner and tone of language used in social media posts, not the content.[58]

Another area in which the General Counsel has been expanding Section 7[59] rights is confidentiality policies. Policies that explicitly prohibit discussion concerning terms and conditions of employment—such as workplace grievances, hours, and wages—or that could reasonably be understood to prohibit these discussions have generally been found to violate Section 7 according to the General Counsel. The challenge for employers is protecting confidential and proprietary information without violating the Act. A broad restriction on communicating confidential employer information protects employers. The guidance memorandum states such broad restrictions may be acceptable as long as the policy would not reasonably lead employees to understand the rule as restricting their Section 7 rights to communicate about working conditions. On the contrary, the

[55] *See Trump Marina Associates, LLC,* 354 N.L.R.B. 1027, 187 L.R.R.M. (BNA) 1207, 2009 WL 5178368 (2009).
[56] Richard F. Griffin, Jr, *Report of the General Counsel concerning Employer Rules*, (*Griffin Report*) (Mar. 18, 2015).
[57] *See Lily Transportation Corporation And Robert Suchar,* 202 L.R.R.M. (Bna) 2143, 2014-15 Nlrb Dec. (Cch) P 15937, 2015 Wl 1439930 (N.L.R.B. 2015); *Boch Imports, Inc.,* 203 L.R.R.M. (BNA) 1137, 2015 WL 1956199 (N.L.R.B. 2015); *Hoot Winc, LLC,* 199 L.R.R.M. (BNA) 1567, 2014 WL 2086220 (N.L.R.B. Div. of Judges 2014).
[58] *Landry's Inc. And Its Wholly Owned Subsidiary Bubba Gump Shrimp Co. Restaurants, Inc. And Sophia Flores,* 203 L.R.R.M. (BNA) 1059, 2015 WL 1756976 (N.L.R.B. 2015).
[59] National Labor Relations Act § 7.

guidance memorandum specifies that policies defining "employee information" or restricted "personal" or "confidential" information too broadly (or those lacking any definition at all) violate the Act.[60]

Ultimately, the result of these NLRA expansions is to give employees greater Section 7 rights in regard to technology. The trend is to protect and expand the electronic means by which workers may organize the workplace. Generally, the broader the language of a policy regarding social media, confidentiality, and technology systems, the greater the chance it may be construed to restrict protected rights. An employer could violate the NLRA simply by having a policy that restricts or could reasonably be construed to restrict Section 7 activity, even if it has not enforced the policy in such a manner.[61] Employers are therefore well advised to narrowly tailor their policies. Simply including a "savings clause" that explicitly states nothing in the employee handbook limits employee rights under the Act is *not* sufficient to save a policy from violating the NLRA.[62]

This enhanced scrutiny of handbook policies begs the question: what type of penalties do employers face if their policies are found to violate the NLRA? In 2014, the NLRB found the majority of Wendy's International, LLC's employee handbook was unlawfully overbroad. As part of an informal settlement with the NLRB, Wendy's revised its handbook, and the NLRB and the General Counsel approved the revisions. This might suggest the penalty for violating the NLRA is simply some bad press, litigation fees, and NLRB assistance in drafting a new employee handbook. In reality, an employer may face unfair labor practice charges and could be forced to pay back wages to—or reinstate—an employee adversely affected by a challenged policy.

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[60] See *Griffin Report*.

[61] *Martin Luther Memorial Home, Inc*., 343 N.L.R.B. 646, 176 L.R.R.M. (BNA) 1044, 2004-5 NLRB Dec. (CCH) P 16786, 2004 WL 2678632 (2004); *MACYS, INC. AND UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL* 1445, 2015 WL 2235632 (N.L.R.B. Div. of Judges 2015).

[62] *MACYS, INC. AND UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL* 1445, 2015 WL 2235632 (N.L.R.B. Div. of Judges 2015).

Conclusion

Compliance Strategy

Knowledge of recent developments is important; however, it is only the first step a business must take to protect itself. Implementing a compliance strategy is critical to limiting potential liability. In developing a strategy, employers should take the following precautions:

- *Stay apprised of employment law updates.* Stay informed about developments in employment law. Partner with human resources and industry groups, and consult employment counsel for consistent advice.
- *Conduct an audit and review worker classifications.* Misclassification of employees can carry significant penalties including back wages, benefits, and taxes. Employers can hire outside counsel to conduct an independent audit. Alternatively, employers may conduct an internal evaluation of their worker classifications. Determine whether workers fall into the following categories: full-time or part-time; exempt or non-exempt; independent contractor; temporary; or intern.
- *Reality-test job descriptions and contracts.* Employees' duties and relationships with management may have changed over time. Review service contracts, job descriptions, and your employee handbook, and compare duties described therein with existing practices and procedures. Interview employees and managers to understand how policies may diverge from actual practice. Next, assess whether any changes may have resulted in a new classification. If so, contact outside counsel to update contracts and compensation as appropriate.
- *Review and update employee handbooks and policies.* Review employee handbooks to ensure policies are up to date with current laws. Pay attention to policies that may affect employees' rights under the NLRA. Make sure conduct, confidentiality, technology, and social media policies do not infringe on protected activity.
- *Conduct training.* Train management-level employees to understand employee classifications and that their cooperation is critical to avoiding liability. Create a culture of professional development through consistent training with all employees, especially human

resources professionals. Regular reinforcement will keep employees apprised of their duties and responsibilities.

- *Develop a decision-making protocol.* Develop a centralized strategy for handling internal conflict and decision making. A consistent and straightforward protocol will ensure issues are resolved efficiently and fairly.

Key Takeaways

- Help your clients with unpaid internship programs determine whether those programs satisfy the DOL's six-factor test and any other potentially applicable tests in their jurisdiction and whether they can strengthen the program to stand a greater likelihood of satisfying any court-applied test.
- Educate your companies that facilitate on-demand, peer-to-peer transactions via sophisticated apps on the bevy of legal issues they face, the most substantial of which is likely workforce classification. Advise clients that wish to use an independent contractor model of the risks under applicable tests, including the right to control test.
- Encourage your clients to watch minimum wage laws in their cities and states to prepare for increases. Further, help them look beyond their financial statements to understand the other legal implications of minimum wage increases, including those related to mini-WARN Acts and employee classification, and the consequences for noncompliance.
- Because employees are gaining greater Section 7[63] rights in regard to technology, advise your clients to narrowly tailor their policies. Simply including a "savings clause" that explicitly states nothing in the employee handbook limits employee rights under the Act is *not* sufficient to save a policy from violating the NLRA.

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[63] National Labor Relations Act § 7.

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Acknowledgment: *Ms. Corman would like to acknowledge Skadden associates Ryne Posey and Allison Towle and Skadden summer interns Kelsey Leeker and Catherine Thompson for their help in researching and writing this chapter.*

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