

Independent Contractors

Five Key Independent Contractor Legal Developments in 2017—and What to Expect in 2018 (Part II of II)



By Richard Reibstein and Janet Barsky, Locke Lord LLP

2017 was notable for a shift in the law of independent contractors. [Part 1](#), published Jan. 4, discussed five key legal developments from 2017. Part 2, below, offers readers predictions of what lies ahead in 2018 in this area of the law. Both parts also offer takeaways designed to maximize IC compliance and minimize exposure to IC misclassification liability.

What should you expect to see in 2018?

First, many commentators will attach outsized significance to two long-awaited court decisions, but one case could be a game-changer in California.

We can expect no less than two court rulings to which many commentators are likely to attach oversized importance and notoriety. The first such case is the U.S. Supreme Court's decision, expected in the first half of 2018, involving mandatory arbitration clauses with class action waivers. This case involving class action waivers may have [little impact](#) on companies, including those using ICs, which have already drafted their independent contractor agreements in a manner that will be enforceable regardless of the way in which the Court rules. Those companies are using "opt out" clauses that afford contractors the opportunity to opt out of arbitration agreements with class action waivers, and to do so without any penalty or repercussion on workers who have signed them.

Another case likely to be given outsized importance is a judge's decision in the GrubHub trial involving a delivery driver using that company's app, who has claimed that he should have been classified and paid by GrubHub as an employee and not treated as an IC. This is reportedly the first on-demand, gig economy case to go to trial. While this sharing economy case has grabbed headlines, it is [unlikely to be momentous](#) from a legal standpoint. Why? Because cases of this nature dealing with a single individual frequently turn on their particular facts, which can differ from case to case. Differing facts often lead to different results regarding the proper classification of workers. And cases where there are some facts favoring IC status and other facts supporting employee status – cases in the so-called "gray area" – oftentimes have little precedential effect. Indeed, the court's decision may not even be a precedent for other drivers who contract with GrubHub.

One court decision that may be of outsized significance is likely to be decided in 2018. That case, *Dynamex Operations West v. Superior Court*, has been on appeal before the California Supreme Court (No. S222732) since January 2015. The issue in *Dynamex* is whether, in wage and hour cases in California, where the issue is whether the workers in question are independent contractors or employees, should the Supreme Court continue to follow its time-honored holding in *S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations* (which is roughly akin to a common law / economic realities test for determining IC status) or apply a far more rigorous standard that more closely resembles an ABC test.

While some commentators have written that most companies, including those in the gig economy, will be unable to satisfy the more rigorous test, that is by no means our view. Nonetheless, a departure from *Borello* could be extremely disruptive for companies with business models reliant upon independent contractors where such businesses have thoughtfully structured their IC relationships in a manner that was intended to comply with the law as set forth in *Borello*. Indeed, the *Borello* standard

has been incorporated into the California Department of Industrial Relations [website](#) advising the public of the test for “independent contractor versus employee” for many years.

Second, expect more state legislation affecting the ride-sharing industry.

As noted in Part 1, in May 2017, the Governor of Florida signed the Transportation Network Companies Act ([HB 221](#)). That law designates drivers for ride-sharing companies in the on-demand economy as independent contractors provided the transportation network company meets four criteria, all of which were already being met by the major ride-sharing companies including Uber and Lyft.

Other state legislatures are likely to follow the lead of Florida and seek to create a safe harbor for ride-sharing companies using ICs to transport customers.

Third, don't expect an abatement in the number of IC misclassification class actions.

We are likely to see class action lawyers doubling down on IC misclassification cases in the coming year, inasmuch as these types of lawsuits remain a lucrative cottage industry for those lawyers and multi-million-dollar settlements have become commonplace.

Class action lawyers are more likely to target companies that do not have an enhanced level of compliance with IC laws or valid arbitration provisions with class action waivers in their IC agreements.

Fourth, administrative reviews, proceedings, and audits are unlikely to diminish.

As noted in Part 1, some state courts are making it less burdensome to satisfy state law tests for IC status. Nonetheless, it is still highly likely that state unemployment agencies will remain aggressive in seeking unemployment tax contributions from companies using ICs. It is also likely that state workforce agencies, including those enforcing state wage laws, will not become any less aggressive in pursuing companies that misclassify employees as independent contractors. Thus, while the Trump Administration will be more hospitable to companies using ICs than the Obama Administration, this leveling of the playing field at the federal enforcement level is unlikely to trickle down to the state workforce agencies. It will remain challenging for companies that use ICs to remain free from one or more state agency investigations, audits, or proceedings.

Takeaways

There are ways that companies using ICs can minimize the likelihood that they will become targets for class action lawyers and administrative agencies. One way used by an increasing number of companies is [IC Diagnostics™](#), a process designed to structure, document, and implement IC relationships in a customizable and sustainable way intended to maximize compliance with applicable federal and state IC laws and, at the same time, minimize IC misclassification liability. Form IC agreements and one-size-fits-all approaches may be ill-fitting and create a comfort level that may betray businesses who can and should do more to enhance their IC compliance.

Another way to minimize the likelihood of being targeted by plaintiffs' class action lawyers is to add an arbitration clause with a class action waiver to a company's IC agreement. Many of these clauses are being enforced by the courts. At the same time, though, there have been numerous court decisions striking down arbitration clauses because they have not been drafted in a state-of-the-art manner or because they needlessly impose what some courts view as “unfair” burdens or costs on workers who sign such agreements.

While well-drafted arbitration agreements can help, they are not a panacea, because they don't offer any protection against investigations by state or federal regulatory agencies. Further, some companies with a high level of IC compliance have also concluded that arbitration clauses may not always be advantageous to add to existing IC agreements. The bottom line: companies that wish to consider adopting an arbitration provision with a class action waiver should give as much thought to whether they should add that type of provision to their IC agreements and the wording of their arbitration clauses as they do to the language of every other provision in these important agreements.

Richard Reibstein is a partner with Locke Lord LLP and has published a [blog](#) since 2010 dedicated exclusively to independent contractor misclassification and compliance law. He co-heads his law firm's independent contractor misclassification and compliance practice, an interdisciplinary group of over 20 labor, employee benefits, tax, and class action lawyers. Janet Barsky is a Senior Counsel with Locke Lord; her practice is dedicated to independent contractor compliance and misclassification.