



Mixed Up On Misclassification:

Where “ABCs” Are Not So Elementary



Today's Speakers



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Chief Executive Officer
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Areas we will cover today

1. Misclassification, cost, triggers and who is involved in the enforcement
2. Tests used for misclassification—AB5, ABC, etc.
3. Interesting specific AB5 risk mitigation nuances
4. Steps that can be taken to mitigate general misclassification risks
5. Blueprint to jumpstart misclassification risk mitigation

misclassification noun

mis·clas·si·fi·ca·tion | \ ,mis-ˌkla-sə-fə-ˈkā-shən  \

plural misclassifications

Definition of *misclassification*

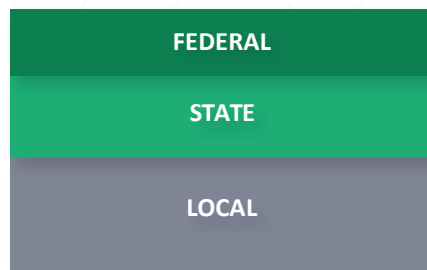
: an act or instance of wrongly assigning someone or something to a group or category : incorrect [classification](#)

// Cracking down on the *misclassification* of workers so that those mislabeled as "independent contractors" can become unionizable employees.

— Harold Meyerson

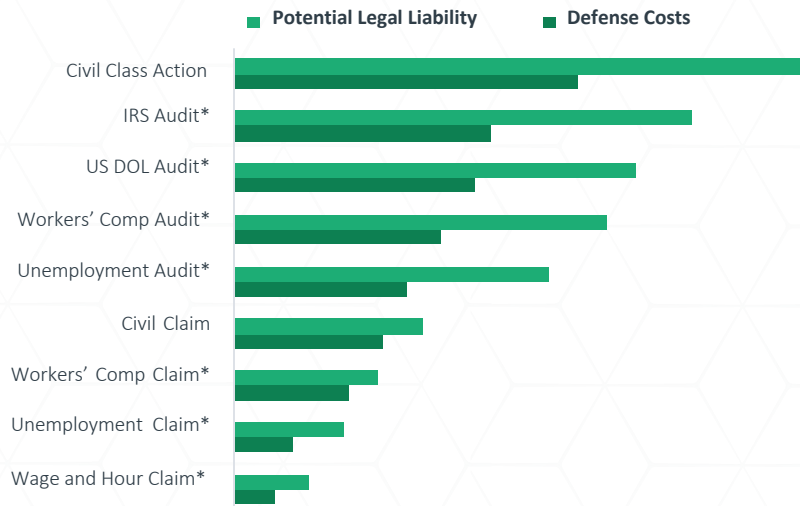
Types of misclassification

- > Workers' comp claims and audits
- > Unemployment claims and audits
- > IRS SS-8 inquiries and audits
- > DOL, State and Local Wage & Hour claims and audits
- > EEOC
- > NLRB and Union claims
- > Individual civil actions
- > Civil class actions
- > PAGA claims
- > And on and on ...



The types of misclassification

Not all claims are created equal



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Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

ANGEL OMAR ALVAREZ, an individual;
ALBERTO RIVERA, an individual;
FERNANDO RAMIREZ, an individual; JUAN
ROMERO, an individual; and JOSE PAZ, an
individual; on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Defendants.

Case No.: BL695123

CLASS ACTION *DB*

FIRST AMENDED COMPLAINT FOR:

1. FAILURE TO PAY MINIMUM WAGE
(*Cal. Lab. Code §§ 1194.2 & 1197*);
2. FAILURE TO PAY WAGES FOR MISSED
MEAL PERIODS (*Cal. Lab. Code § 226.7*);
3. FAILURE TO PAY WAGES FOR MISSED
REST PERIODS (*Cal. Lab. Code § 226.7*);
4. FAILURE TO REIMBURSE BUSINESS
EXPENSES (*Cal. Lab. Code § 2802*);
5. FAILURE TO PROVIDE ACCURATE,
ITEMIZED WAGE STATEMENTS (*Cal.
Lab. Code § 226*);
6. WAITING TIME PENALTIES (*Cal. Lab.
Code §§ 201, 202 & 203*);

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Superior Court of California
County of Los Angeles

FEB 28 2018

Sherri R. Carter, Executive Officer/Clerk
By Nancy Alvarez, Deputy

NATURE OF ACTION

1. This case involves defendant-employers' deliberate scheme to misclassify their truck drivers as independent contractors, thereby denying them the fundamental protections due to employees under California law. This class action seeks to enjoin the defendants' unlawful conduct, to obtain restitution of unpaid wages and unlawful deductions made from truck drivers' pay, and to prosecute a private enforcement action to collect civil penalties under the Labor Code Private Attorney General Act ("PAGA"), against Defendants [REDACTED] and DOES 1 through 100, inclusive (hereafter, collectively referred to as "Defendants"), under the California Labor Code, the California Industrial Welfare Commission's ("IWC") Wage Orders, the California Business and Professions Code (§§ 17200 *et seq.*), and other statutes and regulations applicable to non-exempt employees in the State of California.

2. This combined class and PAGA enforcement action is brought against Defendants—who run a large trucking operation in Southern California—for engaging in a pattern and practice of willfully misclassifying their truck drivers, including Plaintiffs ANGEL OMAR ALVAREZ, ALBERTO RIVERA and FERNANDO RAMIREZ (hereafter, collectively referred to as "Plaintiffs"), as independent contractors instead of affording them their true status as employees, thus denying these workers the basic wage-and-hour rights and protections guaranteed to employees by the California Labor Code and the IWC's applicable Wage Order.

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FIRST AMENDED CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL



Important tests to know: “ABC Test”

3-part test to determine if a worker is an independent contractor—  and the relation to AB5

- A. The worker is free from the control and direction of the purported employer in relation to the performance of the work, both under the contract and in fact;
- B. The worker performs work that is outside the usual course of the purported employer’s business; AND**
- C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hirer.
 - The purported employer bears the burden of proving each factor, and the failure to prove a single factor leads to liability.
 - This test (with slight variations) is used in the Northeast, West Coast and Illinois. So, major areas of commerce—such as California and Massachusetts—apply the ABC test.

Alt
ABC Test

Economic
Realities Test

Right to
Control Test

Statutory
Specialty Tests

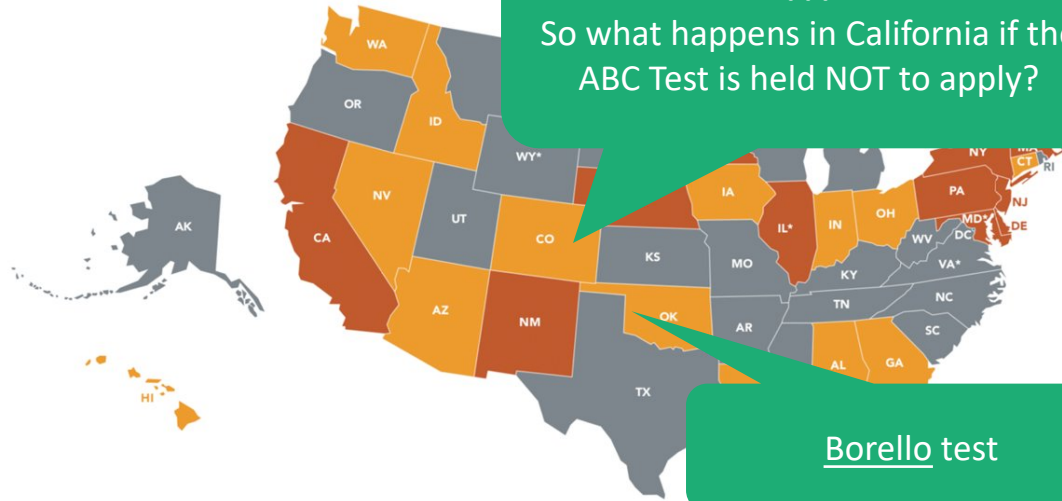
Example:
jurisdictional
dilemma Nevada

State-by-state map of ABC Test

State uses some form of ABC Test for wage and hour laws

State uses some form of ABC Test for unemployment insurance eligibility

State uses some form of ABC Test in some sectors and may also use it for unemployment insurance eligibility



???

So what happens in California if the ABC Test is held NOT to apply?

Borello test

Important tests to know: “Economic Realities Test”

Under federal law (and modified by some states), we have a six-part Economic Realities Test:

1. How **integral** the work is to the business
2. The **permanency** of the worker’s relationship with the company
3. The worker’s and employer’s **investments** in things like equipment
4. How much **control** the worker has
5. The worker’s opportunity for **profit and loss**
6. How much **skill** is required to do the job and the worker’s initiative



DEPARTMENT OF LABOR /Wage and Hour Division
29 CFR Parts 780, 788, and 795
Independent Contractor Status under the Fair Labor
Standards Act
ACTION: Notice of proposed rulemaking and request for
comments.

Know what triggers misclassification claims

IC CLAIMS ARISE FOR TWO REASONS

- Money
- Injury

These claims come before workers' compensation commissions, government agency officials, and administrative judges—generally looking for an avenue of relief for the IC

AVOID MONEY CLAIMS

- Say what you're going to pay, pay it. Don't pay less
- Get authorization for deductions. Show deductions clearly
- Pay accurately, on time & don't pay by the hour
- Be careful with pay floors—remember, the IC needs to have an opportunity for profit or loss
- Be careful with reimbursements, e.g., fuel, assessorial, tools, etc.

AVOID ON-THE-JOB INJURIES

- Don't include the IC on employee benefits, but do encourage ICs to have plans in place in case of injury
- Remind ICs of the importance of having a contingency plan in place
- Encourage OOIDA and other IC benefit services companies, e.g., Openforce, ATBS, Drivers Legal Plan, and more
- Consider Occupational Accident plans and workers' compensation plans

Injuries, insurance and missiles



Injured ICs can be workers' comp seeking missiles

- ICs often do not have health insurance
- When injured, ICs sometimes seek the most visible “insurance” policy—workers' comp insurance of the contracting company
- This can trigger more IC claims, government/insurer investigations, government reporting and sharing, etc.



Workers' comp and occupational accident insurance coverages

- Workers' comp framework—and relation to state-by-state requirements and remedies
- Occupational accident insurance framework—and the “covered activity” concept
- The three-legged stool concept—and how contingent liability policies bring it together



Be careful of insurance “traps”

- Policies in your company name
- Adding ICs onto company policies
- Charge-backs and markups

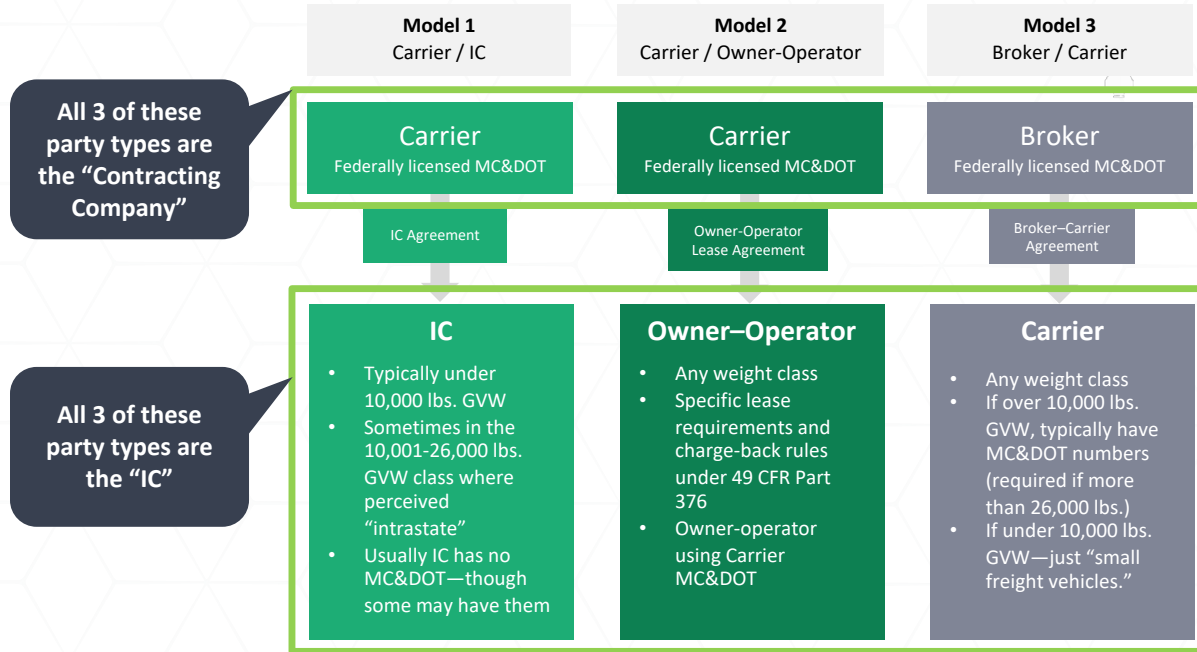


Provide options and elections

- Set contract requirements for insurance coverages
- Do not force IC participation in coverages sponsored by your company

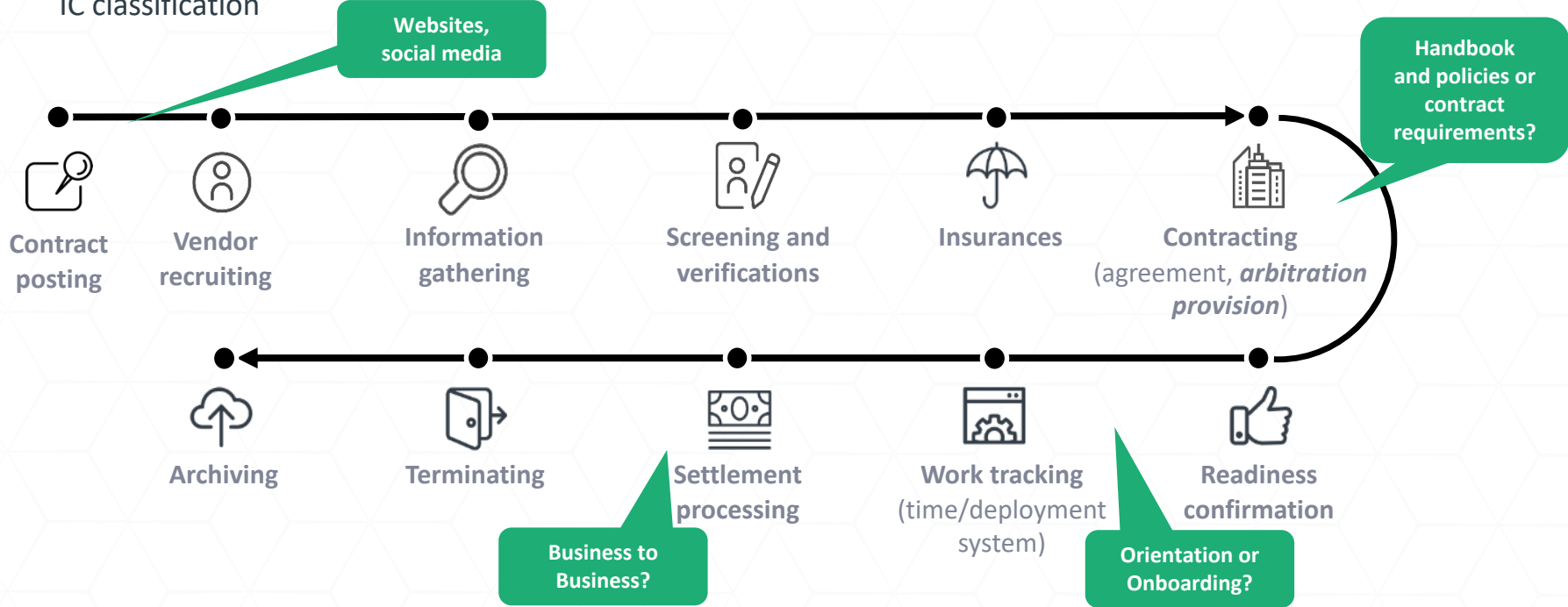
Understand your desired transportation model(s)

What you call yourself now matters for misclassification



Fortify your desired model—mind the details

Every interaction with an IC sheds evidence that either supports or undermines your model and related IC classification



What is the B2B exemption and impact

Business service providers:

AB5 identifies “business service providers,” who provide business services to “contracting businesses,” as exempt from the ABC Test’s reach. Referred to in legislative discussions as “bona fide business relationships.”

To satisfy the exemption, however, a contracting business bears the burden of establishing that each of its “business service providers” **satisfy each of 12 factors.**

The dirty dozen requirements:

- Control
- Services must be to the business, not customers
- In writing
- Properly licensed
- Separate location
- Independent, established business
- Other clients
- Actively advertises
- Provides own equipment
- Negotiate rates
- Set own hours and location
- Not applicable to construction

Two pending (!) California AB5 trucking industry cases

California v. Cal Cartage Transportation Express, LLC,

Superior Court of the State of California, for the County of Los Angeles, Case No. BC689320



- “Because Prong B of the ABC Test under both Dynamex and AB 5 prohibits motor carriers from using independent contractors to provide transportation services, the ABC Test has an impermissible effect on motor carriers' "price[s], route[s], [and] service[s]" and is preempted by the FAAAA. (49 U.S.C. § 14501(c)(l)).”

California Trucking Association v. Attorney General Xavier Becerra,

United States District Court Southern District of California, Case No.: 3:18-cv-02458-BEN-BLM

- “The Court finds AB-5’s ABC test has more than a “tenuous, remote, or peripheral” impact on motor carriers’ prices, routes, or services, particularly in light of our Ninth Circuit jurisprudence casting serious doubt on the type of “all or nothing rule” that AB-5 implements.”
- [California officials] ... are temporarily enjoined from enforcing Assembly Bill 5’s ABC test, as set out in Cal. Labor Code § 2750.3(a)(1), as to any motor carrier operating in California, pending the entry of final judgment in this action.

Eight keys to mitigate risk

A blueprint for compliance

1. Conduct an internal audit of all current workers classified as ICs
2. Create guidelines for engaging and contracting with ICs
3. Have a written and signed contract that includes an arbitration provision and class waiver (if permissible) for all ICs
4. Make sure ICs provide supporting documents that show they operate an independent business, such as business incorporation, insurance and tax IDs
5. Record an interactive negotiation process
6. Use scalable digital document management, alerting and archiving
7. Train operations employees regarding their interactions with ICs
8. Rely on third parties to provide certifications, licenses, training, insurance coverages, and other services and benefits





Questions?

Contact us at sales@oforce.com

