



# Half an Hour for Health Care

**Joint Employment Hot Topics!  
Wages, Time Keeping and How to Minimize  
Exposure with Your Staffing Agency Vendors**

September 12, 2024

**Seyfarth Shaw LLP**

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# Speakers

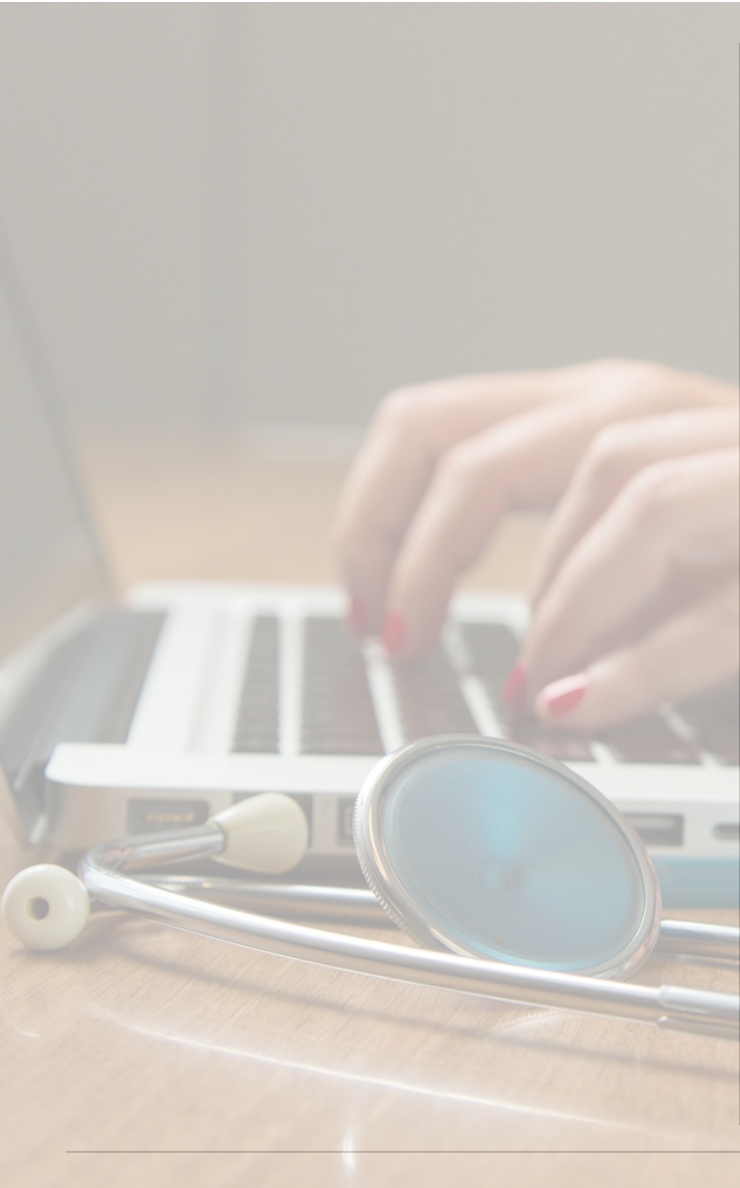
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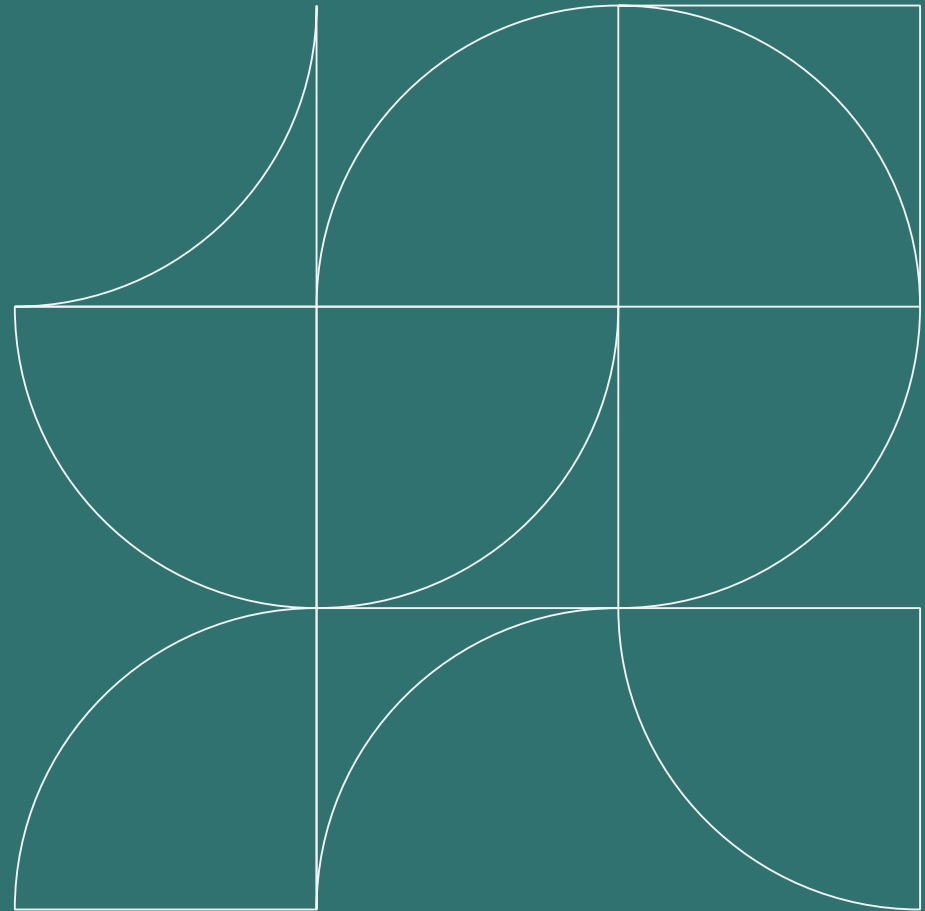
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## Agenda

- 1 | Legal Test – Who Is the Employer?
- 2 | Preemptive Audits
- 3 | Common Wage, Timekeeping and Scheduling Issues

# Legal Test – Who Is the Employer?



# Joint Employment Standards

## ***Martinez v. Combs***

Three definitions of employment:

1. To exercise control over wages, hours, or working conditions
  - Intended to reach “situations in which multiple entities control different aspects of the employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work”
2. To suffer or permit to work
  - Intended to reach “irregular working arrangements”
3. To engage, thereby creating a common law employment relationship
  - Intended to reach “the regularly hired employees who undoubtedly comprise the vast majority of the state’s workforce”

# Joint Employment Standards

## Labor Code Section 2810.3

(b) A client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for both of the following:

(1) The payment of wages

(2) Failure to secure valid workers' compensation coverage as required by Section 3700

(c) A client employer shall not shift to the labor contractor any legal duties or liabilities under Division 5 (commencing with Section 6300) with respect to workers supplied by the labor contractor.

## Joint Employment Standards

### ***Jimenez v. U.S. Continental Marketing, Inc.,***

“To evaluate whether an entity is an employer for FEHA purposes, courts consider the totality of circumstances and analyze several factors, principal among them the extent of direction and control possessed and/or exercised by the employer over the employee.”

*Jimenez v. U.S. Continental Marketing, Inc.*, 41 Cal. App. 5<sup>th</sup> 189, 193 (2019).

“In the particular case of temporary staffing, factors under the contractual control of the temporary staffing agency (such as hiring, payment, benefits, and timesheets being handled by a temporary staffing agency) are not given any weight in determining the employment relationship with respect to the contracting employer.” *Id.*

“The inquiry with respect to the contracting employer is considered individually, not in relation to that of the direct employer” *Id.*



# Joint Employment Standards

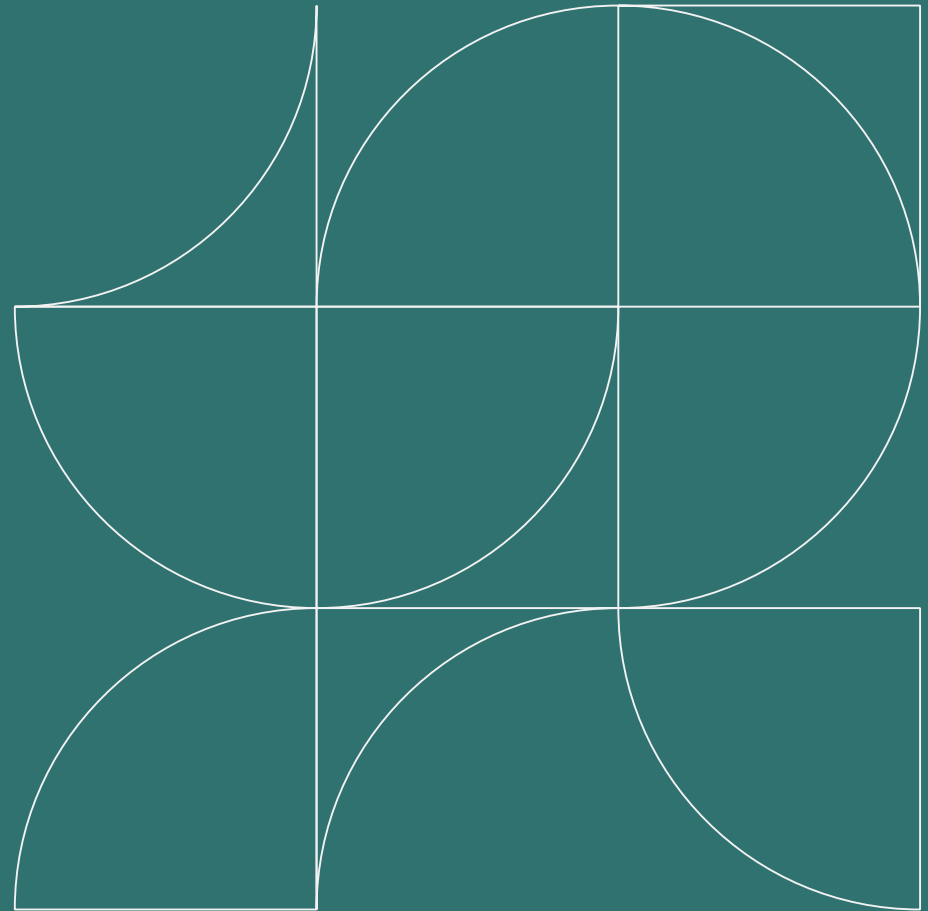
## ***Dynamix Operations West, Inc. v. Superior Court***

- Considered the test for employment in the context of a claim for independent contractor misclassification
- Applied “ABC” test in considering the “suffer or permit to work definition” or employment. That test requires the hiring entity to establish:
  - (A) “that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact”;
  - (B) “that the worker performs work that is outside the usual course of the hiring entity’s business”; and
  - (C) “that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.”

“[T]he Supreme Court’s policy reasons for selecting the ‘ABC’ test are uniquely relevant to the issue of allegedly misclassified independent contractors. . . . Therefore, it does not appear that the Supreme Court intended for the ‘ABC’ test to be applied in joint employment cases.”

*Curry v. Equilon Enterprises*, 23 Cal. App. 5<sup>th</sup> 289, 314 (2018)

# Preemptive Audits

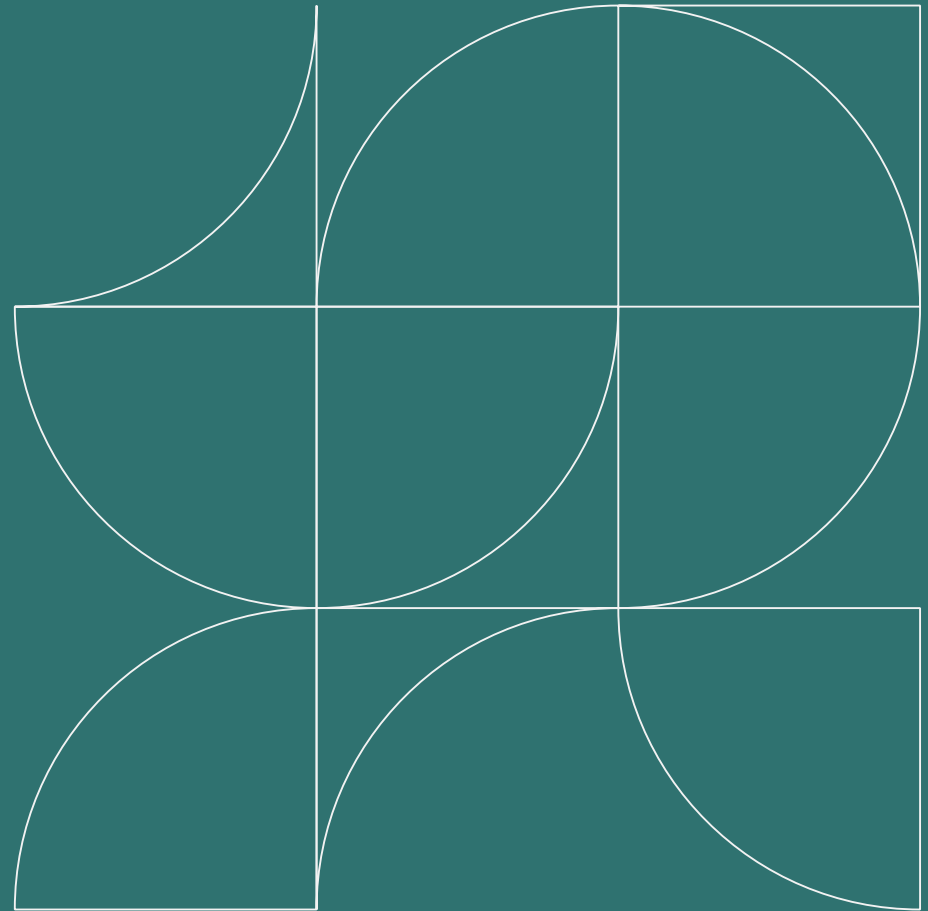


# Preemptive Audits

## Audit Considerations

- What is the scope of potential exposure?
  - Where do your temporary workers work?
  - How many temporary workers do you have?
- Collect and evaluate relevant information
  - Do you have written policies or procedures regarding time and pay practices?
  - Are there “informal practices”?
  - Sample paystubs and timecards
- Review staffing agency contract
  - Cooperation/audit clause
  - Third-party beneficiary in arbitration provision
  - Indemnification provision

# Best Practices to Address Wage, Timekeeping and Scheduling Issues



# Scheduling Issues

## Reporting Time

- Reporting time:
  - Each day an employee reports for a scheduled day's work but is provided less than half of the employee's usual or scheduled day's work, the employee must be paid for half of the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at the employee's regular rate of pay
  - employee is required to report to work a second time during the workday, but is provided less than two hours of work on this second reporting

# Scheduling Issues

## Split Shift Premium

- What is a split shift?
  - Work schedule that is interrupted by non-paid and non-working time periods established by the employer
  - Longer than a bona fide meal period
  - Within the same workday
- How much is owed?
  - One hour at the applicable state or local minimum wage
  - BUT any money earned over and above minimum will be credited towards employer's obligation to pay
    - E.g. a temporary worker earns \$16 / hour 8 hour shift = \$128 / day
    - Split shift premium (assuming \$15 minimum wage) is \$7 per shift
      - \$15 (one hour at minimum wage) - \$8 (amount employee was paid over minimum wage)
- Other considerations
  - Travel time pay
  - Mileage reimbursement

# Timekeeping and Wages

## Considerations

- Client-site employer can be liable for payment of wages under Labor Code section 2810.3.
- How do workers record their time?
- How are workers being paid?



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