Case No. 07-16487

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHIT NARAYAN, et al.,
Plaintiffs-Appellants,

v.

EGL, INC., et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. CV-05-04181 RMW
Hon. Ronald M. Whyte

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CERTIFICATE OF SERVICE

CASE: *Mohit Narayan et al. v. EGL, Inc. et al.*

CASE NO.: U.S. Court of Appeals for the Ninth Circuit
No. 07-16487

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On May 8, 2008, I served the following document(s):

1. **PLAINTIFFS-APPELLANTS' OPENING BRIEF (additional copies; original filed on March 28, 2008);**

2. **PLAINTIFFS-APPELLANTS' EXCERPTS OF RECORD, VOLUMES I THROUGH III AND V THROUGH VI;**

3. **PLAINTIFFS-APPELLANTS' EXCERPTS OF RECORD, VOLUME IV (filed under seal by August 22, 2007 order of U.S. District Court, Northern District of California)**

4. **NOTIFICATION OF FILING UNDER SEAL; and this**

5. **CERTIFICATE OF SERVICE**

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☒ By Messenger Service: I am readily familiar with the practice of Altshuler Berzon LLP for messenger delivery, and I prepared each such envelope, to be delivered by a courier employed by Western Messenger Service, with whom we have a direct billing account, who personally delivered each such envelope to the office of the addressee(s) on the date last written below.

ADDRESSEE	**PARTY**
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this May 8, 2008, at San Francisco, California.

Belinda Yamate

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JURISDICTIONAL STATEMENT

EGL, a Texas-based corporation, removed this case from Santa Clara Superior Court to the U.S. District Court for the Northern District of California (Whyte, J.) pursuant to 28 U.S.C. §§1332(a), 1441(a). ER 856-59. The district court entered final judgment on July 16, 2007, and plaintiffs filed a timely notice of appeal on August 2, 2007. Fed. R. App. P. 4(a)(1); ER 1, 20-21. This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether the district court erred in granting summary judgment for defendant EGL on the ground that plaintiff delivery drivers, who allege violations of the California Labor Code, were ineligible "independent contractors" rather than covered "employees," as a matter of law.

2. Whether the district court erred, under California choice-of-law principles, in concluding that Texas law rather than California law applies to the determination of whether plaintiffs were "employees" for the purposes of their California Labor Code claims.

STATEMENT OF THE CASE

Plaintiffs-Appellants Mohit Narayan, Hanna Rahawi and Thomas Heath, pick-up and delivery drivers for defendant EGL, Inc., filed this putative class action lawsuit for back wages and expense reimbursements under California law. Their First Amended Complaint alleges nine statutory claims for relief. ER 830-55.[1]

Defendant EGL sought summary judgment on the ground that plaintiffs were independent contractors rather than employees, and thus ineligible for the protections of the California Labor Code. The district court agreed, concluding as a matter of law that plaintiffs were not EGL's employees. *See* ER 3-19.

The district court analyzed plaintiffs' status under Texas law, rather than California law, because of language in plaintiffs' contracts with EGL stating that the "Agreement shall be interpreted under the laws of the State of Texas." ER 9:17-18. Despite Texas case law holding that such "interpret[ation]" clauses should be construed narrowly, the district court construed this language as requiring it to apply Texas law in determining whether plaintiffs were "employees" for purposes of their California Labor Code claims. ER 9-13.

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[1] Plaintiffs also sued Eagle Freight Services, a subsidiary of EGL that no longer exists. ER 4:9, 857. References to "EGL" shall include both entities, as appropriate.

The district court concluded that plaintiffs had not created a triable issue concerning their employment status, and that plaintiffs were independent contractors as a matter of law. ER 13-17. In a brief footnote, the district court also concluded that the result would be the same under California law. ER 17 n.12.

STATEMENT OF FACTS[2]

EGL is a Texas-based company that provides local freight pick-up and delivery services in California. ER 4:8-14. Although EGL classifies some of its drivers as "employees," *see* ER 106, 450, it unlawfully classifies most of them (including plaintiffs and the class they purport to represent) as "independent contractors" -- even though it controls their work by requiring them to pick up and deliver cargo at times specified by EGL, on terms negotiated by EGL, pursuant to

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[2] Plaintiffs do not believe this Court needs to reach any of the evidentiary objections asserted below to conclude that disputed issues of fact should have precluded summary judgment. However, if the Court finds it necessary to address those objections, plaintiffs appeal the district court's overruling of plaintiffs' objections to: (1) Schmidt Decl. ¶¶5-12 (ER 774-75), which lack foundation, constitute improper opinion testimony, are irrelevant, and rely on vague and ambiguous terms, *see* ER 4 n.4, 5 nn.5-7, 15 n.11, and (2) Heath Depo. Tr. at 143:11-24 (ER 785), which constitutes improper opinion testimony and is irrelevant, *see* ER 17 n.13. The district court did not expressly rule on plaintiffs' remaining objections. Plaintiffs preserve all other objections asserted below, to the extent they become relevant.

procedures established and enforced by EGL.

Plaintiffs lived and worked for EGL in California. *See* ER 452, 453-454, 751. Two plaintiffs were based in EGL's Sacramento station (Heath, December 1999 to July 2002; Narayan, July 1999 to September 2006), and the third was based in EGL's San Francisco area station (Rahawi, 2000 to October 2005). ER 651¶2, 652¶4; ER 671¶2, 672¶4; ER 632¶2, 645. All three worked for EGL full-time and did not drive their vehicles for any other company during the applicable limitations period. ER 637¶27; ER 656¶26; ER 675¶23.[3] Narayan and Rahawi drove small, two-axle trucks that weighed under 26,000 pounds, *see, e.g.,* ER 468, while Heath drove a van weighing less than 10,000 pounds, ER 633¶2, 652¶2, 671¶2.

Plaintiffs performed pick-up and delivery functions that EGL's regional manager called as "basic as it gets." ER 328-29. EGL required only an ordinary, non-commercial drivers' license and limited driving experience. *See* ER 450. Still, each plaintiff was required to complete an application, interview, and drug test to be hired, ER 310-13, 633¶5, 652¶3, 672¶3, and to agree in writing to adhere to EGL's policies and procedures. *See* ER 291-92, 450-51, 457-58; *see also* ER

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[3] Rahawi and Heath also worked part-time for EGL before the period covered by their present claims. ER 683, 777.

460. Plaintiffs were also required to sign a company-drafted, non-negotiated, one-year form contract, which set forth the terms and conditions of their duties as EGL drivers. *See* ER 5:23-6:6, 6:28-7:7, 7:24-8:6, 633¶5, 652¶3, 672¶3; *see generally* ER 151-53.[4]

The principal issue in this case is whether plaintiffs were employees – and thus covered by the California Labor Code – or independent contractors. As explained below, under both California law (which should apply in this case) *and* Texas law (on which the district court erroneously relied), a worker's status as an employee or independent contractor depends on the extent of the principal's right to control the worker's duties. The evidence before the district court, set forth below, demonstrates that EGL had substantial control over the details of plaintiffs' job duties and performance, enough to satisfy the test for "employee" status under either State's laws, and certainly enough to create a triable issue of fact as to their

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[4] Although EGL had different form contracts for 1999 and 2000, the contracts' language was identical in relevant respects. The 2000 contracts are at ER 694-710, 809-29, and 751-72. *See also* ER 688-93 (partial contract). The 1999 contracts are at ER 794-808 and 735-50. Hereinafter, "Contract" refers to the cited paragraphs as included in *each* of the contracts. When distinction between the paragraph numbering in the 1999 and 2000 versions is necessary, the versions will be referred to as "1999 Contract" and "2000 Contract."

status.[5]

A. EGL's Contract and policies gave EGL enormous control over how plaintiffs performed their duties.

While EGL's Contracts with its drivers included boilerplate, conclusory language proclaiming that plaintiffs had "independent discretion and judgment to determine the method, manner and means of performance of [their] contractual obligations," Contract ¶I, in fact EGL tightly controlled nearly every aspect of plaintiffs' work. Such control was ensured by more specific provisions in the Contract and by EGL's comprehensive corporate policies, *see* ER 66, 139-40, 178, 238-40, 461, many of which were set forth in EGL's "Safety and Compliance Manual," ER 334-91, "Driver's Handbook," ER 394-439, and training video, ER 440-48. *See also* ER 64-67, 93-94, 143, 147-49, 303-04, 461-65, 495¶27, 672¶7.[6]

EGL retained nearly unlimited authority to regulate its drivers' pick-up and

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[5] Indeed, both the California Employment Development Department and the federal Internal Revenue Service concluded in opinion letters that Narayan was an "employee" of EGL because the company had the right to control his work. ER 621-23; 625-31.

[6] Evidence from current and former EGL supervisors, dispatchers, and other employees, as well as declarations from 23 drivers other than plaintiffs confirm the uniformity of EGL's company policy. *See* ER 54-180, 215-264, 307-329, 490-502 (declarations and testimony from dispatchers and other personnel); ER 505-619 (driver declarations); ER 33-39 (summary of common elements in driver declarations, with citations to the specific declarations and paragraph numbers).

delivery duties. Under the Contract, EGL expressly reserved the right to require its drivers' compliance with all "safety" and "driving" requirements, Contract ¶2.07, and all "instructions regarding the results to be accomplished by Contractor," Contract ¶I. The Contract also required plaintiffs to meet a host of standards presented in language so imprecise as to vest EGL with enormous enforcement discretion, such as "prompt and speedy transit times," "timely and accurate communication," and a "courteous, customer-focused, service-oriented, professional, business-like manner." 2000 Contract ¶4.04; 1999 Contract ¶4.03.

EGL's Safety and Compliance Manual covered such details as vehicle inspections, accidents, and permissible passengers. *See* ER 335. The company's accident policy, for example, required drivers to complete a form report, submit to post-accident drug testing in some cases, and follow step-by-step instructions including, "[n]ever use foul language and never admit fault" and "[t]ake pictures of the vehicles, the people involved in the accident, any property damage, cargo damage, and a clock or watch." ER 360-63.

EGL's Drivers' Handbook directed drivers how to receive assignments, what to do at a delivery site, how to respond to an upset customer, and how to handle damaged freight. ER 406-09, 414. Drivers were instructed when to communicate with dispatch (*e.g.*, upon arrival of an urgent shipment, before

leaving the dock, after each stop); when to use the two-way radio (*e.g.*, not while playing the car radio, not while swearing); how to introduce themselves to customers (*e.g.*, driver's name and motor carrier's name); and what tasks to perform upon pick-up or delivery (*e.g.*, check address labels and count pieces). ER 403-12.

The company's training video was also highly detailed, including such precise instructions as, "When receiving a call for pickup, acknowledge information from the dispatcher. . . . Remember to lock your cab and keep your trailer door down and locked until you're ready to begin loading." ER 444 at 16:12-16.

EGL closely regulated its drivers' appearance as well. Drivers were required to wear EGL-logoed shirts, dark pants, safety boots, and an EGL identification badge. ER 182-83, 243, 245, 494¶21, 634¶8, 653¶11, 672¶9, 721. In accordance with the Contract requirement that drivers maintain their work clothes in "good condition" and keep their "personal appearance consistent with reasonable standards of order," Contract ¶2.10; ER 325-27, EGL's managers directed drivers (including Narayan) to wear clean, tucked-in shirts, to maintain their personal hygiene, and to keep their badges visible. ER 89-90, 201-02, 495¶23.

EGL also tightly regulated its drivers' equipment. EGL retained the authority to require plaintiffs' vehicles to comply with any "customer service specifications" it established, Contract ¶2.01; and in practice, EGL required its drivers' vehicles to be less than five years old, painted entirely white, and covered with EGL-mandated logos and markings. Contract ¶2.04; ER 634¶9, 637¶28, 652¶6, 656¶27, 672¶¶5,8, 675¶23; *see also* ER 107, 256, 484-85. Daily, quarterly and annual vehicle inspections or maintenance reports were mandatory. Contract ¶2.06; ER 637¶¶24-26, 655-56¶¶23-25, 675¶¶20-21; *see also* ER 91-92, 101, 110-11, 155, 219-20, 372, 459, 495¶25. EGL's managers enforced the Contract requirement that plaintiffs maintain their vehicles "in a clean and presentable fashion free from body damage and extraneous markings," Contract ¶2.10, by requiring drivers to wash their vehicles or make certain repairs, ER 175-76, 495¶24, 634¶9. The Contract also required drivers to use a Nextel brand or other company-mandated two-way communication unit, Contract ¶¶5.01-5.02, and obtain EGL's written consent before using any replacement rental vehicle, Contract ¶2.06.

EGL trained plaintiffs and other drivers in the minutiae of its required procedures, including in required forms. ER 158-59, 284, 633¶6, 653¶8, 672¶6; *see also* ER 464-65. Managers distributed the company's memos and policies to

drivers, ER 109, 241-42, 495¶27, and regularly exercised the company's right (Contract ¶¶2.07, 2.11) to require drivers to attend unpaid meetings on company policies. *See* 637¶29, 656¶28, 675-76¶24; ER 16:7-9; *see also* ER 82-84, 238-40, 276, 495¶26, 502¶11, 664.

EGL obtained compliance with its policies through threats and discipline. *See generally* ER 495¶28. For example, EGL suspended Rahawi for three days for failing to report an accident as required, ER 636¶22, 641-43, and threatened Narayan with termination for failing to paint his truck cab white, ER 652¶6, 171-74, 186, 476, and for failing to put EGL decals on the box of his truck, ER 185.

B. EGL closely managed the details of plaintiffs' work days.

EGL exercised close supervisory control over plaintiffs throughout their work days, through management and oversight of their schedules, equipment, and assignments.

First, the record contains substantial evidence that EGL regulated which days and hours its drivers worked (notwithstanding the district court's finding to the contrary, *see* ER 5:4-5, 15:2-3, 17 n.12). Managers ordered drivers to report to their stations at specified times and directed them to give advance notice of requested days off. *See* ER 49-50, 187-89, 272-73, 634¶10, 638¶33, 645, 653¶12, 672¶10 (plaintiffs' testimony); ER 55-58, 107-08, 492¶7, 498¶7, 501¶8

(dispatcher and other employee testimony); ER 471, 473 (photos of start times). Indeed, EGL denied work to Rahawi as discipline for his having arrived late to a shift. ER 57. Although the district court noted that drivers did not always submit vacation requests in advance, ER 15:1-3, EGL repeatedly demanded such advance notice, ER 38¶11.X (and evidence cited therein), and it also challenged driver requests for days off, even for such compelling reasons as attending a funeral. ER 552-53¶17, 564¶19.[7]

EGL also determined when its drivers' work days could end. EGL's dispatchers often ordered drivers to wait without pay for additional pick-ups, ER 636¶19, 655¶19, 674¶16, 85-86, 494¶17, or to call dispatch to be "cleared" to return to the station after completing their assignments, ER 636¶20, 655¶20, 674¶17; *see also* ER 169-70, 289-90, 404.

Second, EGL provided and controlled most of the facilities, personnel, and

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[7] While EGL submitted evidence to support its position that some drivers took days off, arrived early or late, or did not comply entirely with supervisors' orders, *see* ER 778-82, 785-91; ER 196-97, 722, 726-27, 728; ER 271, 272-75, plaintiffs objected to much of this evidence as inadmissible or incomplete (although the district court did not rule on those objections). To the extent EGL reasserts that evidence, plaintiffs renew their objections – but note that whether EGL's evidence is admissible or not, because plaintiffs' evidence is sufficient to create a disputed issue of fact the district court should not have found that EGL's drivers "make themselves available at their own discretion," ER 15:2-3, and "were not required to work regular schedules," ER 17 n.12.

equipment that plaintiffs needed to perform their duties. At the loading dock, EGL employees assisted the drivers in loading freight. ER 67-68, 99-100, 216-17, 235-37, 286-87, 493¶¶12-13, 498-99¶¶6,8, 634-35¶14; 654¶16, 673¶13. EGL issued its drivers logoed boxes and packing tape for special pick-ups, ER 234-35, 302, and required them to use EGL-issued forms to track their work, ER 636-37¶23, 655¶22, 675¶19, and to communicate using EGL-mandated equipment, which EGL leased to those who chose not to purchase it, Contract ¶¶5.01-5.02. EGL even arranged the laundering of its drivers' uniforms. ER 495¶22, 502¶13.

Finally, EGL managers supervised plaintiffs' work from the time that they arrived at the loading dock until they returned. Drivers began work by reporting to stations and waiting for EGL dispatchers to issue pick-up and/or delivery assignments. Delivery assignments typically came in batches of "delivery receipts" which specified the shipment, customer, delivery time and place, and any special instructions. ER 115-16, 122-23, 225-27, 492¶8, 634¶12, 654¶14, 673¶11; *see generally* ER 58-59, 80-82, 477.[8] Although the Contract purportedly gave plaintiffs the right to reject assignments, Contract ¶2.02, in practice the drivers had

[8] Special instructions could designate loading methods, specific delivery times, contact persons, freight unpacking instructions, or limitations on use of additional help or a lift gate. *See* ER 87-88, 115-21, 130-34, 165-66, 221-27, 229-30, 319-24, 477, 670.

little choice but to accept what was offered. EGL did not permit drivers to "pick and choose" among the batched delivery assignments, but required them to accept the entire batch or to wait for whatever remained after all other drivers were dispatched. ER 61-63, 123, 160, 308-09, 494¶15, 660. Narayan and Heath feared retaliation if they refused an assignment, ER 655¶21, 674¶18; *see also* ER 191-96, and considerable evidence showed that EGL responded to such refusals with threats and retribution such as offering "junk" or no assignments the following day. *See* ER 37¶11.T (and evidence cited therein), 73-76, 190, 493-94¶¶10, 15, 499¶9. In particular, EGL repeatedly sent Rahawi home or told him not to report the day after he refused particular assignments, ER 102-05, 268-70, 636¶21, and EGL terminated him after "an argument he had with a dispatcher regarding refusal to pick up assignments." ER 7:8-9, 639¶35, 649.

EGL often required plaintiffs to wait without pay for freight to be ready for loading. ER 634¶11, 653¶13, 673¶11; *see also* ER 77, 125-26, 498-99¶7. When freight was ready, EGL required its drivers to load it in accordance with company policy and any special customer requests, ER 120-21, 126-29, 301-02, 493¶13, 635¶15, and EGL did not permit drivers to depart until they had notified dispatch or submitted the EGL manifest. ER 71-72, 124-25, 203, 287; *see also* 673¶11.

EGL's supervision of its drivers continued even after they left the station.

Although the district court concluded that "[t]he contracted truckers determine how to route the orders in the assigned delivery packet," ER 5:9-10; *see also* ER 15:5-6, 17 n.12, substantial evidence shows that in practice, plaintiffs had little control over the order or schedule of their deliveries – or, as a result, the order in which to pack their vehicles. In some cases, EGL supervisors specifically told the drivers how to order their routes; in others, EGL set specific delivery times, windows, or priorities that left plaintiffs little discretion in how to order deliveries. *See* ER 59-60, 69-70, 492-93¶8, 499¶8, 634¶¶12-13, 654¶¶14-15, 673¶¶11-12; *see also* ER 36¶11.O (and evidence cited therein).[9]

EGL required its drivers to remain in contact with the company throughout the day, thus enabling it to oversee the drivers' work, task by task. Drivers were instructed to notify the company immediately of delays and other problems, ER 144-46, 287-88, and promptly to confirm pick-ups and deliveries by phone or through "Eagle Mobile Access" (eMAD), the company's electronic tracking system. ER 635¶¶17-18, 654¶¶17-18, 674-75¶¶14-15; *see also* ER 112-14, 161-62, 164, 246-51, 481, 488-89, 660, 666. EGL's dispatchers called drivers

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[9] EGL disputed this fact and submitted evidence that plaintiffs were not always directly ordered to perform their assignments in a certain order. *See* ER 205, 730-32, 783-84. Again, although plaintiffs' objections to some of that evidence should have been sustained, plaintiffs' evidence is sufficient to create a material fact dispute.

throughout the day to check on their location and progress, to update work instructions, and to assign additional pick-ups. ER 635¶17, 654¶17, 674-75¶¶14-15; *see also* ER 135, 255, 493-94¶14, 499¶9. The EGL training video instructed, "As an Eagle driver, you need to be in constant communication with dispatch, with the customer and with the computer tracking system. Communicating with dispatch is the single most important aspect of your job." ER 443 at 9:13-17.

Plaintiffs finished most work days at the station, where they unloaded any remaining freight. In accordance with EGL policy, drivers had to turn in documentation of their assignments and COD payments the same day (or, in exceptional circumstances, early the following morning) in order to be paid. ER 636-37¶23, 655¶22, 662, 675 ¶19; *see also* ER 169, 177, 228-29, 285, 494¶19.

C. EGL controlled plaintiffs' earnings and other business decisions.

EGL also retained substantial authority over the business aspects of plaintiffs' work. EGL alone negotiated all customer relationships, and drivers had no input into the pricing or details of the services they provided. ER 252-54, 285, 638¶32, 657¶31, 676¶26.

Moreover, EGL unilaterally controlled its drivers' compensation. Drivers were paid weekly or biweekly, based on their submissions of mandatory paperwork. 2000 Contract ¶4.03; 1999 Contract ¶4.02. Wages were calculated

based on: 1) a percentage of a "tariff" that EGL assigned to each routine pick-up and delivery based on weight and distance, subject to a per-load weight cap, ER 6:26-27, ER 638¶30, 656-57¶29, 676¶25; *see also* 153-54, 257-60, 296-98, 314-15, 496¶30; per-distance charges for unusual "hot-shot" deliveries, *see, e.g.,* ER 47, 475; and 3) "accessorial" fees to cover special services, *see* ER 78-79, 474; *see generally* 2000 Contract Appendix III; 1999 Contract ¶4.01; ER 475, 478. EGL unilaterally set tariff rates and drivers' percentages, decided if non-contract rates would be paid, and determined whether drivers would be compensated for accessorials. *See* ER 47-48, 51, 150-52, 167-68, 198-200, 218, 261-62, 293-95, 314-18, 479, 633¶5, 652¶3, 672¶3. While drivers could occasionally negotiate a higher rate for unusual deliveries, such assignments were rare and negotiations over pay rarer still. ER 206, 277, 638¶31, 676¶25. Furthermore, EGL reserved the right to reduce drivers' pay for "partial" performance and for any customer "service" claims that it (unilaterally) decided to honor. *See* 2000 Contract ¶4.04(b), (f), Appendix III; 1999 Contract ¶¶4.01, 4.03(a), (e); ER 231-33, 638¶32, 676¶26. EGL also reserved the right to deduct certain permit fees from plaintiffs' paychecks, Contract ¶2.05, and required plaintiffs to purchase certain insurance, Contract ¶3.02, and to indemnify EGL for any service-related losses, Contract ¶3.03.

EGL also controlled each driver's job tenure. Although the Contract contained an automatic renewal clause, it could "be terminated by either party without cause with thirty days' notice" or by EGL "immediately for failure to follow EGL instructions." ER 6:11-12, 16:26-27; *see also* Contract ¶¶I, 6.02-03. For instance, EGL "suspended" Rahawi pending investigation into alleged misconduct and then informed him during his suspension that he would be terminated effective 30 days after the notice. *See* ER 639¶35, 649.

Finally, EGL limited the scope of plaintiffs' services for EGL and their ability to work for others. Although the Contract purported to permit plaintiffs to hire assistants, those assistants (as well as replacement drivers) were subject to restrictions similar to those imposed on plaintiffs. *See* 2000 Contract ¶¶2.07, 2.09, 2.10; 1999 Contract ¶¶2.07, 2.09, 2.10. Moreover, drivers could not use an assistant without EGL's consent to that specific individual for a specific date or trip. ER 374. Furthermore, the drivers did not alone decide when they required assistance; sometimes EGL just assigned a "second man" and paid the worker directly. ER 7:20-23, 676¶28.

The Contract's "noncompetition" clause prohibited drivers from servicing any EGL customer outside of the Contract, a prohibition that extended six months after termination. 2000 Contract ¶6.08; 1999 Contract ¶6.07. EGL also prohibited

its drivers from using their EGL-dedicated vehicles for "any non-[EGL] use" unless they notified EGL and covered all EGL "identification, signs and permit markings." 2000 Contract ¶2.12; 1999 Contract ¶4.08; *see also* Contract ¶2.04. In practice, this requirement made it virtually impossible for plaintiffs to put their EGL vehicles to any other commercial use. EGL's required markings covered much of the plaintiffs' vehicles when fully applied, and plaintiffs found that covering them was difficult and impracticable. *See* ER 43-45, 184, 656¶27, 637¶27, 675¶23; *cf.* ER 461; 467, 469, 472, 484-85.

SUMMARY OF ARGUMENT

Plaintiffs filed this lawsuit under California Labor Code provisions that require companies, among other things, to reimburse employees' business expenses, provide meal periods, and pay overtime to their "employees." Whether plaintiffs were covered employees, rather than non-covered independent contractors, should have been decided under California law. Under California law, plaintiffs were clearly employees, given EGL's expansive right of control over their work. *See Borello v. Dep't. of Indus. Relations*, 48 Cal.3d 341 (1989); *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal.App.4th 1, *review denied* (Nov. 28, 2007); *Air Couriers Int'l v. Employment Dev. Dep't.*, 150 Cal.App.4th 923 (2007).

The district court erroneously analyzed the threshold employee/independent contractor question under the law of Texas – the State where EGL is headquartered, but where no plaintiff lived or worked – and compounded that error by incorrectly ruling under Texas law that undisputed material facts established plaintiffs' status as independent contractors.

The district court was wrong for several reasons. First, it erred in concluding that the choice-of-law provision in plaintiffs' contracts required application of Texas law to determine whether plaintiffs were "employees" for

purposes of their California Labor Code claims. The parties' Contract specified only that Texas law would govern questions of *contract interpretation* – not statutory claims or their elements. In the absence of a contract provision designating foreign law as governing those claims, California law applies under applicable choice-of-law rules.

Second, the trial court erred in holding that the Texas choice-of-law provision, even if intended to encompass plaintiffs' statutory claims, could be enforced under California choice-of-law principles. If the test for "employee" status under Texas law were as the district court characterized it, enforcement of a contract provision requiring application of such Texas law would undermine fundamental California labor policies and therefore be prohibited under *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459 (1992). An employer cannot force its workers to waive the statutory protections of the California Labor Code simply by imposing adhesive contract terms that designate the law of a less protective state as applying to all workplace claims.

Finally, even if the district court had been correct to apply Texas law, it applied that law incorrectly in granting summary judgment. At a minimum, material disputes of fact should have precluded such a ruling.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed *de novo*. The Court should "view the evidence in the light most favorable to the nonmoving party and then determine whether there remains a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Dark v. Curry County*, 451 F.3d 1078, 1082 n.2 (9th Cir. 2006). EGL "can prevail only if it can show that no reasonable jury would infer from [plaintiffs'] evidence that [they have] stated . . . valid claim[s]." *Id.*

ARGUMENT

The district court granted summary judgment to EGL upon concluding that plaintiffs were independent contractors rather than employees, and therefore were statutorily ineligible for the protections of the California Labor Code. ER 8:22-24, 13:18-18:3. The distinction between employees and independent contractors is "[t]he single most important factor in determining which workers are covered by employment and labor statutes." *The Dunlop Commission on the Future of Worker-Management Relations – Final Report* 64 (Cornell University 1994), *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/2. This distinction was initially developed to protect companies from *tort* liability for the

actions of workers they did not in fact control. But in recent years, increasing numbers of employers have sought to exploit the distinction to insulate themselves from liability under worker protection statutes, by misclassifying workers fully integrated into their businesses, often through designations in adhesive contracts. *See, e.g, NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1093 (9th Cir. 2008); *Estrada*, 154 Cal.App.4th at 4.[10]

In this case, the district court erred in accepting EGL's characterization of its drivers' status. The undisputed facts fail to support the court's conclusion that plaintiffs are independent contractors as a matter of law – and that is true under Texas law *as well as* California law.

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[10] The purpose of the employee/independent contractor distinction is different in tort law and worker protection law. *See Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1543-45 (7th Cir. 1987) (Easterbrook, J. concurring) (contrasting tort law's focus on risk with wage-and-hour law's concern with unfair working conditions); *Borello*, 48 Cal.3d at 352 (contrasting tort law's concern with injuries *by* employees with social legislation's concern with injuries *to* employees).

An employer's financial incentives for misclassifying workers, as EGL has done, can be substantial. For example, employers owe fewer taxes and are not bound by federal minimum wage, overtime, family leave, workplace safety, and workers' compensation laws with regard to independent contractors. *See* GAO, Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification, No. GAO-07-859T, at 7-8 (2007), *available at* www.gao.gov/cgi-bin/getrpt?GAO-07-859T.

I. Plaintiffs' Factual Showing Would Permit a Reasonable Jury to Conclude that Plaintiffs Are Employees Under California Law.

California's test for employee status requires a fact-intensive examination of the "nature of [plaintiffs'] work" and their "overall arrangements" with their principal. *See Borello*, 48 Cal.3d at 353. "The essence of the test is the [principal's] 'control of details' – that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work." *Estrada*, 154 Cal.App.4th at 10. Even a relatively low level of oversight is sufficient to establish an employment relationship where, as here, the job "d[oes] not require a high degree of skill and [is] an integral part of the employer's business." *JKH Enters., Inc. v. Dep't of Indus. Relations*, 142 Cal.App.4th 1046, 1064, *review denied* (Dec. 20, 2006); *cf. Borello*, 48 Cal.3d at 356-57. Although a company's *exercise* of control is often persuasive evidence of its underlying *right* to control, *see e.g., Borello*, 48 Cal.3d at 356, a company need not actually exercise that control for an employment relationship to be found. The *right* of control over the manner and means of work, whether exercised or not, is what matters. *See Toyota Motor Sales v. Superior Court*, 220 Cal.App.3d 864, 875 (1990); *see also Brose v. Union-Tribune Publishing Co.*, 183 Cal.App.3d 1079, 1082, 1086 (1986).

In *Borello*, the California Supreme Court explained that while the principal's right to control is the "'most significant consideration" affecting employment status, court may also weigh a series of "secondary indicia" in evaluating such status. 48 Cal.3d at 350 (quotation marks omitted). These indicia include whether the principal has the right to discharge the purported employee at will, and:

> (a) whether 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 worker 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.

Id. at 350-51; *see also Estrada*, 154 Cal.App.4th at 10.

These factors are not meant to be applied "mechanically as separate tests," but "are intertwined and their weight depends often on particular combinations." *Borello*, 48 Cal.3d at 351 (internal quotes omitted). Under California law, moreover, the crucial inquiry is the *actual* relationship between the parties; the "parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship." *Estrada*, 154 Cal.App.4th at 10-11; *see also*

Toyota, 220 Cal.App.3d at 877. Contractual designations are particularly irrelevant if workers had no "real choice" over their terms. *See Borello*, 48 Cal.3d at 359.

In cases involving worker-protection legislation, as here, the "test for determining whether a person rendering service to another is an 'employee' or an excluded 'independent contractor' must be applied with deference to the purposes of the protective legislation." *Id.* at 353; *see also id.* at 359. "The . . . statutory purpos[e] of the distinction between 'employees' and 'independent contractors' [is] substantially different" from the common law purpose, to limit *employers'* tort liability. *Id.* at 352. Such a difference justifies necessary "departures from common law principles." *Id.*

Because the district court mistakenly evaluated plaintiffs' status under Texas law, it addressed plaintiffs' argument that they were employees under California law only in a single, short, erroneous footnote. *See* ER 17 n.12. Plaintiffs' evidence established that EGL's drivers should not be considered independent contractors, or, at a minimum, raises "'conflicting inferences,'" *Brassinga v. City of Mountain View*, 66 Cal.App.4th 195, 210 (1998), that

preclude summary judgment. *See also Borello*, 48 Cal.3d at 349.[11]

California courts have repeatedly found drivers in circumstances similar to plaintiffs to be employees rather than independent contractors. *See, e.g., Air Couriers*, 150 Cal.App.4th at 937-39; *JKH*, 142 Cal.App.4th at 1064-67; *Gonzalez v. Workers' Comp. Appeal Bd.*, 46 Cal.App.4th 1584, 1593-94 (1996); *Santa Cruz Transport, Inc. v. Unemploy. Ins. App. Bd.*, 235 Cal.App.3d 1363, 1372-78 (1991); *Yellow Cab Coop. Inc. v. Workers' Comp. Appeal Bd.*, 226 Cal.App.3d 1288, 1298-1302 (1991); *Grant v. Woods*, 71 Cal.App.3d 647, 653-54 (1977). Most notably, the relationship between EGL and plaintiffs, as established by plaintiffs' facts, closely mirrors the employment relationships described in *Estrada*, 154 Cal.App.4th 1, decided shortly after summary judgment here, and *Air Couriers Int'l*, 150 Cal.App.4th 923, decided shortly after the district court's summary judgment hearing.

In *Estrada*, plaintiff FedEx drivers provided and maintained their own trucks which had to be painted approved colors and marked with the company's logo (*compare supra* at 9); agreed to maintain their own and their truck's

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[11] Indeed, the evidence of EGL's control over its drivers is so consistent that it is difficult to imagine a reasonable jury concluding anything other than that plaintiffs were EGL's employees. While plaintiffs did not file a cross-motion for summary adjudication of their legal status, plaintiffs reserve the right to do so on remand.

appearance in good condition (*compare supra* at 8-9); were paid weekly at rates set by the company (*compare supra* at 15-16); worked full-time and exclusively for the company and had to work each day unless they had pre-approved replacements (*compare supra* at 4, 10, 17); were required to arrive at a particular time each day for sorting, packing, and mandatory meetings (*compare supra* at 10-11); had to return with required paperwork at the end of each day (*compare supra* at 15); could sequence the order of their route but had to comply with designated pick-up and delivery times (*compare supra* at 14); could use only company-approved helpers (*compare supra* at 17-18); could finance required equipment purchases through the company (*compare supra* at 12); and had to comply with delivery and tracking rules, including by using the company's approved scanners and forms (*compare supra* at 7-8, 12, 14). 154 Cal.App.4th at 7-8, 12. The Court of Appeal, attributing no weight to the fact that the drivers' contract nominally identified them as independent contractors, concluded that "the evidence shows unequivocally that FedEx's conduct spoke louder than its words." *Id.* at 5, 11.

The circumstances of the employment relationship in *Air Couriers* also paralleled those here in all significant respects (except where they were *less* indicative of employee status): the drivers had control over their routes but worked regular schedules and had to meet designated delivery and pick-up times (*compare*

supra at 14); had discretion over when to take breaks and vacation (*compare supra* at 10-11); could turn down jobs but did so infrequently (*compare supra* at 13); worked long tenures for the company (*compare supra* at 4); were paid on a regular schedule (*compare supra* at 15-16); had to use company forms and comply with delivery rules (*compare supra* at 7-8, 12); were dispatched to deliveries and required to notify dispatchers when deliveries were completed (*compare supra* at 14); were encouraged to wear uniforms (*compare supra* at 8); delivered packages to the company's customers rather than their own (*compare supra* at 15); had no control over customer rates or billings (*compare supra* at 15); and "were performing an integral and entirely essential aspect of [the employer]'s business." 150 Cal.App.4th at 937-38. Based on these facts, the Court of Appeal concluded that substantial evidence supported the finding that the drivers were employees because the employer "exerted control over the drivers to coordinate and supervise the company's basic function: timely delivery of packages." 150 Cal.App.4th at 939.

The strikingly similar facts in this case – particularly when viewed in the light most favorable to plaintiffs, as required on review of summary judgment –

establish the same relationship.[12] And, as shown below, many other California cases are in accord.

1. *Right of control.* As in *Estrada*, *Air Couriers*, and other cases in which courts found an employment relationship, the detail and breadth of EGL's pick-up, driving, delivery, and documentation rules would permit a reasonable jury to conclude that EGL's control over its drivers was sufficient to establish their employee status – especially because the company could modify its policies at any time, and did in fact enforce its policies through training and discipline. *Compare supra* at 6-10 *with Estrada*, 154 Cal.App.4th at 7; *Wedeck v. Unocal Corp.*, 59 Cal.App.4th 848, 858 (1997); *Toyota*, 220 Cal.App.3d at 875; *cf. Friendly Cab Co.*, 512 F.3d at 1099. Indeed, EGL's retention (and frequent exercise) of the right to impose virtually *any* directive upon plaintiffs, *supra* at 6-7, belies any description of plaintiffs' work as "independent."

Particularly indicative of plaintiffs' employee status is their *lack* of control over the issues for which they seek statutory protection: the expenses they bore,

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[12] The district court sought to distinguish *Air Couriers* based on its findings that in the instant case plaintiffs had written contracts and "were not required to work regular schedules, were paid on a per job basis, and determined their own routes." ER 17 n.12. But these distinctions were all either inaccurate or insignificant. In particular, the *Air Couriers* decision did not treat the fact that many drivers lacked written contracts as dispositive (and, in fact, one driver testified he had signed such a contract). 150 Cal.App.4th at 938.

the hours they worked, and the wages they were paid. *See supra* at 15-17; *also generally infra* at 50-52. EGL's drivers negotiated neither their pay rates nor any other terms or conditions of their employment – facts that the district court ignored. *Compare supra* at 5, 15-16 *with Estrada*, 154 Cal.App.4th at 7; *Borello*, 48 Cal.3d at 359; *Gonzalez*, 46 Cal.App.4th at 1594; *cf. Yellow Cab*, 226 Cal.App.3d at 1301 (drivers who do not set rates, but are paid based on number of passengers and distance, bear no entrepreneurial risk and are not independent). Furthermore, the EGL drivers' ostensible control over their hours, assignments, and routes was illusory. In practice, drivers worked full-time, regular schedules, with assignments dictated by EGL, and little flexibility over their routes, *see supra* at 4, 10, 13-14 – arrangements consistently associated with employment. *See Yellow Cab*, 226 Cal.App.3d at 1298-99 (control over workers' hours is "paradigmatic" of employment relationship); *id.* at 1298 (all-or-nothing dispatch policy); *see also Estrada*, 154 Cal.App.4th at 12; *Air Couriers*, 150 Cal.App.4th at 937-38; *Gonzalez*, 46 Cal.App.4th at 1593; *cf. Toyota*, 220 Cal.App.3d at 876 (when company "determined what would be delivered, when and to whom and what price would be charged," its failure to control delivery drivers' actual routes and speeds did not alone show absence of right of control, as such freedom was inherent in work).

EGL's personal appearance and uniform policies also indicate an employment relationship. Such measures are unrelated to any delivery results; they only evidence EGL's effort to make its drivers as fully integrated into the company as *any* regular employee would be. *Compare supra* at 8 *with Estrada*, 154 Cal.App.4th at 11-12; *Air Couriers*, 150 Cal.App.4th at 938; *Santa Cruz*, 235 Cal.App.3d at 1372-73; *Yellow Cab*, 226 Cal.App.3d at 1298. The same is true of EGL's vehicle appearance requirements. As in *Estrada*, 154 Cal.App.4th at 5-7, plaintiffs' vehicles had to meet size, color, and other specifications; to display the company's logo prominently when in service for the company but not otherwise, and to be inspected and cleaned in accordance with company standards, *see supra* at 9; *see also Yellow Cab*, 226 Cal.App.3d at 1298 (cab cleanliness requirement).

2. *Secondary factors.* The *Borello* secondary indicia reinforce EGL's right of control over its drivers and also weigh strongly in favor of plaintiffs' employee status.

First, unlike true independent contractors, plaintiffs were not engaged in a separate profession or business in which their "remuneration . . . depend[ed] upon [their] initiative, [their] judgment, or [their] managerial abilities." *Gonzalez*, 46 Cal.App.4th at 1594. Plaintiffs drove their vehicles exclusively for EGL during the relevant time periods. *Compare supra* at 4 *with Estrada*, 154 Cal.App.4th at

12; *Yellow Cab*, 226 Cal.App.3d at 1298. And EGL – not its drivers – controlled the customer relationship. *Compare supra* at 15 *with Estrada*, 154 Cal.App.4th at 12; *Air Couriers*, 150 Cal.App.4th at 938; *Gonzalez*, 46 Cal.App.4th at 1593; *Toyota*, 220 Cal.App.3d at 876; *see also JKH*, 142 Cal.App.4th at 1064-65 ("[O]btaining the clients in need of the service and providing the workers to conduct it" establishes control because the drivers' work was simple).

Plaintiffs' opportunity to profit was further limited by EGL's unilateral authority to impose per-load caps on pay, to decide whether to pay for "accessorials," to impose insurance and indemnification requirements, to reduce pay to reflect customer service complaints and partial performance, and to reject plaintiffs' choice of helpers. *Compare supra* at 16-18 *with Estrada*, 154 Cal.App.4th at 12 (pay reduced by limits on assignments or for "slight violations of the rules"); *id.* (FedEx's discretion to reject helpers, temporary replacements, or assignees); *cf. Friendly Cab Co.*, 512 F.3d at 1098-99 (taxi company's prohibition against drivers soliciting customers and employing others evidences employment); *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 756 (9th Cir. 1979) (power to reject licensee's choice of "sub-licensee" showed control).

Second, plaintiffs were paid like employees fully integrated into the company rather than like contractors with discrete projects: weekly or biweekly,

not by the job, even though one component of their pay was based on the number of deliveries they made. *Compare supra* at 15-16 *with Estrada*, 154 Cal.App.4th at 7, 12 (drivers' weekly pay showed employment status, even though weekly pay partially reflected per-package rate); *Air Couriers*, 150 Cal.App.4th at 938 ("regular" pay schedule and required use of principal's forms in order to be paid); *Gonzalez*, 46 Cal.App.4th at 1594 (payment by number of routes completed); *Toyota*, 220 Cal.App.3d at 877 (payment on commission basis); *see also Borello*, 48 Cal.3d at 357-58 (payment by weight is similar to piecework payment to employees).

Third, like the drivers in *Estrada* and *Air Couriers*, EGL's drivers were not specialized outsiders; their "only required skill [was] the ability to drive." *Estrada*, 154 Cal.App.4th at 12; *compare with supra* at 4; *see also JKH*, 142 Cal.App.4th at 1064.

Fourth, the general practice in the industry is to classify package delivery drivers as employees. Although the record in this case does not address competitors' practices, *Estrada* not only held that FedEx drivers should be classified as employees, but it also recognized that competitors UPS and DHL classify their drivers as employees. *See Estrada*, 154 Cal.App.4th at 12. Indeed,

EGL itself has used drivers who it admits are employees. *Supra* at 3.[13]

Fifth, plaintiff drivers' long tenures, automatically renewable annual contracts, and full-time schedules established a "permanency" that indicates an employment relationship. *Compare supra* at 4 *with Estrada*, 154 Cal.App.4th at 6, 12; *Air Couriers*, 150 Cal.App.4th at 938; *Gonzalez*, 46 Cal.App.4th at 1594; *Borello*, 48 Cal.3d at 357.

Sixth, as plaintiffs' regular pay, schedules, and uniforms established, the drivers' work was an essential "part of the regular business of" EGL, *Borello*, 48 Cal.3d at 351, and was "wholly integrated into [its] operation," *Estrada*, 154 Cal.App.4th at 9. *See also Air Couriers*, 150 Cal.App.4th at 938 ("drivers were performing an integral and entirely essential aspect of [employer]'s business" as shown by use of employer's forms to be paid, payment on regular schedule, and dispatcher control); *JKH*, 142 Cal.App.4th at 1064 (pick-up and delivery services are the "heart" of courier service business); *Santa Cruz*, 235 Cal.App.3d at 1376 (no independent business where cabs bore Yellow Cab's identity and Yellow Cab made arrangements with customers for business); *Yellow Cab*, 226 Cal.App.3d at 1300 (driving is essential component of taxi business); *Grant*, 71 Cal.App.3d at

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[13] The record does not indicate in what respect, if any, the employee drivers' jobs differed from those of plaintiffs.

653 (newspaper carriers were "essential" to distributor's business rather than involved in a "separate and distinct occupation of their own").

Finally, EGL reserved almost unlimited discretion to terminate its drivers. While the district court dismissed this fact as irrelevant, ER 16:25-17:1, under California law the authority to terminate generally indicates an employment relationship, *Santa Cruz*, 235 Cal.App.3d at 1372; *Grant*, 71 Cal.App.3d at 653; and at-will termination is particularly "strong evidence" of an employment relationship. *Borello*, 48 Cal.3d at 350; *see also Toyota*, 220 Cal.App.3d at 875; *Brose*, 183 Cal.App.3d at 1085.

EGL's Contract with its drivers, like FedEx's, "provide[d] for nonrenewal without any cause at all" on 30 days' notice. *Estrada*, 154 Cal.App.4th at 11; *compare id.* at 6 *with* Contract ¶¶6.01, 6.02. Furthermore, EGL reserved the right to terminate plaintiffs' agreements without cause upon 30 days' notice, Contract ¶6.03 – effectively, the right to terminate immediately at will, since EGL faced no penalty for failing to provide work during the 30-day notice period and could effectively ignore the notice requirement because of its authority to "suspend" a driver without pay at any time (as it did to Rahawi). *See supra* at 17; *see also Gonzalez*, 46 Cal.App.4th at 1593 ("at will" status when employer would suffer no consequence for violating 14-day notice provision).

EGL also retained the right to terminate the agreement "immediately for failure to follow EGL instructions," ER 16:25-27; *see also* Contract ¶¶I, 6.03 – an additional measure of unbridled discretion that evidences employment. *See Toyota*, 220 Cal.App.3d at 875 ("real test" of right to control is "whether the employee was subject to the employer's orders and control and was liable to be discharged for disobedience or misconduct") (internal quotes omitted); *Santa Cruz*, 235 Cal.App.3d at 1372 ("[F]ailure to maintain good public relations as a specific reason for termination" shows employee status); *Yellow Cab*, 226 Cal.App.3d at 1298 ("Liability to discharge for disobedience or misconduct is strong evidence of control."); *Brose*, 183 Cal.App.3d at 1085-86 (agreement allows discharge without notice if worker "violated the agreement in any way" and fails to fully define many requirements).

In short, although EGL's Contract nominally classified plaintiff drivers as "independent contractors" and disavowed control over their manner and means of performing pick-up and delivery services, Contract ¶I, the company's "conduct spoke louder than its words." 154 Cal.App.4th at 11. Particularly when the facts are viewed in the light most favorable to plaintiffs, a reasonable jury could conclude that EGL retained the right to control drivers' conduct, by instructing them on nearly every detail of where to go, what to do, and when and how to do it.

II. The Court Should Apply California Law to the Question Whether Plaintiffs Are Employees or Independent Contractors.

California law should control this case. The district court erroneously applied Texas law to determine plaintiffs' status.

Because California is the forum state, California choice-of-law principles determine the choice of law, as EGL concedes. *See Bassidji v. Goe*, 413 F.3d 928, 933 (9th Cir. 2005). Those rules require application of California law to this case for two independent reasons.

First, the Contract's narrow choice-of-law provision applies only to disputes over contract *interpretation*, not to disputes over statutory rights. In the absence of a governing choice-of-law clause, California law must apply under *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal.4th 906, 919 (2001).

Second, even if the Texas choice-of-law clause were broadly stretched to encompass plaintiffs' statutory claims, application of Texas law as construed by the district court would interfere with fundamental California state policy. In such circumstances, when California's interests materially outweigh the foreign state's, California will not enforce contractual provisions designating foreign law as controlling. *See Nedlloyd*, 3 Cal.4th at 466.

A. The Contract's narrow choice-of-law provision does not encompass plaintiffs' claims, so California law should apply.

It is EGL's burden to prove that the Contract's provision designating Texas law applies to plaintiffs' California Labor Code claims. *See Oestreicher v. Alienware Corp.*, 502 F.Supp.2d 1061, 1065 (N.D. Cal. 2007), citing *Wash. Mut. Bank*, 24 Cal.4th at 916. The scope of a contractual choice-of-law designation "is a question of contract interpretation that in the normal course should be determined pursuant to" the law designated in the provision – in this case, Texas law. *Nedlloyd*, 3 Cal.4th at 469 n.7; *see also Wash. Mut. Bank*, 24 Cal.4th at 916 n.3. Because EGL drafted plaintiffs' Contract, any ambiguities in its contractual choice-of-law designation must be construed against the company. *See Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990).

1. The choice-of-law provision does not encompass plaintiffs' statutory claims.

Contracting parties can provide language that a particular state's law will narrowly apply only to disputes over contract interpretation, broadly apply to all disputes between the contracting parties, or anything in between. Plaintiffs' contracts state, "This *Agreement* shall be *interpreted* under the laws of the State of Texas," Contract ¶7.03 (emphasis added), which is one of the narrowest choice-of-law designations commonly used.

On its face, the Contract's narrow designation does *not* encompass plaintiffs' statutory claims, which seek relief under the California Labor Code. *See* ER 830-55, citing Lab. Code §2802 (requiring reimbursement of business expenses); §§221, 223, 400-410 (prohibiting wage deductions by all employers); §450 (prohibiting coerced purchases); §§226.7, 512 (requiring meal breaks); §§510, 1194 (requiring overtime compensation); §§226, 226.3 (requiring accurate wage statements); §§1174, 1174.5 (requiring accurate payroll records); §§201-203 (imposing waiting time penalties)).[14]

These California statutes apply to all employers and employees, whether they have formal written employment contracts or not. The statutory rights are independent of any contract claims or the existence of an employment contract, and do not depend on the interpretation of such contracts. In short, they are not contract "interpret[ation]" claims.

Under Texas law, this plain reading of the Contract's narrow choice-of-law provision is the only permissible reading. *See Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 433 (Texas 1999) (employees's non-contractual claims not covered by choice-of-law provision covering disputes over "interpretat[ion]" or

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[14] Plaintiffs' ninth cause of action, for unfair competition under section 17200 of the California Business and Professions Code, is derivative of plaintiffs' Labor Code claims. *See* ER 849-52.

"enforce[ment]" of the agreement).

Stier involved a plaintiff's claim that his employer was liable for his on-the-job injuries because it violated its duty to provide a safe workplace. 992 S.W.2d. at 424, 433. Stier's employment contract was broader than EGL's, as it stated, "this agreement shall be interpreted *and enforced* in accordance with" Texas law. *Id.* at 433 (emphasis added). The Texas Supreme Court held that the provision's narrow language did *not* encompass the plaintiff's claim, which "sounds in tort and does not concern the interpretation or enforcement of his contract." *Id.* at 433. The Court recognized that the claim ultimately derived from plaintiff's relationship with his employer (in other words, agency principles), *id.*, but held that choice-of law provision inapplicable because, "by its terms, [it] applie[d] only to the interpretation and enforcement of the contractual agreement[; i]t [did] not purport to encompass all disputes between the parties or to encompass tort claims." *Id.*; *see also Thompson & Wallace v. Falconwood Corp.*, 100 F.3d 429, 432-33 (5th Cir. 1996) (similar analysis, noting that "narrow choice-of-law provisions are to be construed narrowly"); *Caton v. Leach*, 896 F.2d 939, 943 & n.3 (5th Cir. 1990) (similar analysis, noting narrowness of clause mentioning only

contract construction).[15]

The *Stier* rule – holding that a provision designating a particular state's law for contract interpretation does not encompass statutory or tort disputes – applies even when the parties' underlying relationship is contractual and the plaintiffs' statutory or tort claims arise from that relationship. In *Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 676 (Tex. App. 2007), *review denied* (Jan. 25, 2008), for example, the Texas Court of Appeals concluded that a franchise agreement's choice-of-law provision (again broader than EGL's) stating that it would "be interpreted, construed and enforced in accordance with" Ohio law did not apply to the franchisee's statutory and tort claims. 223 S.W.3d at 684. At

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[15] Texas law is not unique in construing such choice-of-law designations narrowly. *See Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 171 (9th Cir. 1989) ("By its own terms, this 'choice of law' provision governs [only] the construction or interpretation of the franchise agreement itself" and not recission counterclaims based on noncompliance with applicable franchise laws.); *Walker v. Bankers Life & Cas. Co.*, 2007 WL 967888 at *3-*4 (N.D. Ill. Mar. 28, 2007) (provision stating "[c]ontract shall be construed in accordance with the laws of the State of Illinois" is narrower than "provisions that apply to all claims 'arising out of' the contract" and does not encompass tort claims); *cf. S-Fer Int'l, Inc. v. Paladion Partners, Ltd.*, 906 F.Supp. 211, 213-14 (S.D.N.Y. 1995) (forum selection clause mentioning only "enforcement" is narrower than clause mentioning "validity, performance *and* enforcement," and does not cover action for fraudulent inducement challenging validity of agreement); *cf. also Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79 (1998) ("The cause of action [plaintiff] asserts arises not out of contract, but out of [federal statute], and is distinct from any right conferred by the collective-bargaining agreement.").

least one of the claims (for tortious interference with contract) necessarily involved the parties' contract and application of contract law; to prevail, the plaintiff would have to prove the *existence* and *breach* or impossibility of the franchise agreement. *Id.* at 686. Nonetheless, the court held the choice-of-law provision inapplicable because, "[b]y its language, the choice of Ohio law is limited to the interpretation, construction, and enforcement of the franchise agreement." *Id.* at 684. Similarly, in *Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719 (5th Cir.) *modified*, 355 F.3d 356 (5th Cir. 2003), the Fifth Circuit concluded under Texas law that a provision stating that a contract should be "governed by, and construed in accordance with" New York law applied to the plaintiff's breach of contract claim and a subsidiary issue concerning the validity of a disclaimer in the contract, but not to his fraud and negligent misrepresentation claims – even though those claims were based on representations set forth in the parties' contracts. 343 F.3d at 722, 726-27, 729-30.

Under *Stier*, *Red Roof*, and *Benchmark*, the Contract's choice-of-law provision cannot be construed to encompass plaintiffs' statutory claims. The district court erred in concluding otherwise.

2. The choice-of-law provision is equally inapplicable to the "employee" element of plaintiffs' claims.

EGL took the more limited, but equally indefensible position in the district court that its contractual choice-of-law provision governs at least one element of plaintiffs' claims: the definition of "employee." ER 8:22-24, ER 25-26. For good reason, however, neither *Stier* nor the Contract permit such an element-specific choice-of-law analysis.

In determining whether plaintiffs are "employees" for purposes of their California Labor Code claims, it makes no difference whether they would be considered "employees" under Texas law. When the California Legislature created the employment rights guaranteed by the Labor Code, it determined as a matter of State policy which categories of workers should be protected. No provision was made in the California scheme for another state's law to govern different elements of the statutory analysis, or to interfere with the Legislature's choice of which categories of workers are entitled to which statutory protections.

Further, divorcing the term "employee" from the remainder of plaintiffs' claims serves none of the basic purposes of choice-of-law rules: to protect a state's policy interests, to promote the parties' interests in predictability and uniformity, and to determine and apply the law with ease. *See* Restatement (Second) Conflict

of Laws §6. It is not easy to fit Texas law – shaped mostly in the context of tort claims, *see infra* at 59-60 – into California wage and hour statutes. *See generally Borello*, 48 Cal.3d at 353 ("employee" definition "must be applied with deference to the purposes of the protective legislation."). Because state legislatures and Congress have given the term "employee" specific statutory meanings, a plaintiff's status in one context and in one jurisdiction may bear little relation to his or her status in other contexts and other jurisdictions.

In any event, application of the *Stier* rule would produce the same result, whether addressed to plaintiffs' claims as a whole or to a single element of them. Under the California Labor Code, a court's determination whether plaintiffs were statutory employees is not a matter of contract interpretation. *See Walker*, 2007 WL 967888 at *5-*6 (California expense reimbursement claim does not depend on contract). Rather, it is a term of art defined through an extensive body of case law, which depends on the actual relationship between the parties and the Legislature's intent in defining the term "employee." *See supra* at 24-25.

In fact, California prohibits employers from redefining by contract who is an "employee" under the Labor Code. A California employer may not require employees by contract to waive statutory wage rights, either directly, *see, e.g.*, Labor Code §§219(a), 510(a), 512(a), 1194, 2804; Cal. Civ. Code 3513, or

indirectly, *see, e.g., Gentry v. Superior Court*, 42 Cal.4th 443, 450, 457 (2007). Appropriately, a contract provision labeling someone an "independent contractor" is accorded minimal weight under California law in determining the parties' actual relationship. *See Estrada*, 154 Cal.App.4th at 11; *Toyota*, 220 Cal.App.3d at 877; *Plute v. RPS, Inc.*, 141 F.Supp.2d 1005, 1010 (N.D. Cal. 2001); *see generally Grant*, 71 Cal.App.3d at 654 (employer "cannot, in effect, require his employees to waive their rights under the Unemployment Insurance Code and absolve himself of obligations under the code by requiring his employees to sign a document which states that they will act as independent contractors."); *Borello*, 48 Cal.3d at 359 (permitting employers to evade workers' compensation laws by signing nominal independent contractor agreements would "suggest a disturbing means of avoiding an employer's obligations under other California legislation intended for the protection of 'employees'").[16]

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[16] Even under Texas law, contractual characterization is not dispositive. *See Alice Leasing Corp. v. Castillo*, 53 S.W.3d 433, 441 (Tex. App. 2001); *Weidner v. Sanchez*, 14 S.W.3d 353, 373 (Tex. App. 2000); *infra* at 59-61. Thus, even if this Court were to decide that one state's law may be used to construe another state's statute, the fact that contractual characterizations may be given greater weight in Texas than in California does not transform the issue of whether plaintiffs were employees into a question of contract interpretation.

3. California law applies under the governmental interests test.

Because no contractual choice-of-law designation governs plaintiffs' statutory claims, this Court should apply California law. Absent a contractual choice-of-law designation, California requires application of the law of the forum state, unless a party invokes a foreign state's law and establishes that: 1) the foreign state's law "materially differs from the law of California"; 2) the foreign state has an interest in application of its own law; and 3) the foreign state's interests will be "'more impaired'" than the forum state's if its law is not applied. *Wash. Mut. Bank*, 24 Cal.4th at 919-20; *see also Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 100 (2006); *Hurtado v. Superior Court*, 11 Cal.3d 574, 581 (1974).

EGL did not argue in the district court that Texas law would apply in the absence of its contractual choice-of-law designation. *See* ER 10 n.10. Nor has EGL identified any Texas state interest in applying its definition of "employee" to claims by plaintiffs who lived in California, worked in California, filed suit in California, and asserted claims exclusively under California statutes. *See also infra* at 57-58. Accordingly, this Court should hold that California law applies.

B. Even if the Contract's choice-of-law provision encompasses plaintiffs' claims, California law does not permit its enforcement.

Even if EGL's contractual choice-of-law provision could be distorted to encompass plaintiffs' statutory claims, plaintiffs' status should still be determined under California law. Under California's choice-of-law rules, even if a contractual choice-of-law designation encompasses the dispute at issue, it will not be given effect if contrary to fundamental California policy where California has a materially greater interest in the determination of the particular issue than the foreign state. *See Nedlloyd*, 3 Cal.4th at 466; *Wash. Mut. Bank*, 24 Cal.4th at 916-17.

To the extent the district court accurately characterized Texas law as it would apply to this case, California choice-of-law principles would preclude enforcement of the contractual choice-of-law designation. Enforcing the provision to apply Texas law in these circumstances would allow EGL to effect a waiver of fundamental and unwaivable protections that California guarantees to employees in the State – simply by designating that another state's law should apply.

1. Application of Texas law as the district court characterized it would violate fundamental California policies.

a. A state rule of law constitutes a fundamental policy when it promotes important goals or is not waivable.

In determining whether differences in two states' law are "fundamental," courts look to the importance of the policies underlying those differences. *See America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 5, 14-15 (2001) (choice of law provision not enforceable when practical effect would be to waive non-waivable statutory rights, law of chosen state provides "significantly less . . . protection," and policies underlying California laws are important); *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal.App.4th 881, 900-01 (1998) (refusing to enforce choice-of-law provision in contract containing noncompete clause based on importance of policies underlying California's statutory prohibition of such agreements); *see also Van Slyke v. Capital One Bank*, 503 F.Supp.2d 1353, 1361 (N.D. Cal. 2007); *Ribbens Int'l S.A. v. Transport Int'l Pool, Inc.*, 47 F.Supp.2d 1117, 1122-23 (C.D. Cal. 1999).

A statutory protection that may not be waived necessarily reflects a fundamental state policy for purposes of *Nedlloyd* choice-of-law analysis: "If the policy underlying [the statute] bars avoidance of the statute by contractual waiver or formal structuring of a transaction, it should be fundamental enough to restrict

use of a choice-of-law provision to avoid application of the statute." *Guardian Savings & Loan Ass'n v. MD Assocs.*, 64 Cal.App.4th 309, 322 (1998); *see also id.* (decisions holding statute non-waivable "reveal a policy sufficiently strong to be characterized as fundamental . . . because they elevate the statutory policy . . . above the consensual arrangements of the parties"); *ABF Capital Corp. v. Grove Properties Co.*, 126 Cal.App.4th 204, 217-18 (2005). Consequently, when "the enforcement . . . of a choice-of-law provision adopting out-of-state law will be the *practical equivalent* of enforcing a contractual waiver" of an otherwise non-waivable right, the provision may not be enforced. *Guardian*, 64 Cal.App.4th at 322 (emphasis added); *see also America Online*, 90 Cal.App.4th at 5 ("Enforcement of the contractual forum selection and choice of law clauses would be the functional equivalent of a contractual waiver of the consumer protections under the CRLA and, thus, is prohibited under California law."); *Gentry*, 42 Cal.4th at 457 (courts will not enforce "a class arbitration waiver [that] would lead to a de facto waiver of statutory rights"). A contrary rule would permit parties that cannot obtain direct waivers to accomplish the same result by contractually designating the law of a state that has no comparable statutory protection.

b. The Labor Code provisions at issue embody fundamental California policies.

Plaintiffs' complaint seeks to vindicate statutory wage and hour rights, including the rights to reimbursement of business expenses, meal periods, overtime pay, and against improper payroll deductions. These rights, long protected by the Labor Code, are "fundamental" in California.

California's wage and hour statutes express "important societal interests . . . includ[ing] the assurance of a wage adequate to supply the neeessary cost of proper living and to maintain the health and welfare of employees." *ACORN v. Dep't of Indus. Relations*, 41 Cal.App.4th 298, 301 (1995) (punctuation omitted); *see also Kerr's Catering Serv. v. Dep't of Indus. Relations*, 57 Cal.2d 319, 325 (1962) (California public policy grants workers' wages "special status," as "expressed in the numerous statutes regulating the payment, assignment, exemption and priority of wages").

Specifically, Labor Code §2802, regarding business expenses, embodies the "obvious" purpose of protecting "employees from suffering expenses in direct consequence of doing their jobs." *Grissom v. Vons Cos., Inc.*, 1 Cal.App.4th 52, 59-60 (1991). Furthermore, "there is in this state a fundamental and substantial public policy protecting an employee's wages, and that protection includes

freedom from [prohibited] setoffs." *Phillips v. Gemini Moving Specialists*, 63 Cal.App.4th 563, 574 (1998) (referencing Labor Code §§201-02, 221-24). Provisions of the Labor Code that prohibit deductions from employee wages serve the important state policies of preventing employer fraud and deceit, avoiding the imposition of "special hardship" upon employees, and protecting employees' right to rely on the timely payment of their legally owed wages. *See Kerr's Catering Serv.*, 57 Cal.2d at 327-29; *see also Hudgins v. Neiman Marcus Group*, 34 Cal.App.4th 1109, 1118-19 (1995) (regarding Labor Code §§221-23); *Quillian v. Lion Oil Co.*, 96 Cal.App.3d 156, 163 (1979) (regarding Labor Code §§400-10).

The Labor Code's meal period provisions similarly "address some of 'the most basic demands of an employee's health and welfare.'" *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1081 (9th Cir. 2005), quoting *Cal. Mfr. Ass'n v. Indus. Welfare Comm'n*, 109 Cal.App.3d 95, 115 (1980). Further, "[e]ntitlement to overtime compensation . . . is based on an important public policy," and laws requiring payment of overtime serve "the public health and general welfare" by giving employers incentives to "spread employment throughout the work force" as well as "serv[ing] the important public policy goal of protecting employees . . . against the evil of overwork." *Gentry*, 42 Cal.4th at 456 (internal quotation marks omitted); *see also id.* at 455.

Additionally, the California Legislature has declared that the statutory rights plaintiffs seek to vindicate may not be waived by contract. Labor Code §2804 provides that the indemnification requirements of §2802 may not be waived by "[a]ny contract or agreement, express or implied." *See also Desimone v. Allstate Ins. Co.*, 1999 WL 33226248 at *9 (N.D. Cal. Sept. 14, 1999) ("Section 2804, on its face, explicitly and unequivocally precludes any contractual waiver of an employee's right to indemnification for all necessary expenses under §2802). The Labor Code's other protections are also unwaivable, except in particular circumstances not present in this case. *See* Labor Code §219(a) (§§200-43 rights); *id.* §510(a) (§510 rights); *id.* §512(a) (§512 rights); *id.* §1194 (minimum wage and legal overtime); *see also* Cal. Civ. Code §3513 ("[A] law established for a public reason cannot be contravened by a private agreement").

As a result, effectively waiving the protections on which plaintiffs rely through application of Texas law would violate California's fundamental policies. Texas law cannot be so applied to plaintiffs who lived, worked, and signed contracts in California.

This limitation on Texas law applies even though "the issue before this court is whether plaintiffs were employees or whether they were independent contractors." ER 11:20-22. The determination of whether a foreign state's law

violates a fundamental policy can be case-specific. Even if a particular statutory right may be waivable in *some* circumstances, (*e.g.*, for true independent contractors), if it would not be waivable in the particular case before the court (*e.g.*, if plaintiffs would be employees under California law), then application of a different state's law that *does* permit waiver would violate fundamental state policy under *Nedlloyd*. *See Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1068 (9th Cir. 2007) (when class action waivers that are valid under New York law may be unconscionable under California law, choice-of-law designation of New York law is unenforceable); *Oestreicher*, 502 F.Supp.2d at 1066-68 (because California law would not enforce class action waiver in this case, fundamental state policy is implicated and California law must be applied); *Brazil v. Dell, Inc.*, 2007 WL 2255296 at *7 (N.D. Cal. Aug. 3, 2007) (application of Texas law, which would enforce contractual class action waiver, would violate fundamental California policy when facts establish unconscionability of waiver under California law); *Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 1293-98 (2005) (similar).

c. Application of the Texas law definition of "employee" would violate fundamental California policies.

California law is in many respects far more protective of worker rights than Texas law, as it guarantees substantive statutory rights (including those asserted by plaintiffs) that the State of Texas has chosen not even to recognize. Texas law provides no general right to meal periods or overtime pay, for example, and does not prohibit the types of deductions from wages that California forbids. *See generally* Tex. Lab. Code, Ch. 61-62.

Additionally, if EGL and the district court have correctly applied Texas law in characterizing plaintiffs as independent contractors (which plaintiffs do not concede), the test for distinguishing independent contractors and employees is necessarily different under Texas and California law, in a potentially outcome-determinative way. In other words, application of Texas law alone could prohibit plaintiffs from receiving California's fundamental Labor Code protections. Consequently, California's fundamental policy interests must trump the contractual designation of Texas law provisions.

First, as EGL has acknowledged, in California there is a presumption of employee status when analyzing whether someone is covered by an employee-protective statute. *See* ER 24 n.1; *see also Borello*, 48 Cal.3d at 349; *Desimone v.*

Allstate Ins. Co., 2000 WL 1811385 at *10 (N.D. Cal. Nov. 7, 2000). The district court recognized no such presumption under Texas law.

Second, in California, a contract that designates someone as an independent contractor "is not dispositive and will be ignored if [the parties'] actual conduct establishes a different relationship." *Estrada*, 154 Cal.App.4th at 11; *see also Toyota*, 220 Cal.App.3d at 877. The district court held that under Texas law, by contrast, an independent contractor agreement "is determinative, unless there is extrinsic evidence indicating the contract was a sham or cloak designed to conceal the true legal relationship between the parties." ER 9:25-27; *see also* ER 17:7-9, 713-14.

Third, under the district court's and EGL's reading of Texas law, the right-of-control test differs in a fundamental respect from California's test. In California, the key question is whether the employer has the *right* to control the person's work, even if that right is not *exercised*, *see Toyota*, 220 Cal.App.3d at 875; but in Texas (if the district court and EGL are correct), when a contract designates workers as independent contractors, it must be shown that the employer's "'exercise of control [is] so persistent and the acquiescence therein so pronounced as to raise an inference that . . . the parties by implied consent had agreed that the principal had the right to control the details of the work.'" ER 714.

Fourth, California considers several factors that Texas case law seemingly does not (or at least has not yet addressed), including: whether the work is usually performed by employees; whether the work is part of the principal's regular business; and the parties' subjective beliefs about their relationship. *Compare Borello*, 48 Cal.3d at 350-51 *and Estrada*, 154 Cal.App.4th at 11, *with Wasson v. Stracener*, 786 S.W.2d 414, 420 (Tex. App. 1990); *compare also supra* at 24-25 *with infra* at 59-61. In particular, under California law, "[p]erhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so." *Toyota*, 220 Cal.App.3d at 875 (quotation marks omitted). By contrast, under the district court's reading of Texas law, the principal's right to terminate its contracts without constraint is not entitled to any weight at all. ER 16:25-17:2, citing *Bell v. VPSI, Inc.*, 205 S.W.3d 706, 714 (Tex. App. 2006).

To the extent these distinctions are real and would produce a different result in this case if Texas law were applied – at this stage or later in the proceeding – Texas law must be rejected as the applicable rule of decision. Classifying workers as independent contractors under Texas law – when they would be employees under California law – would violate policies fundamental to California by waiving statutory protections that, as explained above, California has deemed so

critical that they should be unwaivable for such workers.

d. California has a materially greater interest in application of its law than does Texas, and its interests would be more seriously impaired if its policy were subordinated to that of Texas.

All plaintiffs lived, worked, and signed contracts in California, and filed suit in California court to assert their right to California statutory protection. As a result, California's interest in applying its own state's laws to plaintiffs' claims is substantial, *see Douglas*, 495 F.3d at 1067 n.2, citing *Reich v. Purcell*, 67 Cal.2d 551, 555 (1967); *Klussman*, 134 Cal.App.4th at 1299; *ABF Capital Corp.*, 126 Cal.App.4th at 220; *In re Marriage of Crosby and Grooms*, 116 Cal.App.4th 201, 211 (2004), and outweighs any contrary Texas interest that EGL might assert, *compare Klussman*, 134 Cal.App.4th at 1300 ("California's fundamental public policy interest in protecting its residents is materially greater than Delaware's interest in uniformity among its corporate citizens."); *see also Application Group*, 61 Cal.App.4th at 901, 903.

EGL's superior bargaining power and role as the drafter of the Contract favors application of California law as well, because "'[t]he state where a party to the contract is domiciled has an obvious interest in the application of its law protecting its citizens against the unfair use of superior bargaining power.'"

Oestreicher, 502 F.Supp.2d at 1068-69, quoting *Klussman*, 134 Cal.App.4th at 1299).

EGL's regular and extensive conduct of business in California further undermines any claim that it should not be subject to California's labor laws. *See Application Group*, 61 Cal.App.4th at 904-05; *Van Slyke*, 503 F.Supp.2d at 1361-62; *cf. Ribbens Int'l*, 47 F.Supp.2d at 1123; *Bernhard v. Harrah's Club*, 16 Cal.3d 313, 322 (1976), *superseded on other grounds by statute, as stated in Cory v. Shierloh*, 29 Cal.3d 430 (1981). To permit out-of-state businesses that operate in California with California workers to ignore the California Legislature's requirements for the employment relationship would mean that the State "c[ould] not reasonably effectuate" its protections for employees. *See Bernhard*, 16 Cal.3d at 322.

In fact, Texas lacks *any* legitimate interest in denying the statutory protections of the California Labor Code to workers who perform their jobs in California. California's interest in application of its wage and hour laws, including its definition of who qualifies for the protections of those laws, thus greatly outweighs any interest that Texas might have in such definition, and provides another reason why this Court should apply California law.

III. Even Under Texas Law, a Reasonable Jury Could Find that Plaintiffs Were Employees, Not Independent Contractors.

Even if this Court were to disagree with plaintiffs' choice-of-law analysis and hold that Texas law applies, it should reverse the district court's order granting summary judgment. Despite the differences between California and Texas law articulated by the district court, material factual disputes would also require the reversal of summary judgment for EGL under Texas law. *Cf. Davis v. EGL Eagle Global Logistics L.P.*, 243 Fed. Appx. 39, 43 n.3 (5th Cir. 2007) (recognizing the "significant indications of control" by *EGL* over its drivers).

Like California, Texas distinguishes employees from independent contractors by application of a common law "right to control" test. In a series of tort and workers' compensation cases, Texas courts have recited the following description of the factors bearing on employee status:

> In determining whether a worker is an employee or an independent contractor, several factors must be considered: (1) the independent nature of the worker's business; (2) the worker's obligation to furnish the necessary tools, supplies, and materials to perform the job; (3) the worker's right to control the progress of the work except as to final results; (4) the time for which the worker is employed; and (5) the method of payment, whether by time or the job.

Wasson, 786 S.W.2d at 420.

In such cases (the only contexts in which Texas courts appear to have

explained the definition of "employee" in detail), a contractual classification may shed light on the right to control issue but is not determinative. No matter how a contract characterizes a worker's status, if its terms are ambiguous or indefinite a court applying Texas law may still consider evidence of the parties' actual practice or the principal's exercise of control over the worker. *See Newspapers, Inc. v. Love*, 380 S.W.2d 582, 590 (Tex. 1964). Furthermore, a contract that "expressly provides for an independent contractor relationship" is "determinative" *only* "in the absence of extrinsic evidence indicating the contract was subterfuge, that the hiring party exercised control in a manner inconsistent with the contract provisions, or [that] the written contract has been modified by subsequent agreement." *Weidner*, 14 S.W.3d at 373, citing *Newspapers*, 380 S.W.2d at 590; *see also Elder v. Aetna Cas. & Surety Co.*, 236 S.W.2d 611, 623 (1951) ("The test is: Did the . . . company actually assume and exercise such detailed control over [its worker] . . . as to make him a servant, even though the contract did not so provide?").

The right of control test under tort and worker's compensation law, however, does not necessarily apply to this case. The Texas Workforce Commission, the agency responsible for enforcing Texas' Payday Law and which serves as a forum for Texas wage claims, has articulated a different version of the

test, which relies on 20 common law factors whose weight depends on the facts of each case. *See* 40 Tex. Admin. Code § 821.5; *see generally* Tex. Lab. Code §§61.001, 61.002, 61.051. Under the Payday Law test, a contractual label is *irrelevant* to a worker's status. The Workforce Commission regulation states that "[i]f an employment relationship exists, it does not matter that the employee is called something different." 40 Tex. Admin. Code §821.5.

Although Texas courts have apparently not addressed the definition of "employee" in the context of Payday Law claims or clarified the relationship between the Payday Law's "right of control" test and the tort version of the test, the Workforce Commission's Payday Law test would be the most appropriate for this case, if Texas law applied. Under the Payday Law, which is the Texas statute most similar to the California statutes at issue here, that test would be entitled to substantial deference. *See Southwestern Bell Tel. Co. v. Pub. Util. Comm'n*, 863 S.W.2d 754, 758 (Tex. App. 1993) ("[W]e give due deference to an agency's construction of a statute that the agency is charged with enforcing"). For the sake of completeness, however, we discuss both tests below.

A. The Contract's terms do not establish plaintiffs' status as independent contractors.

The Contract's description of plaintiffs as independent contractors does not determine their status under either Texas "right of control" test. As explained above, such a label is irrelevant under the Payday Law test. 40 Tex. Admin. Code §821.5. Under the tort test, a contract labeling a worker an "independent contractor" is presumptive evidence of such status only if it also "definitely fix[es]" the worker's status as such. *Newspapers*, 380 S.W.2d at 590; *see also Swift v. Aetna Cas. & Sur. Co.*, 449 S.W.2d 818, 820 (Tex. Civ. App. 1970) (contract must be "specific in treatment of the matter of the right of one to control the other" to establish parties' relationship). In other words, an agreement must not only "provid[e] that a person shall be an independent contractor," but also must provide "for no right of control [in the employer]." *Durbin v. Culberson County*, 132 S.W.3d 650, 659 (Tex. App. 2004); *see generally Newspapers*, 380 S.W.2d at 591-92. A contract's specific terms must be fully *consistent* with any recitation of the "independent contractor" label. *Cf., e.g., Bell*, 205 S.W.3d at 713-14 (considering whether contract's terms are consistent with its labeling of the parties). There is no such consistency here.

Although EGL's Contract characterized its drivers as "independent

contractor[s]," Contract ¶I, other contract terms – not to mention the parties' actual relationship – contradict this facile, self-serving label. The district court erred in concluding otherwise. *See* ER 17:11-12. EGL's contractual control over its drivers' "tools and appliances" – vehicles, uniforms and communication equipment, *see supra* at 9, 11-12 – is emblematic of an employment relationship under Texas laws. *Thompson v. Travelers Indem. Co. of Rhode Island*, 789 S.W.2d 277, 278-79 (Tex. 1990); *see also Bennack Flying Servs., Inc. v. Balboa*, 997 S.W.2d 748, 753 (Tex. App. 1999) (citing contractual equipment specifications and right to approve pilots and equipment as evidence of principal's right of control). EGL's general authority to require compliance with each of its instructions and policies, *see supra* at 6-7, further "indicates a master-servant relationship" because it is "in effect [a requirement for a driver] to do anything [EGL] might tell him to do." *Humble Oil & Refining Co. v. Martin*, 222 S.W.2d 995, 998 (Tex. 1949) (citing provision that required worker to "perform other duties . . . that may be required of him"). And the comprehensive control that the Contract grants EGL over its drivers' business decisions (including non-EGL vehicle use and insurance purchases) is inconsistent with Texas' definition of independent contractors as those "in the pursuit of an independent business." *Durbin*, 132 S.W.3d at 658 (internal quotation marks omitted).

Because, at a minimum, the Contract terms permit "more than one reasonable conclusion" about the drivers' status, *see Bennack Flying Services*, 997 S.W.2d at 751; *see also Berel v. HCA Health Services of Texas, Inc.*, 881 S.W.2d 21, 24 (Tex. App. 1994), this Court must reverse the district court's summary judgment ruling even if Texas law is deemed to apply.

B. Evidence that the parties' actual relationship was inconsistent with any independent contractor contract is sufficient to defeat summary judgment.

Even if the Court were to conclude that the Contract's terms were consistent with an independent contractor relationship under Texas law, it should reverse the district court's ruling because the extensive evidence of EGL's exercise of control over plaintiffs and other drivers is sufficient to show that EGL retained a *right* to control them.

Under the Payday Law test, a reasonable jury could conclude that plaintiffs are employees under Texas law based on evidence that supports the great majority of the 20 factors that the Texas Workforce Commission attributes to an employment relationship. As described previously, plaintiffs normally: 1) "receiv[ed] instructions about when, where and how the work is to be performed"; 2) "[we]re required to attend meetings or take training courses"; 3) saw their "[s]ervices . . . merged into [EGL's] overall operation"; 4) "[could] act as a

foreman for the employer but, if so, helpers [we]re paid the employers' funds"; 5) "often continu[ed] to work for [EGL] month after month or year after year"; 6) "work[ed] . . . during hours and days as set by [EGL]"; 7) "ordinarily devot[ed] full-time service to [EGL], or [EGL] [had] a priority on the [drivers'] time"; 8) were told "where services are performed"; 9) "perform[ed] services in the order or sequence set by [EGL]"; 10) were "required to submit regular oral or written reports about the work in progress"; 11) "[we]re paid for services rendered"; 12) "ordinarily work[ed] for one employer at a time and may be prohibited from joining a competitor"; 13) "c[ould] be discharged at any time without liability on the employer's part"; and 14) "[could] quit work at any time without liability on [the drivers'] part." *See* 40 Tex. Admin. Code § 821.5; *supra* at 6-18.

Even under the Texas tort law "right of control" test, plaintiffs' status would at least be a jury question. Because of EGL's regulation of hours, extensive policies, training, threats and discipline, a reasonable jury could conclude that EGL exercised "the type of control normally exercised by an employer[:] when and where to begin and stop work, the regularity of hours, the amount of time spent on particular [tasks], the tools and appliances used. . . , and . . . manner of accomplishing the end result." *Thompson*, 789 S.W.2d at 278-79; *see also generally Weidner*, 14 S.W.3d at 375 ("[T]he draconian economic penalties

Liberty threatened to assess against Weidner . . . only served to intensify its explicit and implicit control").

Indeed, in *Davis*, 243 Fed. Appx. 39, a case involving EGL, its drivers, and Texas law that was decided the day before the summary judgment ruling in this case, the Fifth Circuit recognized as "arguably the most significant indications of [EGL's] control" over its drivers requirements similar to those in this case: that drivers work exclusively for EGL and for minimum number of hours, attend EGL meetings, and keep and use EGL communications equipment. *Id.* at 43 & n.3 (not reaching the issue of drivers' status because the district court's summary judgment could be affirmed on other grounds, but expressing doubt about the district court's ruling that drivers were independent contractors as a matter of law because it ignored or contradicted evidence of the cited factors).

Moreover, Texas courts have repeatedly concluded in circumstances similar to those here that a jury could find that workers are employees regardless of whether a contract recites the term "independent contractor." In *Weidner*, 14 S.W.3d at 374-75, for example, the Texas Court of Appeals affirmed a jury's finding that a taxi driver who had signed an agreement nominally creating an independent contractor relationship, which "gave [him] full managerial responsibility, management and operation of his business," was an employee,

based on evidence that the employer – similarly to EGL – directed the driver which customers to pick up, when and where to pick them up and take them, how to sequence pick-ups, within which time period to complete the route, and generally how to dress; required the driver to report accidents; prohibited him from picking up other fares while working for the company; and threatened fines for violations. *Compare supra* at 7-10, 12-13, 17-18.

The circumstances of this case are also similar to those in *Home Interiors & Gifts, Inc. v. Veliz*, 695 S.W.2d 35 (Tex. App. 1985) – indeed, are even more indicative of an employment relationship. The court there considered the status of a delivery driver who was told at the time of hiring that he was an independent contractor, and had far more independence than plaintiffs: he rented warehouse space for storing deliveries, hired helpers, chose his own hours, worked for other customers, and was subject to virtually no daily supervisory control. 695 S.W.2d at 38, 41. The court concluded that record nonetheless supported a finding of employment because the employer "prescribe[d] detailed procedures and policies" that were strikingly similar to EGL's: they instructed drivers on tasks including "receiving . . . merchandise[,]. . . reporting shortages and damaged merchandise[,] . . . delivering merchandise[,] . . .returning or reshipping merchandise[,] . . . processing freight claims and . . . a [driver's] vacation or absence" and

communications with headquarters. *Id.* at 38 & n.1, 41; *compare with supra* at 7-8. The policies indicated employment because, like EGL's policies, they left the driver "little or no discretion" over the two critical parts of his job: "how to receive . . . merchandise [for delivery] or . . . what to do upon receipt thereof." 695 S.W.2d at 41.

In particular, courts applying Texas law have recognized that company policies as extensive and mandatory as EGL's strongly indicate employment; such policies quite literally delineate an employer's right of control. *See Household Credit Services, Inc. v. Driscol*, 989 S.W.2d 72, 86 (Tex. App. 1998) (upholding finding of agency based on principal's extensive "Work Standards" despite facts showing that agent, a business, could work for others, operated its own facilities and equipment, and otherwise exercised some autonomy); *Permian Basin Cmty. Cents. for Ment. Health and Ment. Retardation v. Johns*, 951 S.W.2d 497, 501 (Tex. App. 1997) (employer's use of a personnel manual and its "right to evaluat[e] performance, hire and fire, set hours and salaries, define work assignments, and supervise the day-to-day functioning of the group home" evidence employment); *see also Hathcock v. Acme Truck Lines, Inc.*, 262 F.3d 522, 525-27 (5th Cir. 2001) (although transport driver owned his truck and chose route and some work details, he was an employee because, *inter alia*, the company

imposed medical and driving requirements, disciplined drivers' manual violations, required driver to drive exclusively for the company with the company logo on his truck, paid administrative costs, and controlled prices and rates).[17]

Because courts applying Texas law – like California courts – have consistently found workers similar to plaintiffs to be employees, the district court erred in concluding that plaintiffs were independent contractors as a matter of law. In particular, the district court erroneously likened this case to *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308 (Tex. 2002) (per curiam) and *Bell*. *See* ER at 13-17. In *Limestone*, a driver was told "where to pick up and drop off loads,

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[17] Texas courts have also recognized a number of other factors present in this case as as probative of employment status. *Compare Wasson*, 786 S.W.2d at 420 (evidence that principal paid driver's helper is probative of employee status) *with supra* at 17; *compare Texas Emp. Ins. Ass'n v. Bewley*, 560 S.W.2d 147, 150 (Tex. Civ. App. 1977) (skill required indicates independent contractor status), *with supra* at 4; *compare Merchant v. State*, 379 S.W.2d 924, 925-26 (Tex. Civ. App. 1964) (citing noncompetition clause as evidence of employment, where employer also "made all basic decisions, [such as] what equipment would be used, . . . the prices to be charged, . . . [and] what insurance would be carried") *with supra* at 16, 18.

Under Texas law, the parties' beliefs about their relationship (other than as expressed in a work contract) are irrelevant. *See Hoechst Celanese Corp. v. Compton*, 899 S.W.2d 215, 221 (Tex. App. 1994). The district court thus erred in concluding that supposed evidence of Heath's belief about his status was relevant under Texas law. *See* ER 17:14-17. And certainly, under any law, any evidence of Heath's subjective beliefs is irrelevant to Narayan and Rahawi.

and [had to] turn in his load tickets to get paid." 71 S.W.3d at 312. However, "he had broad discretion in how to do everything else" including "to drive any route he wished when delivering . . . . [The driver] did not work regular hours and did not have to visit the office on a regular basis. Moreover, [the company] supplied no tools or equipment to [the driver]. . . . [and] paid [him] by the load." *Id.* "[The driver] could submit the [load] tickets daily or let them accumulate." *Id.* at 310. Here, by contrast, plaintiffs submitted evidence that they had to work regular hours, visit the office regularly for meetings, and submit daily paperwork, and were not as a practical matter free to drive any route or work any hours they wished. *See supra* at 10-11, 14-15; *see also Weidner*, 14 S.W.3d at 375 (jury could infer that delivery limitations affected driver's decisions about how to drive).[18]

Bell is also inapposite. In that case, the court held that a volunteer van pool driver, who was provided with a van in return for agreeing to drive and maintain it, was not an employee. 205 S.W.3d at 710-11. The court held that provisions regulating van maintenance, gasoline purchase, and driver training did not

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[18] Given these differences, the few similarities between this case and *Limestone* – vehicle ownership, per shipment payment, and submission of delivery manifests for payment, *see* ER 14:24-15:9 – cannot justify summary judgment to EGL.

evidence a right to control because there was no explanation of "how . . . [they] constitute anything more than would be required for an ordinary *lease or bailment* or are inconsistent with the express provision that [the driver was] not an . . . employee." *Id.* 715 (emphasis added). In this case, by contrast, EGL and its drivers are not operating under a lease or bailment agreement; the drivers provided their own vans to EGL, ER 4:19, and thus EGL's extensive vehicle regulations constitute only management of its drivers' *work*. *See generally Thompson*, 789 S.W.2d at 278-79 (control over "the tools and appliances used" indicates employment).

In sum, in Texas law as under California law, the district court's ruling cannot stand. A reasonable jury could conclude that plaintiffs were employees, not independent contractors because "the true operating agreement . . . vested the right of control in [EGL]." *Newspapers*, 380 S.W.2d at 592.

CONCLUSION

For the reasons discussed, the district court erred in granting summary judgment to EGL, and its decision should be reversed.

DATED: March 28, 2008

Respectfully submitted,

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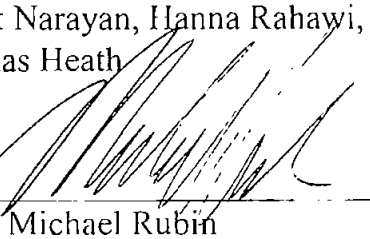
By: 
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West's Ann.Cal.Labor Code § 219

West's Annotated California Codes Currentness
Labor Code (Refs & Annos)
Division 2. Employment Regulation and Supervision (Refs & Annos)
Part 1. Compensation (Refs & Annos)
Chapter 1. Payment of Wages
Article 1. General Occupations (Refs & Annos)

➡§ 219. Payment of wages at more frequent intervals, or in greater amounts, or in full when or before due; private agreements; state employers

(a) Nothing in this article shall in any way limit or prohibit the payment of wages at more frequent intervals, or in greater amounts, or in full when or before due, but no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied.

(b) The state employer does not violate this section by authorizing employees who quit, or are discharged from, their employment with the state to take payment for any unused or accumulated vacation, annual leave, holiday leave, sick leave to which the employee is otherwise entitled due to a disability retirement, or time off to which the employee is entitled by reason of previous overtime work where compensating time off was given by the appointing power, as provided in Section 201 or 202.

CREDIT(S)

(Stats.1937, c. 90, p. 200, § 219. Amended by Stats.2002, c. 40 (A.B.1684), § 8, eff. May 16, 2002.)

West's Ann.Cal.Labor Code § 510

West's Annotated California Codes Currentness
Labor Code (Refs & Annos)
Division 2. Employment Regulation and Supervision (Refs & Annos)
Part 2. Working Hours (Refs & Annos)
Chapter 1. General (Refs & Annos)
§ 510. Day's work; overtime; commuting time

(a) Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work. The requirements of this section do not apply to the payment of overtime compensation to an employee working pursuant to any of the following:

(1) An alternative workweek schedule adopted pursuant to Section 511.

(2) An alternative workweek schedule adopted pursuant to a collective bargaining agreement pursuant to Section 514.

(3) An alternative workweek schedule to which this chapter is inapplicable pursuant to Section 554.

(b) Time spent commuting to and from the first place at which an employee's presence is required by the employer shall not be considered to be a part of a day's work, when the employee commutes in a vehicle that is owned, leased, or subsidized by the employer and is used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code.

(c) This section does not affect, change, or limit an employer's liability under the workers' compensation law.

CREDIT(S)

(Stats.1937, c. 90, p. 205, § 510. Amended by Stats.1982, c. 185, p. 563, § 1; Stats.1999, c. 134 (A.B.60), § 4.)

West's Ann.Cal.Labor Code § 512

West's Annotated California Codes Currentness
Labor Code (Refs & Annos)
Division 2. Employment Regulation and Supervision (Refs & Annos)
Part 2. Working Hours (Refs & Annos)
Chapter 1. General (Refs & Annos)
§ 512. Meal periods

(a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

(c) Subdivision (a) does not apply to an employee in the wholesale baking industry who is subject to an Industrial Welfare Commission wage order and who is covered by a valid collective bargaining agreement that provides for a 35-hour workweek consisting of five seven-hour days, payment of 1 and 1/2 the regular rate of pay for time worked in excess of seven hours per day, and a rest period of not less than 10 minutes every two hours.

(d) If an employee in the motion picture industry or the broadcasting industry, as those industries are defined in Industrial Welfare Commission Wage Orders 11 and 12, is covered by a valid collective bargaining agreement that provides for meal periods and includes a monetary remedy if the employee does not receive a meal period required by the agreement, then the terms, conditions, and remedies of the agreement pertaining to meal periods apply in lieu of the applicable provisions pertaining to meal periods of subdivision (a) of this section, Section 226.7, and Industrial Welfare Commission Wage Orders 11 and 12.

CREDIT(S)

(Added by Stats.1999, c. 134 (A.B.60), § 6. Amended by Stats.2000, c. 492 (S.B.88), § 1, eff. Sept. 19, 2000; Stats.2003, c. 207 (A.B.330), § 1; Stats.2005, c. 414 (A.B.1734), § 1.)

West's Ann.Cal.Labor Code § 1194

West's Annotated California Codes Currentness
Labor Code (Refs & Annos)
Division 2. Employment Regulation and Supervision (Refs & Annos)
Part 4. Employees (Refs & Annos)
Chapter 1. Wages, Hours and Working Conditions (Refs & Annos)
➡§ 1194. Action to recover minimum wage, overtime compensation, interest, attorney's fees, and costs by employee

(a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

(b) The amendments made to this section by Chapter 825 of the Statutes of 1991 shall apply only to civil actions commenced on or after January 1, 1992.

CREDIT(S)

(Stats.1937, c. 90, p. 217, § 1194. Amended by Stats.1961, c. 408, p. 1479, § 3; Stats.1972, c. 1122, p. 2156, § 13; Stats.1973, c. 1007, p. 2004, § 8; Stats.1991, c. 825 (S.B.955), § 2; Stats.1992, c. 427 (A.B.3355), § 120.)

West's Ann.Cal.Labor Code § 2804

West's Annotated California Codes Currentness
Labor Code (Refs & Annos)
Division 3. Employment Relations
Chapter 2. Employer and Employee
Article 2. Obligations of Employer
➡§ 2804. Invalidity of agreement waiving article provisions

Any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State.

CREDIT(S)

(Stats.1937, c. 90, p. 259, § 2804.)

West's Ann.Cal.Civ.Code § 3513

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 4. General Provisions (Refs & Annos)
Part 4. Maxims of Jurisprudence (Refs & Annos)
§ 3513. Waiver of advantage; law established for public reason

Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.

CREDIT(S)

(Enacted 1872.)

Figure: 40 TAC §821.5

EMPLOYMENT STATUS – A COMPARATIVE APPROACH

Under the common law test, a worker is an employee if the purchaser of that worker's service has the right to direct or control the worker, both as to the final results and as to the details of when, where, and how the work is done. Control need not actually be exercised; rather, if the service recipient has the *right* to control, employment may be shown.

Depending upon the type of business and the services performed, not all 20 common law factors may apply. In addition, the weight assigned to a specific factor may vary depending on the facts of the case.

If an employment relationship exists, it does not matter that the employee is called something different, such as agent, contract laborer, subcontractor, or independent contractor.

1. INSTRUCTIONS:

An Employee receives instructions about when, where and how the work is to be performed.

An Independent Contractor does the job his or her own way with few, if any, instructions as to the details or methods of the work.

2. TRAINING:

Employees are often trained by a more experienced employee or are required to attend meetings or take training courses.

An Independent Contractor uses his or her own methods and thus need not receive training from the purchaser of those services.

3. INTEGRATION:

Services of an Employee are usually merged into the firm's overall operation, the firm's success depends on those Employee services.

An Independent Contractor's services are usually separate from the client's business and are not integrated or merged into it.

4. SERVICES RENDERED PERSONALLY:

An Employee's services must be rendered personally; Employees do not hire their own substitutes or delegate work to them.

A true Independent Contractor is able to assign another to do the job in his or her place and need not perform services personally.

5. HIRING, SUPERVISING & PAYING HELPERS:

An Employee may act as a foreman for the employer but, if so, helpers are paid with the employer's funds.

Independent Contractors select, hire, pay and supervise any helpers used and are responsible for the results of the helpers' labor.

6. CONTINUING RELATIONSHIP:

An Employee often continues to work for the same employer month after month or year after year.

An Independent Contractor is usually hired to do one job of limited or indefinite duration and has no expectation of continuing work.

7. SET HOURS OF WORK:

An Employee may work "on call" or during hours and days as set by the employer.

A true Independent Contractor is the master of his or her own time and works the days and hours he or she chooses.

11. ORAL OR WRITTEN REPORTS:

An Employee may be required to submit regular oral or written reports about the work in progress.

An Independent Contractor is usually not required to submit regular oral or written reports about the work in progress.

12. PAYMENT BY THE HOUR, WEEK OR MONTH:

An Employee is typically paid by the employer in regular amounts at stated intervals, such as by the hour or week.

An Independent Contractor is normally paid by the job, either a negotiated flat rate or upon submission of a bid.

13. PAYMENT OF BUSINESS & TRAVEL EXPENSE:

An Employee's business and travel expenses are either paid directly or reimbursed by the employer.

Independent Contractors normally pay all of their own business and travel expenses without reimbursement.

14. FURNISHING TOOLS & EQUIPMENT:

Employees are furnished all necessary tools, materials and equipment by their employer.

An Independent Contractor ordinarily provides all of the tools and equipment necessary to complete the job.

15. SIGNIFICANT INVESTMENT:

An Employee generally has little or no investment in the business. Instead, an Employee is economically dependent on the employer.

True Independent Contractors usually have a substantial financial investment in their independent business.

16. REALIZE PROFIT OR LOSS:

An Employee does not ordinarily realize a profit or loss in the business. Rather, Employees are paid for services rendered.

An Independent Contractor can either realize a profit or suffer a loss depending on the management of expenses and revenues.

17. WORKING FOR MORE THAN ONE FIRM AT A TIME:

An Employee ordinarily works for one employer at a time and may be prohibited from joining a competitor.

An Independent Contractor often works for more than one client or firm at the same time and is not subject to a non-competition rule.

8. **FULL TIME REQUIRED:**

An Employee ordinarily devotes full-time service to the employer, or the employer may have a priority on the Employee's time

A true Independent Contractor cannot be required to devote full-time service to one firm exclusively.

9. **LOCATION WHERE SERVICES PERFORMED:**

Employment is indicated if the employer has the right to mandate where services are performed

Independent Contractors ordinarily work where they choose The workplace may be away from the client's premises

10. **ORDER OR SEQUENCE SET:**

An Employee performs services in the order or sequence set by the employer This shows control by the employer.

A true Independent Contractor is concerned only with the finished product and sets his or her own order or sequence of work.

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18. **MAKING SERVICE AVAILABLE TO THE PUBLIC:**

An Employee does not make his or her services available to the public except through the employer's company.

An Independent Contractor may advertise, carry business cards, hang out a shingle or hold a separate business license.

19. **RIGHT TO DISCHARGE WITHOUT LIABILITY:**

An Employee can be discharged at any time without liability on the employer's part.

If the work meets the contract terms, an Independent Contractor cannot be fired without liability for breach of contract.

20. **RIGHT TO QUIT WITHOUT LIABILITY:**

An Employee may quit work at any time without liability on the Employee's part

An Independent Contractor is legally responsible for job completion and, on quitting, becomes liable for breach of contract.

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1 FOR CASE NO. 07-16487

I certify that:

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 15,529 words.

Dated: March 28, 2008 By: _____
Michael Rubin