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Who the Independents depend on

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Entertainment Law Circular

October 2015

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New Guidance From Department of Labor Affects Employers Who Hire Independent Contractors

The entertainment industry's continued over use of classifying workers as "independent contractors" will be the next big en vogue type of lawsuits presenting potential liability for producers.

In recent years there has been a flurry of activity at the state and federal levels concerning misclassification issues.

Last week, a class action lawsuit was filed on October 7th, 2015 against Thomson Reuters America Corp. alleging the company wrongfully classified writers, photographers, videographers, and editors as independent contractors as opposed to employees. The cause of action is for nonpayment of wages, failure to pay minimum

Avvo 10.0 Rating Superb

RATED BY Super Lawyers
David Albert Pierce
SELECTED IN 2015 THOMSON REUTERS

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Membership limited to attorneys who've won million dollar verdicts & settlements

LEUKEMIA & LYMPHOMA SOCIETY
fighting blood cancers

October is blood cancer awareness month!

On Saturday October 17, 2015 PLG is sponsoring the **Leukemia Lymphoma Society of Greater Los Angeles'** annual **Dream Halloween** at the Egyptian Theater. The event features a **Carnival** with games, food, a bouncy house, and face painting from Noon - 2pm followed by a **screening of the new film Hotel Transylvania 2.** Celebrity guests will be in attendance!

wage, overtime and rest periods and unfair competition-- all of these claims stem from the central idea that by misclassifying the workers as "Independent Contractors" the company was avoiding these statutory obligations owed to bona fide "Employees."

This class action is just the latest sign that federal & state enforcement agencies, as well as, private plaintiffs' attorney mark the entertainment industry as their next big target, Pierce Law Group LLP encourages employers to conduct an internal confidential audit of their entire workforce to best determine if misclassifications may be subjecting their company to liability.

Many producers and film companies mistakenly believe that since their workforce is often short-term in nature, their workers can be classified as independent contractors rather than employees, particularly when often times the workers articulate that they prefer this status. However, this is a common false assumption. And, while length of service and the intentions of the party may hold some weight, they are often far from the definitive determination, and other factors hold much stronger weight.

Last month, the federal Department of Labor weighed in with an advisory opinion which only further demonstrates that its up to strict legal definitions and not the option of either the company or the worker when it comes to defining who can be a bona fide independent contractor. And it is worth reiterating that this is true even when the workers themselves desire independent contractor status, as is so often the case in the entertainment industry!

Independent Contractors vs. Employees

The distinction between an employee and an independent contractors is significant. Employees receive health insurance, minimum wage, overtime, and workers' compensation benefits, while independent contractors do not. Moreover, the employer is obligated to withhold and make payments to assorted state and federal payroll taxes. Conversely, independent contractors are self-employed; they are responsible for their own

Carnival Noon - 2pm.
Hotel Transylvania 2 film: 2:00 - 3:30 pm

All families & movie fans are welcome. Tickets are $30/person ($100/family of 4) and include all food, carnival games, and the Hotel Transylvania 2 screening.

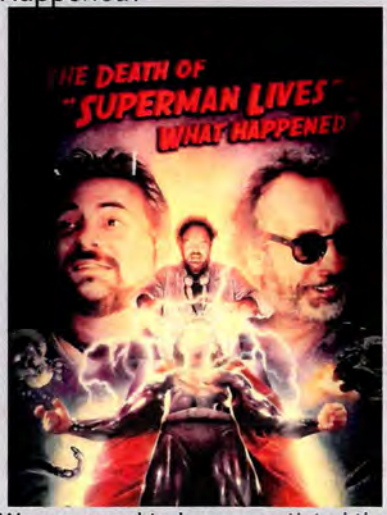
Click here to purchase tickets to attend Dream Halloween.

or

If you cannot attend, **click here** to donate to our Light the Night drive. Donations will be matched to help fund free admission to Dream Halloween for patients and caregivers.

Congratulations!

Congratulations to our client Jon Schnepp on his fanboy documentary "The Death of 'Superman Lives:' What Happened?"



We are proud to have negotiated the film's distribution deal.

payroll taxes, maintenance costs, health care costs, and other expenses.

One of the most frustrating dilemmas concerning this issue is that there are many different test for determining who is an independent contractor. The IRS utilizes the "Right to Control" test (under common law th, while the DOL utilized the "Economic Realities" test, while states such as California use a hybrid of these two tests called the "Multi-factor Test." Various other state unemployment insurance departments or state labor boards may likewise adopt any one of these tests or create a test of their own.

I first wrote about each of these different tests several years ago and for a more lengthy discussion on these various tests utilized by various enforcement agencies, please see my prior article on our Firm's web page here. That prior posted article goes into detail discussing the variations and assorted tests used by different forums in California.

Generally speaking all of the tests may likely lead to the same conclusions, but the fact that different tests exist, results in the possibility for a lack of consistency with one body finding an employment relationship to exist while another agency may not.

The Newest DOL Advisory Notice

This past Summer the DOL Wage Hour Division re-stated its commitment to "Economic Reality Test" in DOL Administrator's Interpretation No. 2015-1

As set forth above, the "Control Test" is what the IRS and those jurisdictions that default to Common Law utilize for determining independent contractors. The Control test looks mainly at the amount of control that an employer had over a worker when determining if that person was an independent contractor or an employee. For example, if the Company directs a worker in regards to how, where and when the tasks are completed along with other dictates and rules, then it was more likely that the worker was an employee. In contrast, if the company only cares

Recent Events

David attending HBO Emmy after-party. Seen above, client Sandra

that the work gets done, and does not control how it is performed or by who (i.e contractors can use subcontractors, etc), then that worker is more likely to be an employee.

In this Summer's DOL advisory notice, tjhe DOL re-affirmed that DOL does not subscribe to the "Control Test" and employers need to be reviewing the status of workers for wage-hour purposes under the "Economic Realities Test."

Under the Economic Realities Test, the most important factor is whether or not the worker is economically or financially dependent on an employer. If a worker gets most of his or her income from one employer, the DOL will likely consider that worker to be an employee, regardless of what that person's contract says.

In addition to this part of the test, the DOL will also consider whether or not a person's work is integral to the purpose of the business. The more related the work is to the goal, the more likely it will be that that person is an employee. For example, a camera operator is integral to the production of a movie and would likely be an employee. In contrast, a worker in the food services does not provide a service which is necessary to the production of a film, and would be more likely to be considered an independent contractor.

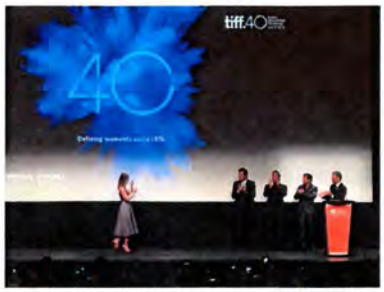
In addition, independent contractors are more likely to work for multiple companies or clients at a time. When a worker is receiving income from only one source for an extended period of time, that person is more likely to be an employee.

Help For Employers

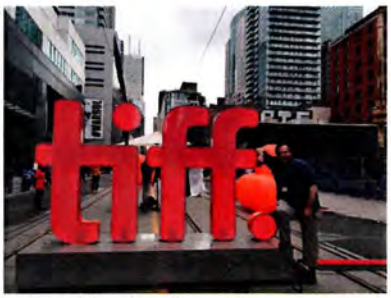
It is important to remember that different agencies will determine independent contractor status using different tests. Usually these tests will reach the same conclusion, but not always. Liability may be avoided for IRS purpose but not a wage-hour claim, or vice versa.

Moreover, interpreting these tests are best left to experts, and we encourage companies to speak with the skilled employment experts at Pierce Law

Vidal, Emmy winner Julia Louie-Dreyfuss, and Mel Brooks



David attended premiere of Sicario at TIFF, featured in photo Emily Blunt, Benicio Del Toro, Josh Brolin, and Director Denis Villeneuve



David having fun at the Toronto International Film Festival

Slamdance Screenwriting Competition: David and Slamdance President Peter Baxter presenting Best Feature Screenplay award to Shane Andries for *The Delegation. Pierce Law Group has sponsored Slamdance for 17 years. The firm also represents the Festival.*

Group LLP rather than relying on the "tribal knowledge" passed on informally from one motion picture's line producer to another.

The DOL's advisory opinion concludes by stating:

"The factors should not be analyzed mechanically or in a vacuum, and no single factor, including control, should be over-emphasized. Instead, each factor should be considered in light of the ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee). The factors should be used as guides to answer that ultimate question of economic dependence. The correct classification of workers as employees or independent contractors has critical implications for the legal protections that workers receive, particularly when misclassification occurs in industries employing low wage workers."

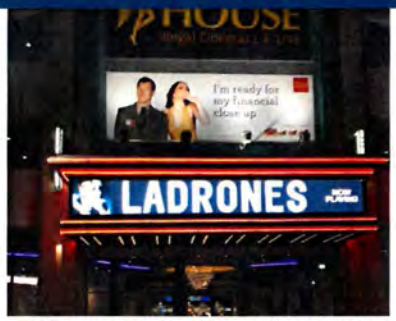
Pierce Law Group LLP can help you analyze the many factors to be considered and in a practical and not "mechanical or in a vacuum" manner.

Simply believing you are safe because "that's the way everybody does it" is a risky business practice to follow.

At Pierce Law Group LLP, we help companies navigate complicated legal issues, and can help you avoid needless liability.

David Albert Pierce is Managing Partner of Pierce Law Group LLP and has been advising clients in employment law matters such as independent contractor determinations for over 20 years with involvement in multiple DOL, EDD, DLSE and court room disputes concerning the same.

Foreign Law, Public Domain, And Licensing Rights: Jay-Z And Timbaland Scheduled For Trial Over Music Sample



The premiere of our client Lantica Media's new Spanish language film *Ladrones* (the film was shot in the Dominican Republic last November)

Congratulations to our client MJ Derricott, founder of Makeovers that Matter, for partnering at a special event with Paul Mitchell Products in the charities efforts to help women seeking reintegration into the workforce to put their best foot forward.

Seminars, Conferences, & Events

Oct 17th: USC and BHBA present the Institute on Entertainment Law & Business. PLG's own Azita Mirazain serves on the Syllabus Committee of this event. This is a full day legal studies event.

Oct. 17th: LLS Halloween Carnival & Hotel Transylvania screeing at Egyptian Theater in Hollywood Noon - 4, sponsored by Pierce Law Group LLP.

Used In 2003 Hit "Big Pimpin" By Tony Hanna

More than 15 years after Jay-Z's classic song "Big Pimpin'" hit the radios in 1999, the rapper and his producer Timbaland will testify at trial regarding whether or not the duo illegally used a flute sample from an Egyptian recording artist to create the song's recognizable melody.

The lawsuit, which was filed by Osama Fahmy in 2007, is finally expected to go to trial in October of this year. In the initial complaint, Fahmy claimed that the pair had used the flute sample without a proper license. Fahmy is attempting to enforce this claim as an heir to the late Baligh Hamdi, who wrote the flute music for the song "Khosara, Khosara," which was featured in the 1960 Egyptian film Fata Alhami.

According to the case documents, Timbaland found the melody on a CD of Middle Eastern music which he believed to be in the public domain. After finding the flute melody, he played the track for Jay-Z, who rapped the lyrics over it.

When the song came out, a foreign subsidiary of EMI, who licenses music on behalf of artists, recognized the flute melody from the song and the film, and contacted Timbaland about using the sample without first buying the rights. Timbaland paid the $100,000 licensing fee, and believed that would end any issues. Instead, the case got much more complicated and became what is now a tangled mess of copyright issues, international law, and contract interpretation.

On one side, Jay-Z and Timbaland believe that they properly licensed the rights to "Khosara, Khosara" through EMI, and that Fahmy has no standing to challenge that license. In 2002, Fahmy and the other Hamdi heirs assigned their rights to the song to the foreign branch of EMI, who licensed the song to Timbaland.

On the other side, Fahmy relies on a tenet of Egyptian law which allows the author of a work (and his or her heirs) to refuse to license a song for use in a work which they find objectionable,

Oct 19th: David Albert Pierce is speaking on the Digital Hollywood panel entitled: *"Exploring Innovation in the Crowdfunding & Other Financing Techniques"* from 2:30pm-3:30pm at the Ritz Carlton in Marina Del Rey. For additional information please click here to visit the Digital Hollywood website.

Oct 20th: California Society of Entertainment Lawyers (CSEL) will host an MCLE panel entitled, "*The Clause That Should Cause Pause: Arbitration Provisions in Entertainment Contracts*" at Maggiano's at The Grove. David Albert Pierce ais Co-CLE Seminar Chair for CSEL and Vera Golattorneys Vera Golosker is the Program Chair for the event. For more information and to register for the event please click here.

Nov 5th: Vera Golosker is the Program Chair for the Beverly Hills Bar Association's *International Trademark Panel. click here for more information and registration: click here*

CSEL at Conference of California Bar Associations

From October 9th to 11th, Pierce Law Group LLP attorney Azita Mirzaian attended the Conference of California Bar Associations as a delegate on behalf of the California Society of Entertainment Lawyers (CSEL). Azita advocated on behalf of CSEL's legislative

regardless of whether or not the heirs gave up their rights. Because of the content of "Big Pimpin,'" Fahmy claims that the family would never have consented to its use in the song. Though these so-called "moral rights" are not applicable in the United States, Fahmy and his attorneys are attempting to void the agreement with EMI by calling on Egyptian law.

The case will depend both on which contracts and licensing agreements are valid, as well as standard copyright defenses. For example, the music was released for general publication in Egypt, which may mean that it is no longer subject to copyright. Additionally, even if the sample is not part of the public domain and is subject to U.S. copyright laws, a judge will still have to determine if using the sample was an example of fair use under the copyright laws.

It is likely that a judge will narrow down these issues further before the case reaches the trial stage in October. Regardless of how the judge rules, this case highlights the need to thoroughly research any potential copyright issues for music used in songs, television shows, or movies.

If you planning to use a sample of music in your next production, and are unsure about your legal rights or obligations, contact the experienced attorneys at Pierce Law Group LLP. Our Los Angeles entertainment lawyers can assist you in securing the rights you need, and can help defend you if you ever end up the subject of a lawsuit.

Tony Hanna is a Member of Pierce Law Group LLP and can be reached at tony@piercelawgroupllp.com

Wolf of Wall Street Filmmakers Sued by Guy Depicted in Movie
By Michael Ashjian

Andrew "Wigwam" Greene filed a lawsuit against the producers of the film, *The Wolf of Wall Street*. Greene alleging the film violated his right of

proposal to provide remedy to prevent frivolous California's Anti-SLAPP motions (*motions alleging claims have been brought solely to squelch free speech without any legitimate genuine purpose*) while preserving the intended purpose of this important law.

Pierce Law Group has been both successfully using Anti-SLAPP motions and defending against them.

Much to everyone's excitement, the Conference delegates voted to approve the legislative proposal! Next, the proposal will go to Sacramento, where it will be fine-tuned and hopefully will be signed into law.

Light The Night Fundraiser for Leukemia Event

On October 10th Pierce Law Group participated in the Leukemia Lymphoma Societies' Light The Night fundraiser for Leukemia. The event also raise awareness about the disease and recognizes volunteers, survivors and those who have lost the struggle with blood cancers.

David Albert Pierce serves as a Trustee on the Executive

privacy and defamed him under New York Law through the portrayal of a character in the movie, Nicky "Rugrat" Koskoff.

Greene is seeking $50 million, as well as an injunction prohibiting future dissemination of the film, and the return of any copies of the film to Greene, as well as and any advertisements that contain his alleged likeness. The Defendants moved to dismiss the complaint for a failure to state a claim.

Greene whose office nickname was "Wigwam" claims that the film's character "Rugrat" is an identifiable portrayal of him with both nicknames referring to the wearing of a toupee, and that the character engages in a number of illegal and morally questionable acts, which have resulted in damage to Greene's reputation. Greene alleges that the film depicts Greene, through the character Koskoff, committing crimes and engaging in "outrageous and depraved sexual and drug activities", all of which Greene denies ever doing.

Greene worked for Stratton Oakmont, Inc., where he served on the Board of Directors and as head of the Corporate Finance Department. Stratton Oakmont was a notorious brokerage house based in Long Island, New York that stole millions of dollars from investors during the early 1990s. The *Wolf of Wall Street* was based on a memoir written by one of Stratton Oakmont's co-founder, Jordan Belfort. The memoir purports to be a true story based on Belfort's life events, and the court compares and contrasts the character traits of Greene in the book and in the film.

The complaint contains causes of action for the invasion of Green's right of privacy under New York Civil Rights Law Section 51, invasion of privacy New York common law, and libel.

The court granted the Defendant filmmakers' motion in part and denied in part.

In its partial granted of dismissal for the first and second causes of action, the Court recognized NY Code Section 51 is construed very narrow. Section 51 states: "Any person whose name, portrait, picture or voice is used within [the State of New York] for advertising purposes without the written consent...may maintain an equitable

Board of Directors of the Southern California Chapter of LLS.

To donate to Leukemia see section above in this newsletter.

About Us

Pierce Law Group LLP practices in all area of litigation and transactional matters affecting film, TV, new media and the business of creative entrepreneurs across many industries.

ENTERTAINMENT LAW
Motion Picture/TV Production Counsel ♦ Production, Talent, Licensing, and Distribution Agreements ♦ Clearances and

action...against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use."

The mere suggestion of Greene's characteristics without using Greene's name, portrait or picture is not actionably under Section 51 based *on Allen v. Nat'l Video, Inc* . The court noted that in *Cerasani v. Sony Corp.*, the court dismissed Section 51 claims based on the use of a fictitious name for a person, even if the depiction at issue evokes some characteristics of the person, or the person is identifiable by reference to external sources.

Further, the court dismissed the common law cause of action because New York does not recognize common-law right of privacy (*Messenger ex rel. Messenger v. Gruner + Jahr Printing & Pub.; Duncan v. Universal Music Grp. Inc.*).

The Court, however, denied the dismissal on the fourth cause of action for libel and is allowing that claim to move forward. To state a claim for libel under New York law, Greene must show: 1) written defamatory statement of fact of and concerning the plaintiff, 2) publication to a third party, 3) fault, 4) falsity of the defamatory statement, and special damages or per se actionability (*Kavanagh v. Zwilling).* The main issue with the court was whether the defamatory statements were "of and concerning" Greene.

The court cited *Fetler v. Houghton Mifflin Co.,* noting that "the question is whether the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant... it is not necessary that all the world should understand the libel, it is sufficient if those who knew the plaintiff can make out that he is the person meant."

Note: the court also allowed Plaintiff to amend a fifth cause of action for so-called "Libel Based On Gross Negligence" which had a correctable defect in the pleading.

Pierce Law Group regularly advises filmmakers how to stay out of trouble with film clearance matters such as this. The firm has also successfully prosecuted and defended defamation

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actions in both California and New York, including last year's successful complete dismissal of a libel suit brought by the "real Kramer" v. Fred Stoller which garnered much national attention. click here

Mike Ashjian is Pierce Law Group LLP's newest Associate Attorney. He is a 2011 graduate of UCLA and received his JD from Southwestern Law School in 2014. He can be reached at: michael@piercelawgroupllp.com

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