Two recently resolved high-profile lawsuits involving allegations of worker misclassification offer helpful insights into the proper structuring of independent-contractor relationships. While these lawsuits involve specific laws for which a specific test is used for determining an individual’s status, as an employee or independent contractor, the discussion below focuses on those issues that would be universally relevant for purposes of most applicable tests.

Any company doing business with independent contractors should consider periodically reviewing its agreements with independent contractors and related documents, its website content, and its marketing materials to ensure that the company’s independent-contractor relationships are defensible. Recent lawsuit resolutions and court decisions can be very helpful in identifying potential issues and offering new ideas on how to bolster the defensibility of such relationships.

Two such recent lawsuit resolutions are *California v. Handy Technology, Inc.*, (“Handy”) and *Sportsman v. A Place for Rover, Inc.* (“Rover”). Both of these lawsuits received a significant amount of attention in news reports and articles. To avoid this update being too long, it will be sent in two parts. Part 1 will discuss *Handy* and Part 2, which will be sent by separate email, will address *Rover*.

**Handy**

*Handy* involved a lawsuit brought by the District Attorneys of San Francisco and of Los Angeles. The lawsuit alleged, among other things, that Handy misclassified as independent contractors certain individuals (whom Handy calls “PROs”) who signed up with and utilized Handy’s platform to obtain clients for which they could perform cleaning and/or handyman
services. Handy asserted in the litigation that its relationship with PROs satisfy the requirements of the referral agency exception to California’s “ABC” test.

On May 18, 2023, the parties in the Handy litigation entered into a Stipulated Final Judgment and Permanent Injunction. Importantly, this resolution of the litigation permits Handy to continue classifying the PROs as independent contractors in California, provided that Handy incorporates specified changes to its business model. It is these mandated business-model changes that can offer helpful insight on structuring defensible independent-contractor relationships.

The following is an outline of some of the more salient mandated changes that were imposed on Handy in the Stipulated Final Judgment and Permanent Injunction.

- Handy shall allow PROs to set hourly rates for themselves with a simple mechanism and provide PROs with an explanation of how they can set their rates.
  - PROs shall be able to change their respective rates at will.
    - **Comment:** The foregoing mandate reaffirms the importance of an independent contractor having the right to set his or her own pay rate.
- Handy shall list the rate offered for each posted job.
  - Any posted job that meets a PRO’s minimum set rate shall be visible to the PRO.
  - If a posted job pays a rate greater than a PRO’s minimum set rate, the PRO shall be paid at the higher posted rate.
  - Handy shall not enable a PRO to see jobs with a posted rate below the PRO’s minimum rate, other than by informing a PRO how the PRO could adjust his or her minimum set rate to a lower rate.
    - **Comment:** Requiring the disclosure of the pay rate for an offered opportunity provides an independent contractor with the information needed to meaningfully exercise entrepreneurial judgment in deciding whether to accept the opportunity.
    - **Comment:** The prohibition against allowing an independent contractor to see jobs with a posted pay rate below the contractor’s pay rate presumably is intended to protect a contractor against any implicit suggestion or pressure to accept client projects at pay rates below the contractor’s minimum set rate.
- Once a PRO claims a job, Handy shall inform the PRO that the posted amount for the job can be increased through negotiation with the consumer and that during a negotiation the PRO can also negotiate any other aspect of the job.
  - Handy shall inform consumers that a posted base rate for a job, as well as any other aspect of a posted job, is subject to negotiation with the PRO who claims it.
    - **Comment:** Requiring that an independent contractor have the right to negotiate with a client the terms and conditions governing a client project fortifies a contractor’s entrepreneurial independence and detachment from the referral service.
- Handy shall implement a system by which a PRO first reserves a job by claiming it, without being contractually obligated to complete the job.
  - The PRO who reserves a job can contact the consumer and negotiate directly with the consumer concerning any terms the PRO wishes.
  - Handy can specify the duration of a negotiation period.
A consumer and a PRO are not contractually bound during the negotiation period.
If a PRO is not satisfied with the negotiations or job terms, the PRO can return the claimed job to the pool.

➢ **Comment:** The foregoing suggests that one strategy for affirmatively demonstrating that an independent contractor has the right to negotiate project terms and conditions with a client is to create a formal negotiation process through which such negotiations can take place.

- If a PRO and a consumer negotiate additional payments, Handy shall receive no additional remuneration, except for its routine payment processing fee, not to exceed a specified percentage of the additional payment amount.

➢ **Comment:** Prohibiting a referral service from receiving additional remuneration for its services commensurate with an increased client payment to an independent contractor for the contractor’s services helps demonstrate the absence of any financial interdependence between the referral service and the contractor.

- Handy shall modify any terms that appear on its website suggesting that the PROs are part of, or work on behalf of, Handy. The following are examples of the types of statements Handy was instructed to remove from its website:
  - Handy professional
  - Handy PRO
  - Our professionals
  - Handy’s top-rated professionals
  - When would you like us to come…
  - We work to assign…
  - Meet some of our top…
  - Handy has installed
  - We will be able to [insert service]
  - We will send another PRO
  - The trusted name in [insert service – if the name of the service is not followed by the word “referrals”]
  - The best [insert service – if the name of the service is not followed by the word “referrals”]
  - Affordable [insert service – if the name of the service is not followed by the word “referrals”]
  - Any images depicting PROs wearing clothes with a Handy logo
  - All videos in which PROs formally introduce themselves to a consumer as a Handy professional

➢ **Comment:** The foregoing mandated changes to the website reaffirm the importance of a referral service not referencing the independent contractors who utilize its referral services with possessive language, or otherwise suggesting that the independent contractors are part of, or provide services on behalf of, the referral service. This helps bolster the contention that the referral service is not a provider of the services that the independent contractors are in the business of providing, but rather that the referral service is strictly a referral service that matches potential clients with independent service providers.
Comment: In my view, it also is helpful for the referral service’s contracts with clients and with independent contractors to state that when an independent contractor provides services for a client, the contractor does so under the contractor’s own name, on the contractor’s own account, and not as an employee, agent, or subcontractor of the referral service.

- Handy shall not require a PRO to check-in or check-out of a job, unless required by a retail partner.

Comment: For a referral service to impose a check-in or check-out requirement for a client project would be indicative of the referral service imposing a term or condition governing the contractor’s relationship with the end user client, which weighs in favor of employment. But there is no problem if a client were to impose such a requirement.

- Handy shall not impose fines, fees, or monetary penalties against PROs except under specified conditions.

Comment: In my view, the better practice is for a referral service not to impose fines, fees, or penalties but rather to defer to the clients and/or the independent contractors and allow them to impose such items, if they so choose.

- If a consumer complains that a PRO fails to show up for a job without canceling or notifying Handy or the consumer, Handy shall not automatically withdraw referrals of upcoming jobs and remove those jobs from the PRO’s schedule on Handy’s app.
  o Handy can, though, withdraw its referral of future jobs if Handy (i) requests the PRO to confirm that the PRO intends to complete the PRO’s upcoming job, and (ii) the PRO fails to confirm the PRO’s intent to do so within a specified time period.
  o Handy shall update its independent contractor agreement to make clear this is a possible consequence of a PRO’s failure to show up for a job without notice.

Comment: The foregoing mandate suggests that an independent contractor’s nonperformance of a client project is not a basis for removing the contractor from future projects the contractor has already accepted and committed to perform, although it does permit a referral service to solicit confirmation from the contractor of the contractor’s intent to perform such future projects.

- Upon signing up to use Handy’s app, Handy shall require a PRO, as a condition of accessing the platform, to affirm the following:
  I do work (or have done work in the past) that is the same as, or related to, the work I intend to find through Handy; and that I am engaged in an independently established trade, occupation, profession, and/or business offering services to the public as a sole proprietorship or a business entity.

Comment: Obtaining a representation along the lines of the foregoing can be helpful for purposes of demonstrating that the referral service has done all it reasonably could do to ensure that it only offers its referral services to individuals who truly are self-employed and have already made the decision to offer their services as an independent contractor. Such a representation also could be used to obtain a contractor’s affirmation that the contractor
satisfies any specific conditions imposed by a specific test for establishing an independent-contractor relationship that are unique to the contractor and that the referral service cannot reasonably ascertain on its own, e.g., that the individual is engaged in an independently established trade or business.

- During the registration process, Handy shall not require a PRO to claim a job as part of that process.

Comment: The foregoing mandate reaffirms the principle that when an independent contractor registers with a referral service, the independent contractor merely gains access to the client opportunities that the referral service offers, but the contractor does not incur any obligation to accept any minimum number of such client opportunities, or any at all.

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If you have any questions or comments concerning the foregoing, please let me know, at rhollrah@hollrahllc.com or (202) 659-0878.

The foregoing is intended solely as general information and may not be considered tax or legal advice; nor can it be used or relied upon for the purpose of (i) avoiding penalties under any taxing statute or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein. You should not take any action based upon any information contained herein without first consulting legal counsel familiar with your particular circumstances.

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1 The referral agency exception, contained in Cal. Lab. Code § 2777, provides, in pertinent part, that California’s “ABC” test and the holding in Dynamex do not apply to the relationship between a referral agency and a service provider, as defined below, under the following conditions:

(a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation (“service provider”) provides services to clients through a referral agency, the determination of whether the service provider is an employee or independent contractor of the referral agency shall be governed by Borello, if the referral agency demonstrates that all of the following criteria are satisfied:

1. The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.

2. If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration in order to provide the services under the contract, the service provider shall certify to the referral agency that they have the required business license or business tax registration. The referral agency shall keep the certifications for a period of at least three years. As used in this paragraph:

   (A) “Business license” includes a license, tax certificate, fee, or equivalent payment that is required or collected by a local jurisdiction annually, or on some other fixed cycle, as a condition of providing services in the local jurisdiction.

   (B) “Local jurisdiction” means a city, county, or city and county, including charter cities.

3. If the work for the client requires the service provider to hold a state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor's license.

4. If there is an applicable professional licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, the service provider shall certify to the referral agency that they have the appropriate professional licensure, permit, certification, or registration. The referral agency shall keep the certifications for a period of at least three years.

5. The service provider delivers services to the client under the service provider's name, without being required to deliver the services under the name of the referral agency.
(6) The service provider provides its own tools and supplies to perform the services.

(7) The service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed for the client.

(8) The referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.

(9) The service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client.

(10) Without deduction by the referral agency, the service provider sets their own rates, negotiates their rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client.

(11) The service provider is free to accept or reject clients and contracts, without being penalized in any form by the referral agency. This paragraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

(b) For purposes of this section, the following definitions apply:

(1) “Client” means:

(A) A person who utilizes a referral agency to contract for services from a service provider, or

(B) A business that utilizes a referral agency to contract for services from a service provider that are otherwise not provided on a regular basis by employees at the client's business location, or to contract for services that are outside of the client's usual course of business. Notwithstanding subdivision (a), it is the responsibility of a business that utilizes a referral agency to contract for services, to meet the conditions outlined in this subparagraph.

(2)(A) “Referral agency” is a business that provides clients with referrals for service providers to provide services under a contract, with the exception of services in subparagraph (C).

(B) Under this paragraph, referrals for services shall include, but are not limited to, graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and interpreting services.

(C) Under this paragraph, referrals for services do not include services provided in an industry designated by the Division of Occupational Safety and Health or the Department of Industrial Relations as a high hazard industry pursuant to subparagraph (A) of paragraph (3) of subdivision (e) of Section 6401.7 of the Labor Code or referrals for businesses that provide janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.

(3)(A) “Referral agency contract” is the agency's contract with clients and service providers governing the use of its intermediary services described in paragraph (2). The intermediary services provided to the service provider by the referral agency are limited to client referrals and other administrative services ancillary to the service provider's business operation.

(B) A referral agency's contract may include a fee or fees to be paid by the client for utilizing the referral agency. This fee shall not be deducted from the rate set or negotiated by the service provider as set forth in paragraph (10) of subdivision (a).

(4) “Service provider” means an individual acting as a sole proprietor or business entity that agrees to the referral agency's contract and uses the referral agency to connect with clients.

…

(8) “Consulting” means providing substantive insight, information, advice, opinions, or analysis that requires the exercise of discretion and independent judgment and is based on an individual's knowledge or expertise of a particular subject matter or field of study.

…

(c) The determination of whether an individual worker is an employee of a service provider or whether an individual worker is an employee of a client is governed by Section 2775.