

Speaker 1: [inaudible]

Speaker 2: All right. Well, welcome back into the performance review. I am your co-host Ryan Bykerk. I'm a partner here in the Los Angeles office of Greenberg Traurig, and I'm joined by my cohost Phillip person, a partner in the San Francisco office of Greenberg Traurig. Uh, for those of you who [00:00:30] missed the pilot episode, first of all, shame on you, but that's okay. I will explain again, uh, what the purpose of the podcast is. And then I'm going to turn it over to Philip to explain what we're going to be doing on today's episode and to introduce our very first guest ever. Um, so, uh, you know, as we mentioned in that pilot, Phillip and I, and really our teams here at Greenberg Traurig, our California D specialists, labor and employment specialists. And we know that that life happens at work. What happens at work [00:01:00] in our various workplaces affects all of us. So the goal of this podcast is to give you an inside, look at our water cooler discussions about whatever compelling employment issues California employers are facing and by water cooler talk, you know, Phillip and I really do mean exactly that this, this isn't intended to be dry, uh, or academic. We're just going to try to cover the things that we are actually talking about right now at work.

Speaker 3: Again, you hit it. Our favorite phrase, life happens at work and that's something [00:01:30] I'll say it again. We need to put it on the t-shirt for those who missed the first episode, but enough about us today, we have an amazing guest, the one, the only Rina Wang head of legal at Silvaco before we get too far into the show, we should give the obligatory disclaimer, although Rina wang is here. Um, and she's an employee of Silvaco her opinions and comments today reflect her personal views. And she's not speaking on behalf of Silvaco. Now that we have that [00:02:00] out of the way, the dry stuff, welcome to the performance review.

Speaker 4: Thank you for having me on the podcast. After listening to the pilot episode, I'm excited to be the first guest

Speaker 3: Don't get too excited right now today's podcast will be on AB five. We expect you to be a therapist counselor, to all of our listeners and tell them that everything's going to be okay.

Speaker 2: Yeah, no, no pressure at all.

Speaker 4: I wish I had all the answers, but my crystal ball for California employment law seems to be on the Fritz

Speaker 3: [00:02:30] Before diving too deep into AB five. Let's give our audience some background on you, uh, along with being Reena, the all saying, tell us a little bit more about Silvaco and your role there.

Speaker 4: I'm head of legal at Silvaco. It's a business to business software and IP company. Um, in the semiconductor industry, we, uh, design software for computer chips, um, and I manage, um, commercial contracts, employment, law litigation, intellectual property, [00:03:00] the whole gamut, most of my day to day is transactional drafting contracts.

And I do monitor laws to just to see what changes need to be made to our contracts.
Sorry,

Speaker 2: When you say software for SEM, I'm so ignorant about this, but what, what honestly, what even is a semiconductor and why does it need software?

Speaker 4: Um, so our, our software helps hardware company design, computer chips, um, and there's computer chips and everything, phones, computers, [00:03:30] TVs. And, um, so, so our, our customers, um, which tend to be, um, named brands that we all recognize, um, they, they will use the software to, to design their chips and everybody wants to, um, increase their speed and efficiency and of course keep costs down.

Speaker 2: Okay. Well, I think we've established it's well above my pay grade. Um, so thank you

Speaker 3: Mine [00:04:00] too.

Speaker 2: Um, we could probably spend the whole episode just asking you the questions for which you see all, but for now let's shift to AB five. Um, you know, the lion, the lion's share of the attention in this space has gone to the ride sharing companies and, and we'll touch on that. In fact, I don't know how you can talk about AB five without touching on, on ride sharing, but today we really want to explore how some of the issues relating to AB five are impacting other companies. So Philip, maybe now's a good time to [00:04:30] kind of just cover where the current, what the current state of affairs is with independent contractor and employee classification laws, if you could. Sure.

Speaker 3: I think it makes sense to start off with a history, uh, for years in California, courts determined whether workers were independent contractors or employees under the Borrelia tests, which gets its name from the 1989 case S G Borello and sons Inc vs. Department of industrial relations that tests had around 11 or so factors, and really [00:05:00] focus on the right to control the process and work with the worker. Now that all change in April, 2018 with the Dynamex decision, that decision held that the independent contractor analysis for obligations under the wage orders, but not the labor code would be governed by the ABC test, the product of out-of-state law, and specifically Massachusetts not wanting to be left out of the party, the California legislature later codified [00:05:30] and expanded the holding of dynamites in AB five, uh, that was codified and, uh, became effective January 1st, 2020, the statute imposes that the ABC test for the independent and independent contractor analysis under both the wage orders and the labor code would be under this ABC test for those unfamiliar, with the test, a work is presumed to be an employee and may be classified as independent contractor.

Speaker 3: Only if a, [00:06:00] the worker is free of control B, the person performs work outside of the company's usual course of business. And see the person is customarily engaged in an independently established trade occupation, or business of the same nature. It's a lot to digest. And it's also a very difficult test to satisfy. One thing to note is that AB five, however, does include exemptions. Uh, when the exemptions apply, generally, a court will analyze whether a worker is properly [00:06:30] classified as an independent

contractor under the Barilla standard that we talked about previously. But for the most part, AB five is the new issue. That's keeping employees up at night.

Speaker 4: That's an understatement, AB fives, potentially growing list of exemptions includes us as lawyers, accountants, salespeople, graphic designers, engineers, and marketing, and HR professionals. Some of these exemptions require a professional license.

Speaker 2: Yeah, there are, um, there are [00:07:00] a number of exemptions and that seems to be where the, where the debate over AB five is going. And we'll get into that a little bit later. Cause there, there have been, uh, laws passed very recently, uh, that, that sort of amend some of those things. I think another important piece of the puzzle is the, uh, a really recent case. That's illustrated how the statute is making major waves in California and that's a California versus Uber technologies. And in that case, uh, probably, you know, probably most of our listeners are pretty familiar with this, so I'll be brief, but they're the California state attorney [00:07:30] general and the cities of LA San Francisco and San Diego, uh, filed a lawsuit in San Francisco county against ride sharing companies and also sought a preliminary injunction to force, ride sharing companies, to reclassify their drivers as employees prior to any formal judgment, determining that the companies had in fact, violated AB five, you know, as an aside, it's interesting to note that the state attorney general decided not to go after some of the more, uh, the, the food delivery focused app based programs or businesses, [00:08:00] uh, you know, your, your door dash Postmates grub hub, et cetera, instead of going after ride sharing companies that people are using a little bit less now these days anyways.

Speaker 2: So you have to assume there were probably some discussions about the political consequences of these lawsuits. So it's just one of those things that would really have been interesting to have been a fly on the wall for. So the San Francisco superior court judge, uh, in that case, and it ended up entering a preliminary injunction and the court did not mince words actually wrote this one down. [00:08:30] Uh, the judge commented quote, if the injunction, the people seek will have far reaching effects, they have only been exacerbated by defendants prolonged and brazen refusal to comply with California law, uh, close quote. So that's pretty clear where the, the judge at least stands on that particular issue. Uh, the, the rideshare companies immediately sought a stay to bring an appeal and threatened to pull out a California. And the spirit court initially denied that request the court of appeal later, granted it, and so it was a, the injunction was stayed to allow [00:09:00] time for, for an appeal, a fascinating issue, tons of strongly held opinions on that case. And just the issue in general.

Speaker 4: I think there's a perspective that AB five helps workers because the gig economy, gender knots are making a killing on the backs of workers by breaking the rules, the rideshare companies beat the cab companies on pricing and they're for market share and revenue because they don't have the overhead who gets hurt cab companies, I guess. And the argument goes, workers who don't get the protections of California labor laws like workers compensation. [00:09:30] I think the assumption is that AB five will cause these gig driven not to convert everyone to employees. Candidly, it's easier to see how traditional businesses might fight your gig economy companies. You could argue, for example, that rideshare drivers could simply quit if they feel exploited, but a cab

company paying employees could argue that it can't compete in what it sees as an unfair playing field. Other think AB five workers hurt or hurt because a gig economy companies provide [00:10:00] workers the freedom to work when they want, where they want for how long they want at best. It provides steady work for those who want it. And at worst, it provides a good stepping stone for people who are out of work and want to earn a living based on things they already have like a car and a smartphone. What's interesting is that we might just see who's right ride sharing and delivery companies make good on the threat and who knows how serious they are. We might just see who gets hurt.

Speaker 3: True. It's a complex issue, but we shouldn't only be focused on ride sharing companies, [00:10:30] AB five has impacted businesses and how they operate in multiple industries. What that say, let's put Rina on the spot. Tell us about your industry and how your companies is responding to AB five.

Speaker 4: Well, um, because AB five has so many exemptions and in our particular, um, industry, we've, we've covered a lot of those exemptions. Um, in, in the contractors we hire including lawyers, accountants, salespeople, graphic [00:11:00] designers, engineers, um, sometimes marketing and HR professionals as well. Uh, for those, um, assumptions though, we, we do have to focus on the Barilla standard in minimizing control. Um, so for instance, um, I will listen to someone who has a proposal for an independent contractor and really outlined what do we need from this individual? Um, oftentimes they'll ask, well, we want somebody on site. Um, [00:11:30] and we want somebody to work nine to five or what have you. And that's really not great for the control standard because it shows that the company is perhaps exercising too much control over that individual. So I'll try to draft a consulting agreement or independent contractor agreement to minimize the amount of control that we as the company have over that work has over that worker. And, and also to, um, to illustrate that what they're [00:12:00] contributing is some discreet skillset that we, uh, don't provide as a company.

Speaker 3: And Rina, just so I'm clear, AB five has added an additional step. So your first analysis is whether we're going to be looking at this under an AB five slash Dynamex, uh, standard or the Barilla standard. And that affects how you're going to draft the agreement with the consultant or with the independent contractor. Is that, is that fair to say?

Speaker 4: Right. Right. So, um, even [00:12:30] when we hire a professional who does follow, who does fall into an exemption of AB five, we, we still have to have, we have to analyze that under the pre-existing law before it, before, uh, AB five and the ABC test.

Speaker 2: So has there been, um, I mean, any, any additional cost, I mean, it sounds like AB five though, you still are falling within exemptions and thus generally fall under pre-existing law. You're still having [00:13:00] to take a pretty close look at all your contracts, I imagine, um, to make sure that you're falling, first of all, within that exemption. And second, now that there's a renewed interest in this issue, uh, within the confines of that Borello test, is that fair to say?

Speaker 4: Yes. Um, well, there's not an increase monetary cost. I would say it's definitely, uh, an increase in time to, to analyze these contracts and to be very careful with exactly what we're asking of that individual worker.

Speaker 2: Are [00:13:30] you finding that the individual workers feel like, I don't know additional stress, additional need to sort of dot every I and cross every T are you hearing anything from them about how AB five is, is maybe impacting their business

Speaker 4: In my work I have, um, in my personal life with friends who are independent contractors, um, for instance, um, I have a friend who was a contractor and a journalist and AB five has this crazy exemption where journalists who write under 35 [00:14:00] articles are still contractors, but once they hit their 35 article mark, then they're considered employees. So there are all these nuances to AB five that just weren't really well thought out. And who has the burden of record keeping with all of that to keep track of 35 articles? And how do you count an article? So these were all considerations that are not in the law, but that affect real people.

Speaker 3: That's a very good point. It's, it's all in a state of flux right now, and we really don't have all the answers [00:14:30] and looking forward to course to kind of provide some guidance there. Right?

Speaker 4: Yeah. That's usually how this plays out. Um, workers get mad. They Sue, um, lobbyists will, um, ask for additional exemptions. So it is definitely a work in progress. That's right.

Speaker 2: And, and there are efforts to repeal or revise AB five, um, and there's even been talk in the national election about making the ABC test a national rule. So Rina, the Alcyone, [00:15:00] could you, could you adopt maybe a wait and see perspective? I mean, as a business, this could change in a few weeks, right? I mean, can we just push pause

Speaker 4: On this? That seems like a risky proposition given the potential consequences.

Speaker 2: Yeah. So, uh, Rina has clearly seen through me playing devil's advocate here. I mean, in keeping with her name, uh, as there are consequences here and, and it's brought, maybe it'd be a good idea to sort of go through those right now. Philip, could you kind of just hit real quickly? Just what, what are some [00:15:30] of the consequences, if a, if a company decides not to comply?

Speaker 3: Well, Megan, start off asking Rina the all saying to chime in, but, uh, let me, let me go through the consequences right now. The consequences can be significant labor code, uh, 26 0.8 makes it unlawful to willfully misclassify individuals as independent contractors. And with that, that carries lots of penalties. That could be from 5,000 to 15,000. Um, you can even get up to 25,000 per violation [00:16:00] depending on the facts and whether there was a pattern and practice of these violations. Some of the claims that are typically asserted are failure to pay wages for all hours, worked failure to pay over time, you get wages plus interests, failure to pay all wages due at terminations. You get penalties up to 30 days of wages, failure to provide accurate, uh, itemized wait statement, penalties, failure to provide a meal and rest breaks the premium payments.

They're [00:16:30] a failure to keep proper records of times words. All these are claims you could have asserted against you as well as the infamous PETA claim, uh, which adds additional penalties. These add up quickly. I mean, plus there's the fact that litigation distracts from the business operations businesses often get bad press here. There are plenty of reasons to take a thoughtful approach to AB five. So maybe you can't ignore it, but let's talk [00:17:00] about how it might change. What's coming down. The horizon.

Speaker 4: One proposition I've been keeping track of is prop 22 and how we could change AB five. I know some of my buddies at other companies are keeping an eye on it as well. It will be on the ballot for the upcoming election if passed. They could define app based transportation, a fancy way of saying ride share and delivery drivers as independent contractors.

Speaker 2: Yeah, that's right. Prep prop 22 could have a really big impact on the ride share and delivery [00:17:30] companies in, in addition to allowing rideshare drivers and th and those companies to continue with the independent contractor model. It also, uh, proposition 22 also includes several other provisions that aren't discussed that often, uh, such as there, there are some health insurance related provisions and some safety related provisions. So for, for health insurance, uh, prop 22 would require companies to provide healthcare subsidies to rideshare drivers in amounts that depend on how much engaged time the driver spends in a given [00:18:00] quarter. So, uh, drivers who average between, I think it's 15 and 25 hours per week of engaged time get subsidies equal to 41% of the average covered California premium for each month. Drivers averaging at least 25 hours per week of engaged time would be entitled to receive subsidies equal to 82%. So double, uh, of the average covered California premium for each month. So, so that's the healthcare piece, um, regarding worker safety, there, there are some other provisions and perhaps wanting to they would, they would [00:18:30] prohibit rideshare drivers from working more than 12 hours during a 24 hour period, unless the driver has been logged off for certain periods. Uh, and it would also require companies to provide occupational accident insurance coverage and, uh, accidental death insurance coverage in certain circumstances.

Speaker 3: So we need to pause right there because Rina, where I'm going to keep playing on this, you're the all-seeing and Ryan, you can't throw out the term engaged time for all of us, except for Rina who knows everything and expect everyone [00:19:00] to automatically know what that means. Can you explain to us what engaged time means under prop 22?

Speaker 2: Yeah, that's fair. So fair enough. Um, so, so these rideshare and, and delivery drivers, aren't going to be punching a clock. Uh, so engaged time is defined as the driver's time between accepting a ride share or delivery request, and then completing that request. So, uh, you're, you're right. I should probably define things from time to time. So anyway, that's with that that's prop 22. Um, [00:19:30] but, but while the legislative, so while the legislature is doing their part, they're working on AB five, trying to hone and change it or do whatever they're doing. The ride share companies and delivery companies are going directly to the people of California with prop 22. So it'll be interesting to see if, uh, if that pays off for them. Another

Speaker 3: AB five cleanup bill that we need to discuss is AB 2257. It's been passed by the legislature and signed by Newsome. As you mentioned, AB five has a number of exemptions already, but, uh, AB 2257 [00:20:00] revises and expands on the existing exemptions among other things, the bill exempt certain occupations in connection with creating marketing, promoting, or distributing sound recordings or musical compositions, unless certain conditions apply AB 2257, also exempts amuse as a musician or musical group for the purposes of a single engagement live performance event. It exempts an individual performance artists presenting materials [00:20:30] that is an original work or creative and character in like you had to write this one down the results, the results of which depend primarily on the individual's invention, imagination or talent. If certain conditions are satisfied, close, quote, I'm not that, but I'm sure we could figure that out down the line. AB 2257 creates further exemptions for various professions and occupations, including insurance, underwriting, consulting services, [00:21:00] landscape architects, real estate, appraisers, and inspectors.

Speaker 4: I think this revision illustrates the problem. Some businesses have been facing due to AB five. Think about the band with the single engagement live performance event prior to AB 22 57 1 a bar owner wanted to hire a band for an evening. The question was, does the bar have to onboard the band, provide workers' compensation coverage, provide meal and rest breaks, wage statements, and W2's seem that way. [00:21:30] AB 2257 clarifies that this situation will likely be exempt from the purview of AB five. This might not be the end of the modifications to AB five. I think we'll find there are a host of similar situations that the legislature did not consider. And really probably couldn't have thought of the economy is so wide and varied and complex a sweeping bill like AB five was bound to have unforeseen consequences. AB 2257 is shorter addressed some of them. But [00:22:00] I imagine it's not the last time, we'll see an AB five cleanup bill. It seems to be unknown how this will shake out.

Speaker 3: You're right. We could spend all day talking about AB five, uh, legislation designed to modify AB five and have Ryan defined fund terms. Um, like he did with prop 22 for us, but with so much in flux right now, including the pending appeal in the first district court of appeals in California, um, involving those ride sharing companies, as [00:22:30] well as the proposal that proposed legislation, it's, it's safe to save that more succumbent. This, this is really up in the air right now, even though it's in flux right now, I say we give it a great for me. I'm inclined to give it an incomplete Rina as our first guest here. Want to ask you, how would you grade AB five so far?

Speaker 4: I'd give it a D I don't think it was well-written because now we have so many exemptions, the goals were not accomplished. We have all these unintended consequences [00:23:00] and it was also just truly bad timing this year with the worst labor market we've had in over a decade.

Speaker 2: Yeah, I think, I think that's fair. I'm not inclined at all to, to disagree with Rina. I think I'm going to give it a, an in, in an incomplete as well to, to sort of, uh, again, I, I agree with what, what Rina said, but also, yeah, Philip, I just incomplete such a good word for it. I feel like we've just started down this road and we have no idea where this is going to go.

Um, and, and it's developing quickly. So we'll, we'll find out a lot more just in the coming weeks. [00:23:30] I look, I look forward to seeing where it lands

Speaker 3: Ryan, your grade of incomplete was nice, migrated. Incomplete was nice, but the most important, great here is the D from Rina, the all-knowing right, the all seeing, uh, we're also starting a tradition here where we ask each guests about their wildest or most interesting L&E story they've heard or been a part of, obviously without revealing any party information. Rina is our first guests. Do you have a story that you can share it to us?

Speaker 4: Many [00:24:00] years ago, I was working at a defense firm and we had a client that was a grocery store. They were sued by a worker who had a condition where he had to ice his genitals during work hours. And, uh, he was fired and sued for disability discrimination, failure to accommodate failure, to engage in the interactive process. We went all the way through to a jury trial and got a complete defense verdict. So a satisfying ending, but weird [00:24:30] set of facts.

Speaker 2: Now that's, that's how you end a podcast. So thank you so much for joining us Rina. You have been absolutely fantastic. Um, so before we kind of let you guys go, let's talk about just our main takeaways for today. First of all, you know, we just don't know what's going to happen here, but there are a few big kind of highlights. I think to keep in mind, the first is proposition 22, which is the ride sharing companies bid to keep their independent contractor model in place with some modifications. [00:25:00] We'll all have to stay tuned for that. The second is AB 2257. It's effective. Now it provides some more exemptions for those in the music industry and some other professionals. So, you know, if you've got a, if you've got a business and you're hiring anybody, uh, in the independent contractor employee space, make sure to look at that and pay some attention, California.

Speaker 2: The third thing is that California versus Uber technologies is still up on appeal and we've got to stay tuned to see how the California court of appeal is, is going to, uh, [00:25:30] is going to resolve that issue. So I think we all as individuals know, look, we're going to have to wait and see, that's just how this is going to pan out. But we already know from talking with Rina, that businesses don't get to wait and see, they've got to be ready. They've got to be up on AB five. They've gotta be up on AB 2257 is new modifications, those new exemptions that we've talked about or they'll have to face all the penalties and, and potential expenses that we talked about is just too important, too costly to, to, to wait and see, or bury your head in the sand and require some vigilance, [00:26:00] some, um, and, and of course the, the, the readiness to rapidly change and adapt as this thing changes, I think all told this really highlights what we're going to see, uh, happening here in November.

Speaker 2: So I guess we'll, I guess we'll find out soon before we go. Let me talk to you just quickly about our next episode, we're going to be discussing handbooks and policies and how maybe some of those have changed during the pandemic, uh, how to go about crafting those and [00:26:30] looking at those, what do they mean? Uh, we're going to talk to a couple of, uh, handbook experts. In the meantime, please email us at

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performancereview@gtlaw.com that's performance review one word@gtlaw.com with thoughts, and I challenge you to try and beat Rina's story. Uh, but with all of that, again, thank you for joining us here on the performance review. [inaudible].