

## New California Independent Contractor Law Impacts PE Investments

### PENpoints

*A recent California court decision could impact any business that engages independent contractors to perform services in the state.*

On April 30, 2018, California courts changed the test for determining whether companies have properly classified workers as independent contractors for purposes of California's wage and hour laws. The new test presumes that every worker is an employee, and requires the engaging company to prove that the independent contractor is properly classified. This development could impact any business that engages independent contractors to perform services in California.

The new test requires an employer to prove all three of the following factors to support its classification of a worker as an independent contractor:

- (A) The worker is free from the engaging company's control and direction in connection with the performance of the work;
- (B) The worker is engaged to perform work that is outside the usual course of the company's business, and
- (C) The worker is actually engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

This test can be very difficult to satisfy, particularly with respect to prongs (B) and (C), which represent the most significant enhancement to the burden of demonstrating proper classification of contractors. Prong (B) may prove particularly difficult to satisfy for companies

that use independent contractors to provide core business services to the company's clients and customers (like a freight company that engages drivers on an independent contractor basis). Companies that engage contractors in California would be wise to reevaluate their relationships with these workers at this time.

The downside risk of misclassification under this new test can be significant, and can include liabilities under California law for:

- Minimum Wage and Overtime violations
- Meal and Rest Break Violations
- Wage deduction, record-keeping and wage statement violations
- Liabilities can also include waiting time and statutory penalties, liquidated damages, costs and attorneys' fees.

This new law could impact a PE firm's existing portfolio companies, and potentially even its operating partners working in California.

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## SEC Risk Alert Cites Frequent Advisory Fee and Expense Compliance Issues

Recently in our *KirklandAIM* newsletter, we discussed a Risk Alert from the SEC's Office of Compliance Inspections and Examinations that details the most frequent advisory fee and expense compliance issues identified in examinations of registered advisers completed during the past two years (click [here](#) to access this edition of *KirklandAIM*).

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## Post-*Dell* Appraisal — Still Work to be Done

In the aftermath of the long-awaited Delaware Supreme Court appraisal decisions in *Dell*, there was cautious optimism that the court's guidance would eliminate or reduce the uncertainty surrounding appraisal proceedings in Delaware courts in recent years. Three recent appraisal decisions, however, show that the Supreme Court guidance in *Dell* has left some open issues that trial courts continue to confront. To learn more, see our recent [M&A Update](#).

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## CFIUS Reform Gathers Strength, with Private Equity and China Looming Large

In May 2018, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing to mark up its draft proposed amendment to the Foreign Investment Risk Review Modernization Act (FIRRMA). Private equity sponsors in particular should carefully evaluate how FIRRMA could be expected to impact their investment and co-investment strategy, future fundraising and fund design. To learn more, see our recent [Alert](#).

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## Washington, New York State Courts Rule on Advance Notice Bylaws

In recent years, many companies have implemented enhanced advance notice bylaws with additional requirements such as requiring nominating stockholders and director nominees to provide information about themselves and their holdings. While these enhanced features have not been tested in Delaware courts, a recent Washington state court decision suggested that courts elsewhere will uphold the validity of robust advance notice bylaws, as well as a company's close review of nomination notices for compliance with the bylaw requirements (read more in our recent [M&A Update](#)).

However, a recent decision from a New York state court highlights for public company boards, particularly in the context of transaction planning, potential challenges to the enforcement of nomination deadlines under certain circumstances. Read more about that decision in this [M&A Update](#).

## EU GDPR — Coming Soon to an M&A Transaction Near You

As of May 25, 2018, European regulators are able to enforce the EU General Data Protection Regulation (GDPR), which represents a significant increase in legal obligations with respect to the personal information of EU individuals. The GDPR will now have greater bearing on M&A activity in the U.S. and elsewhere, and failure to consider the regulation may expose the buyer or seller to significant non-compliance penalties. To learn more, see our recent [Alert](#).

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## President Trump Withdraws U.S. from the Iran Nuclear Deal

Last month, President Trump announced that the U.S. was ending its participation in the Iran nuclear deal, and instructed the administration to take steps to re-impose economic sanctions broadly targeting the Iranian economy. The exit from the deal forces companies and their investors to review the Iran risk profile in their value chains with urgency. To learn more, see our recent [Alert](#).

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## New Rules Impact Private Fund Advisers Managing Chinese Insurance Capital

The Insurance Asset Management Association of China (IAMAC) now requires “investment institutions” that are engaged in equity investments with Chinese insurance capital to report certain information to the IAMAC. The new measures exemplify the Chinese government’s enhanced scrutiny over the Chinese insurance industry and offshore investments by Chinese insurance companies. As a result, private fund managers face a more challenging environment for attracting, securing and managing capital from Chinese insurance company investors. To learn more, see our recent [Alert](#).

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## SEC Proposes Broker-Dealer Standards of Conduct and Related Investment Adviser Rulemaking and Guidance

The SEC recently proposed a long-anticipated package of rulemakings and interpretations aimed at establishing a broker-dealer standard of conduct and clarifying investor confusion about differences in a customer relationship with a broker-dealer and investment adviser. The proposals aim to develop a framework in which retail investors benefit from increased transparency and investor protection through the application of a number of consistent principles to both broker-dealers and investment advisers. To learn more, see our recent [Alert](#).

## PENnotes

**2018 SuperReturn Energy  
Boston, MA, June 18-19, 2018**

Kirkland is a sponsor of this specialized energy private equity event. Bringing LPs and GPs together, SuperReturn Energy provides a platform for energy investors to come together to share expertise, build partnerships and do deals. Kirkland partner John Pitts will participate on the “Private Equity Oil & Gas Deal Sourcing.” panel Click [here](#) for more information.

**Private Debt Investor CFOs & COOs Forum 2018  
New York, NY, June 20-21, 2018**

Kirkland is a sponsor of this event, which will delve into the complexities of managing the finance and operations of firms that invest across the capital structure, including senior secured loans, subordinated debt, hybrid financing and more. Kirkland partner Stephanie Berdik will address how LPs evaluate private debt and credit funds, and partner Norm Champ will discuss the before and after of an SEC exam. Click [here](#) for more information.

**PLI Annual Private Equity Forum  
New York, NY, July 16-17, 2018**

This annual event is designed to provide an overview of the legal issues that need to be considered in marketing a private equity fund, current regulatory and compliance hot buttons, issues in negotiating the terms of private equity funds, GP-led fund restructurings, sponsor stake sales, and other developments. Kirkland partner Beau Brashares will speak on “General Partner Arrangements: Structure and Terms.” Click [here](#) for more information.

**Kirkland Registered Adviser Seminar & CCO Summit  
New York, NY, September 25, 2018  
Boston, MA, September 27, 2018  
Chicago, IL, October 2, 2018  
Houston, TX, October 9, 2018  
Los Angeles, CA, October 17, 2018  
San Francisco, CA, October 18, 2018**

As the SEC continues its focus on private fund managers registered as investment advisers, firms must be familiar with the evolving regulatory environment. This seminar is designed specifically for private fund manager CCOs, general counsel and other senior executives. More information to follow.

**PLI Understanding the Securities Laws  
Chicago, IL, September 26-27, 2018**

This program will provide an overview and discussion of the basic aspects of the U.S. federal securities laws by in-house and law firm practitioners, as well as SEC staff. Emphasis will be placed on the interplay among various regulations, as well as significant legislative and regulatory changes and proposals. Kirkland partner Maggie Flores will be a panelist. Click [here](#) for more information.

# Private Equity Practice at Kirkland & Ellis

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Kirkland & Ellis' nearly 500 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and fund formations on behalf of more than 400 private equity firms and hedge funds around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in each of the last seven years by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. U.S. News Media Group and Best Lawyers have ranked Kirkland as a Tier 1 law firm for Leveraged Buyouts and Private Equity Law for seven consecutive years and as a top-tier firm for Private Funds/Hedge Funds Law since 2012. The Firm was recognized as the #1 law firm for private equity in the 2018 Vault 100 rankings, and, in 2016, Private Equity International named the Firm "Law Firm of the Year in North America: Fund Formation" for the third year in a row.

In 2012-2017, Chambers and Partners ranked Kirkland as a Tier 1 law firm for Investment Funds in the United States, United Kingdom, Asia-Pacific and globally. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011-2017*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

*The Lawyer* magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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