



# The Franchise Valuations Reporter

## Our Expertise

Within the franchise, distribution and dealership context, we are experts in:

- Valuations, Damages & Expert Testimony
- Finance, Accounting and Tax



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## Have a Question About Succession Planning for Franchise Owners?

Call us for a free, confidential consultation. And we're always interested in your comments about the newsletter.

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## We Write the Book

**Franchise Regulation and Damages**, the only treatise that covers valuations and damages in franchise disputes, is updated 3 times a year.

For more details, to see a Table of Contents or to place an order, go to the Wolters Kluwer Law & Business web page [here](#).

## DISCLAIMER

## Expert Testimony

### *Newly Introduced Expert Testimony Pared By Court But Not Precluded Outright*

Plaintiff United Healthcare's late, surprise introduction of numerous new experts in litigation that had already involved many identified experts was contrary to the case's management and the company's own representations, but was not bad faith action warranting total exclusion said a federal district court in Philadelphia. The Court partially granted a motion to exclude much of the proposed new expert testimony but allowed certain proposed new expert testimony because the prejudice was not so excessive as to warrant complete exclusion. (*United HealthCare Services, Inc. v. Cephalon, Inc.*, July 8, 2019, Goldberg, M.).

## Joint Employer

### *California Senate Committee Holds Hearing for AB 5*

This month, the California Senate Labor, Public Employment and Retirement Committee will hold a hearing for AB 5 in Sacramento, California, which would codify the *Dynamex* ruling<sup>[1]</sup>, where the state Supreme Court ruled that certain workers should be presumed employees instead of independent contractors when evaluating wage and hour classification in class action cases.

The IFA has long argued that retroactively applying the ABC test from *Dynamex* would result in the conclusion that every franchisor employs its franchisees; a conclusion that not only conflicts with multiple state laws and the California Supreme Court's own decision in *Patterson v. Domino's Pizza, LLC*, but would threaten the very existence of franchising in California (which accounts for about 77,200 franchise establishments employing over 755,000 people).

### *CNN Agrees to Settle on 15-Year Joint Employer Lawsuit*

Media giant CNN has agreed to pay \$70 million to settle a 15-year-old labor lawsuit brought by over 200 former CNN camera operators, broadcast engineers, and other technicians. The \$70 million-plus settlement is still in early stages, and must be approved by the NLRB before it is finalized. The lawsuit, which started back in 2004, raised a number of important legal questions during the 82-day hearing. Among those issues was whether CNN should be deemed a "joint employer" for freelance staffers who had worked for multiple companies.

The case went before the National Labor Relations Board (NLRB) during the Obama administration; at the time, the NLRB took a broad view about what constituted "joint employers." In 2017, a three-judge panel of the D.C. Circuit Court, which notably included now-U.S. Supreme Court Judge Brett Kavanaugh, affirmed the NLRB's ruling. In his dissent, Judge Kavanaugh noted that "*the board's failure to apply" the long-standing "direct and immediate control" test for joint employment "flouts basic principles of*

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*administrative law. "Moreover, in my view, there is no plausible way to apply the 'direct and immediate control' test and conclude that CNN and TVS were joint employers."*

[1]*Dynamex Operations West Inc. v. The Superior Court of Los Angeles County*

## Subway Story

**Report by The New York Times: Hit Job or Exposé?**

On June 29 the Times published an article by reporters Tiffany Hsu and Rachel Abrams entitled "Subway Got Too Big. Franchisees Paid a Price" which seems to expose unfair practices. I invite you to [read it here](#) then decide for yourself.

## New Tax Law (2017)

**No Benefits to Taxpayers Making Less Than \$250,000**

*The Wall Street Journal* reports that "the first tax-filing season under the new law jostled the upper-middle class, as people making between \$100,000 and \$250,000 became less likely to receive refunds and more likely to owe money with their returns." Under the headline, [You Filed Returns. the IRS Compiled Results. Here's How the New Tax Law is Working](#), the report goes on to say: "In the aggregate, the tax-filing season looked the same as it did the year before, with 79% of taxpayers getting refunds averaging \$2,879, down only slightly from 80% and \$2,908. But those totals mask some significant variation by income, according to newly released IRS statistics from tax returns filed through May 23. These preliminary tallies provide the first hard data from the government about the actual refunds, deductions and taxes reported at different income levels in the new system."

### **Limit on Deductions for Executive Compensation at Public Companies**

The Tax Cuts and Jobs Act (TCJA) made important changes to Section 162(m) of the Internal Revenue Code which limits a publicly held corporation's tax deduction for compensation paid to each covered employee to a maximum of \$1,000,000 per year. A corporation is publicly held if it has issued securities required to be registered under Section 12 of the Securities Exchange Act of 1934. Under TCJA, Section 162(m) also applies to private companies that file reports under section 15(d) of the Exchange Act.

Prior to the TCJA, two broad types of compensation were not subject to the \$1,000,000 limit:

1. Commissions paid "solely on account of income generated directly by" the individual's performance.
2. Performance-based compensation paid "solely on account of the attainment of one or more performance goals."

But the exemptions were eliminated. The elimination of the exception for commissions does not impact many companies because few senior executives are paid commissions. However, elimination of the exception for performance-based pay is a dramatic change since many companies base their officers' pay on performance and have relied heavily on that exception. The regulations under Section 162(m) are lengthy and have not yet been updated for changes in the TCJA. However, the Internal Revenue Service

provides guidance and examples in Notice 2018-68.[1]

[1] See Stephen D. Kirkland, CPA, CMC, CFF, "[Limit on Deductions for Executive Compensation at Public Companies.](#)"

## Synthetic Identity Fraud

### *Creating Fake Identities to Scam Sellers, Banks*

In a recent white paper entitled "Synthetic Identity Fraud in the U.S. Payment System," the Federal Reserve reported on what McKinsey has called the fastest growing type of financial crime in the U.S. You can access the white paper through [this link to the Federal Reserve press release.](#)

Synthetic identity fraud "is a crime in which perpetrators combine fictitious and sometimes real information, such as SSNs and names, to create new identities to defraud government agencies, financial institutions or individuals." The crime is difficult to detect and the cost difficult to quantify. The report concludes, in part:

Synthetic identity fraud is a growing problem in the U.S. payments ecosystem that affects consumers, small and large businesses, financial institutions, government agencies and the healthcare industry. Fraudsters are more sophisticated and organized, crime rings are run as lucrative businesses, data breaches are frequent and the availability of PII on the dark web is staggering. We expect fraudsters will continue to commit this type of crime due to the lack of victims reporting fraud, difficulty in detection and high payoffs for fraudsters - compounded by increased digitization of the financial system.

## Quotations

*First they came for the socialists, and I did not speak out-because I was not a socialist.*

*Then they came for the trade unionists, and I did not speak out- because I was not a trade unionist.*

*Then they came for the Jews, and I did not speak out-because I was not a Jew.*

*Then they came for me-and there was no one left to speak for me.*

**Pastor Niemoller**