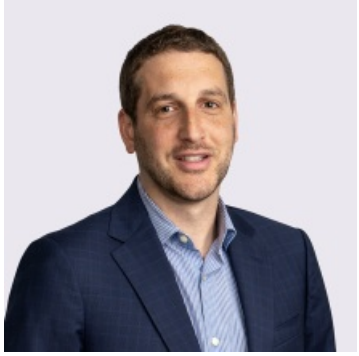
Podcast

# Staying Healthy: Avoiding Legal Issues in the Fitness Industry

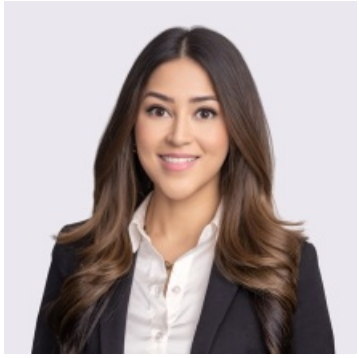
By Adam S. Gross & Jade M. Brewster

November 2, 2023

## Meet the Authors




### Adam S. Gross
Principal
(212) 545-4045
Adam.Gross@jacksonlewis.com


### Jade M. Brewster
Of Counsel
Jade.Brewster@jacksonlewis.com


## Related Services

Fitness
Hospitality

## Details

November 2, 2023

**The fitness industry is projected to outpace the national average growth for U.S. employers over the next ten years. As a result, fitness studios, clubs, gym facilities, and other wellness-centered businesses face unique independent contractor issues, wage and hour practices, and harassment and discrimination claims.**

Jackson Lewis P.C. · Staying Healthy: Avoiding Legal Issues in the Fitness Industry

Listen on Soundcloud
Listen on Spotify
YouTube
Listen on Apple Podcasts

## Transcript

**Alitia Faccone:**

Welcome to Jackson Lewis' podcast, We get work™, focused solely on workplace issues. It is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind, "How will my business be impacted?"

The fitness industry is projected to outpace the national average growth for US employers over the next 10 years. As a result, fitness studios, clubs, gym facilities, and other wellness-centered businesses can face unique independent contractor issues, wage and hour practices, and harassment and discrimination claims. On this episode of We get work™, we discuss the latest employment law issues and trends in the fitness and wellness industry. Our hosts today are Adam Gross, Principal in the New York City office of Jackson Lewis, and Jade Brewster, associate in the Los Angeles office. Both are members of the firm's fitness industry group. Adam has built close, long-term partnerships with employers of all sizes and at all stages of their respective life cycles, from startups to fully formed multinational employers. Jade represents employers before federal and state courts in various matters, including discrimination, harassment, and retaliation claims. Adam and Jade, the question on everyone's mind today is, what are the current legal issues facing the fitness industry, and how does that impact my business?

**Adam Gross:**

Thanks very much, Alitia. Jade and I are excited to be here to answer those questions today, and we'll jump right into it. We're going to go through a couple of issues that are impacting our fitness clients across the country, and we're going to start with independent contractor issues. So Jade, good to be here with you. What are you seeing from your perspective on independent contractor claims that are specifically geared towards the fitness industry?

**Jade Brewster:**

Thank you, Adam. I just want to give a disclaimer to all our listeners out there that we are going to aim to have a broad view. We realize that there are listeners from all across the nation. Adam is a New York attorney, I am a California attorney, but nonetheless, these issues that we're discussing today affect everybody across the nation. Particularly, independent contractor issues have been haunting not only the fitness industry, seems like all my clients, but it's very interesting because fitness industry tends to attract people who have other positions. You'll find that your gym instructor could be a full-time attorney in some ways, or a full-time banker. We typically think of an independent contractor as somebody that serves multiple employers, but the tests in California could be different than the test in New York or the test in Florida. But what we're seeing on a federal level is that the independent contractors are not necessarily covered by the FLSA.

There is a reversion to a lot of the Obama-era economic realities tests that we're seeing as opposed to the Trump administration. And the economic realities test that's proposed right now by the Department of Labor on the federal level, it really mimics essentially how much power is given to the employer on the employee. There are many factors regarding workers' opportunity for profit and loss, investments by the worker, the degree of permanence of the relationship. But what we're seeing more so, at least in California and I don't know in New York, is that the state legislators are really taking over on what that means. But Adam, if you want to chat about what you're seeing on your end.

**Adam Gross:**

Yeah, so I think that, as you alluded to, Jade, we are seeing different states have different rules with respect to independent contractors. But I think that the general gist of pretty much all of these rules, at least a part of it, is how much influence and control does the company maintain over the independent contractors in terms of their schedule, the way that the job gets done, the times that they're doing the job, the amount of time that they're spending on the job, when they need to be available, all of those factors. Those elements of control are generally at the heart of the question as to whether an individual is properly classified as a contractor or should have been classified as an employee.

I think when we talk about these independent contractor issues, it's always important for everyone to remember what the risk is out there. Because it's not always so clear, and it's not always limited to just one risk. So when I advise clients or talk to clients about independent contractor issues, we always focus on two distinct buckets. There's the bucket of risk in connection with if you have classified an individual as a contractor who is later determined to be an employee, the government may come knocking on your door because you have not been

withholding certain payroll taxes that the government would otherwise have been entitled to had they been classified as an employee. So you may deal with some sort of local Department of Labor audit or some sort of Department of Labor audit in connection with the potential tax revenue that you "cheated the government out of".

That often comes about, at least here in New York and I would imagine similarly elsewhere around the country, is you may have an independent contractor who's working for your gym as a personal trainer who has done something that makes you as a company not want to continue engaging that contractor, or you terminate the relationship with this particular contractor and then that contractor goes and files for unemployment. The contractor will only be able to receive unemployment if they are deemed to be an employee, and so oftentimes you then get a local Department of Labor asking questions as to whether your contractor was actually correctly classified as a contractor or whether that contractor is actually an employee. If it's an employee, that would enable the contractor to potentially recover unemployment, but it can also trigger the type of audit that can lead to penalties and potential fines if you are deemed to have misclassified one individual.

A lot of Departments of Labor around the country are not going to just look at the issue with respect to the one contractor at issue. They will look at all of the similarly situated individuals, and they will potentially issue fines or assessments for the entire group of like a classified individuals, and that can be a costly penalty. We are seeing an increase around the country in that type of Department of Labor action. Jade, do you want to talk a little bit about the other bucket in terms of a private lawsuit context and what that can mean both from California perspective and elsewhere around the country?

**Jade Brewster:**

Yeah. A lot of times what I see with my clients is that they will say, "Hey, we have a yoga instructor. We know for sure that this yoga instructor is an independent contractor because this yoga instructor, they work for other yoga companies, they define their own time, they get to do their own rest breaks, their own meal breaks, they bring in their own materials. I don't even tell them which poses to do. They have totally free will." But in California, that is not the test. It just perplexes a lot of people. Adam, what you were alluding to is that that's fine if maybe you're not classified, but what people don't realize is that there's all these extra other penalties associated. There's back pay, there's issues with people complaining that they never got their meal breaks, their rest breaks. There's necessary expenditure where now you're having to pay for potentially even people's phone bills, the yoga mats that they were using. I'm just giving an example for the yoga issues. And we're just seeing a lot more litigation in California, but I'm also keeping a pulse across the nation.

Even though other states are not as strict as California, there's still a large body of lawsuits that are going through the system, especially post-COVID, where we have a lot of these instructors who weren't working during COVID, and they're seeking to recoup their costs. In order to do that, they're becoming plaintiffs in lawsuits. Now that the gyms are reopening, they are becoming more active, and they're able to regain a lot of those costs. But what we were seeing, at least in the beginning of 2020, I'm not sure, Adam, if you were seeing this in 2021 and 2022, was that a lot of these

employees or even independent contractors of these fitness facilities weren't able to work, so they had all the time in the world to sue their former employer. And now we're seeing a little bit of that trickle down.

**Adam Gross:**

I think that's a great point. Jade's articulated the second bucket of risk, which is that these independent contractors go find a lawyer and sue you. To Jade's point, one of the big differences that we're seeing now, which is a good thing on balance in one side of the way of thinking, which is that because gyms are now open and we're seeing customers back into gyms and to fitness studios that companies have a greater need for labor. That means that the idea that someone could be working overtime in 2020 was farfetched, but it may not be farfetched today. That's great from a business perspective, but it also underlines the potential risk that if you have a misclassified independent contractor, you're not paying that contractor overtime. So if that contractor works over 40 hours in a week or, depending upon your state, over eight hours in a day or 10 hours in a day, whatever the case might be, to trigger a violation under local law in addition to potentially under the FLSA, which is the Fair Labor Standards Act that applies everywhere in the country, you as a fitness studio or as a gym, as a fitness employer, you are now ripe for a potential claim.

We are seen, as Jade alluded to, a significant increase in the number of claims that are filed against fitness employers. Most of those claims, or at least a lot of those claims, are not just filed by an individual employee or individual contractor whose damages may be relatively limited. The case will ultimately be filed, more often than not, on a class basis that seeks to include every other individual who was allegedly misclassified during the applicable period of time. If you're asking yourself, "Well, what's the incentive for an individual employee to bring a claim in this fashion?" there's not really much of an incentive for the individual employee, but these cases are often driven by their counsel. Their counsel stand to benefit significantly if there are 500 potential plaintiffs in a case versus just one. And so that is bucket number two. From a dollar and cents standpoint, for an employer, that is often the scariest bucket to be in.

**Jade Brewster:**

The problem too with fitness facilities is they're different rates of pay where you have a fitness instructor, they're going to one studio, they might get paid something for one class, a Pilates class, and then maybe they teach a yoga class, and maybe that yoga class they're getting paid something different. And then maybe they're getting paid a different rate to talk to people before and after class. What we're seeing is, especially with text messaging and Instagram and social media, we're saying, "Oh, so the yoga instructor, do we have to pay for him or her being on social media and talking to people because in some ways is that work? Are they required to do that? They're using their phone." And that can make these wage and hour cases a little more difficult, especially when determining different rates of pay. These lawsuits can get very complicated very quickly. So it's important to keep in mind not only whether somebody's an independent contractor, but also when you determine whether they're an employee how you're really paying them and how you're reflecting that on the pay stub.

**Adam Gross:**

I think that's a great point, and I think that you have seamlessly segued into our second large issue, which is not just limited to independent contractor claims, but wage and hour issues in general. I think one of the things that you just alluded to, which is a staple of this particular industry, is the complicated nature in which some of the employees are paid. In most industries, or in a lot of other industries, it's very simple. People are paid on an hourly basis, and if they work more than 40 hours in a week or more than eight hours in a day, whatever the applicable overtime law is, you pay time and a half for that time. That is not the case. This is an industry in which there is a lot of different methodologies for paying people, and it's often very complicated. Instructors who are teaching classes are often paid on a per-class basis. They may get a session rate. They may get performance bonuses based on hitting certain metrics. They may get paid $2 per attendee above a certain level. There may be productivity bonuses on a weekly basis, on a monthly basis, on a quarterly basis.

There are any number of ways that fitness employers are paying people to work for them, especially the talent who are leading classes and interfacing with customers or training customers. Those unusual or different methodologies of payment are always, always, always going to be red flags for plaintiff's attorneys in the event that they get their hands on a pay stub. They are going to look for what I would call both substantive violations and also technical violations. So, substantively, was the employee paid in a lawful manner? And then technically, does the pay stub or the documentation that we have provided as an employer to these employees, does it comply with all of the technical requirements of the particular state's law?

A lot of states, New York and California being two of the prominent ones, have very, very explicit requirements for what needs to appear on a pay stub. There can be significant penalties that Jade and I as employment attorneys representing management and employers around the country would say are unfairly punitive for simple paperwork mistakes. But that is the world that we are all living in, and this risk I think is especially enhanced in connection with the fitness industry just because of the nuances with which employees in that industry are paid.

**Jade Brewster:**

Yeah, I 100% agree. Especially in California, I think they keep adding on new requirements for a pay stub. It's rare that I see a perfect pay stub. I mean, it's just rare. What Adam you were saying is that especially in the fitness industry where you have somebody getting paid a different rate for a different class or two bucks more for this, two bucks more for maybe a training that they're doing, it's very difficult on a technical level to reflect that perfectly on a pay stub. I have some clients where they tell me, "Jade, I just wanted to pay one extra dollar. Why is that causing me a hundred extra dollars?" Now that's going to potentially could cost you millions just because you want to give one extra dollar. You want to do something good, you want to pay your employees, and then all of a sudden you can be liable for all these punitive damages, waiting time penalties, et cetera. Adam, did you want to talk about type of harassment and discrimination claims you've been seeing on your end?

**Adam Gross:**

Yes, I'm happy to do so, and we can finish with that. I'll just add one thing to what you just said as well, Jade, which is that Jade and I field calls from clients in the fitness industry every day asking questions or proposing various creative methods for paying folks. We're not here to tell you that you can't do that, you can. There are ways to do it. It's just that much more important in this day and age to ensure that whatever methodology you are using to pay people it has been properly vetted and you've thought through all of the contingencies and you have a plan in place with your payroll company on board for how to administer it and make sure that people are being paid properly. Because I don't think the risk has ever been more acute than it is right now in terms of being vulnerable for those types of wage and hour actions.

As Jade mentioned, we're going to finish up. The last big issue that we are seeing across the country is some nuanced harassment, discrimination claims which employers in all industries are obviously subject to, but there are some specific aspects of the fitness industry that make specific types of claims against fitness industry clients more prevalent. One is simply the fact that there are rightly or wrongly various stereotypes about a gym as an environment, whether it's seen as a male territory by some, whether some individual clients prefer to be trained or to be instructed by employees of specific or particular genders. We have seen a lot of cases recently, or a rise in cases recently, that deal with this question of customer preference and whether a gym can ask customers if they have a preference in terms of who is training them by gender, whether a gym can factor in gender preference in terms of the hiring of employees or staff because they see that, for example, there's a gap in female trainers in a particular club and customers are frequently requesting to work with female trainers.

So those claims are relatively new, and we are seeing more of them particularly in this industry I think as a result of some of the preconceived or some of the conceptions that people have about the gym as an environment and about customers really driving some of this with their preferences and gyms giving customers a voice. The question as to whether that's right or wrong or whether gyms should be giving customers any sort of choice with respect to gender of someone who is training them is a relatively new concept that we're seeing more of. I don't know, Jade, if you would want to add anything on that or also talk about some of the other... Maybe you can talk a little bit about the cross-selling, some of the cases that have emanated from that phenomenon as well.

**Jade Brewster:**

Yeah. At the beginning I used to think that these are more like single plaintiff claims, these aren't really the company type settlements that we're getting or verdicts. But now what we're seeing is we're seeing these multimillion dollar verdicts come in that are on par with some of these wage and hour settlements and verdicts. Cross-selling is a big part about the fitness industry where you have a yoga instructor and maybe she is cross-selling with a masseuse to try to get business for the masseuse, and the masseuse is trying to get business for the yoga instructor. There is a very fine line that is unique to the gym situation. Adam was saying sometimes people really prefer a female trainer if you're a female. There is one of the few places where there's nudity. We have the cleaner in a bathroom is exposed to nudity, and that's the reality. It's one of those few positions where in the employment arena where we have to be very

careful about how the sensitivity and training people to really rein in on any type of harassment claim. I know Adam too, if you want to share what you're seeing in New York with this law about not being able to discriminate based on weight and height.

**Adam Gross:**

Yeah, that's a New York City law that adds height and weight as protected categories, meaning that employers will not be able to make employment decisions based on someone's height or weight, which is interesting in intersection with the fitness industry in particular because a lot of the jobs that fitness employers have or that the staff that they employ have requirements in terms of physical fitness. You have to be able to do certain things to be able to qualify for a job, maybe not specifically with height, but you can imagine a world in which weight might play a role in someone's ability or fitness, for lack of a better term, to complete or to be able to adequately perform a job.

I think that's a nice place to leave off because the idea is that we are in New York, and I know elsewhere around the country, active legislatures both on a municipality level and also on a statewide level are passing new laws every session that make it more and more difficult for employers to comply and create more and more landmines that an employer can be tripped up on that can lead to some sort of liability. There are plaintiff's lawyers who are opportunistic at every corner looking to take advantage of these new pieces of legislation or requirements. I think that, as Jade and I have been talking about for the last 20 minutes or so, the fitness industry is often at the frontier of these new issues for a variety of reasons, including the explosion of growth within the industry and the number of additional staff and the labor increase, the number of people who are working for these clients make it an industry that is ripe for these sorts of novel and new issues.

And so we appreciate everyone tuning in, and both Jade and I and our fellow Jackson Lewis attorneys are available. We are ready to assist clients as these issues come up. Again, we appreciate everyone's time. Thanks very much.

**Jade Brewster:**

Thank you, everyone.

**Alitia Faccone:**

Thank you for joining us on We get work™. Please tune into our next program where we will continue to tell you not only what's legal, but what is effective. We get work™ is available to stream and subscribe on Apple Podcasts, Google Podcasts, Libsyn, Pandora, SoundCloud, Spotify, Stitcher, and YouTube. For more information on today's topic, our presenters, and other Jackson Lewis resources, visit jacksonlewis.com. As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship between Jackson Lewis and any recipient.