THE GOLDSTEIN LAW FIRM, A.P.C.
Established 1977

ATTORNEYS AT LAW

LABOR & EMPLOYMENT LAW NEWSLETTER

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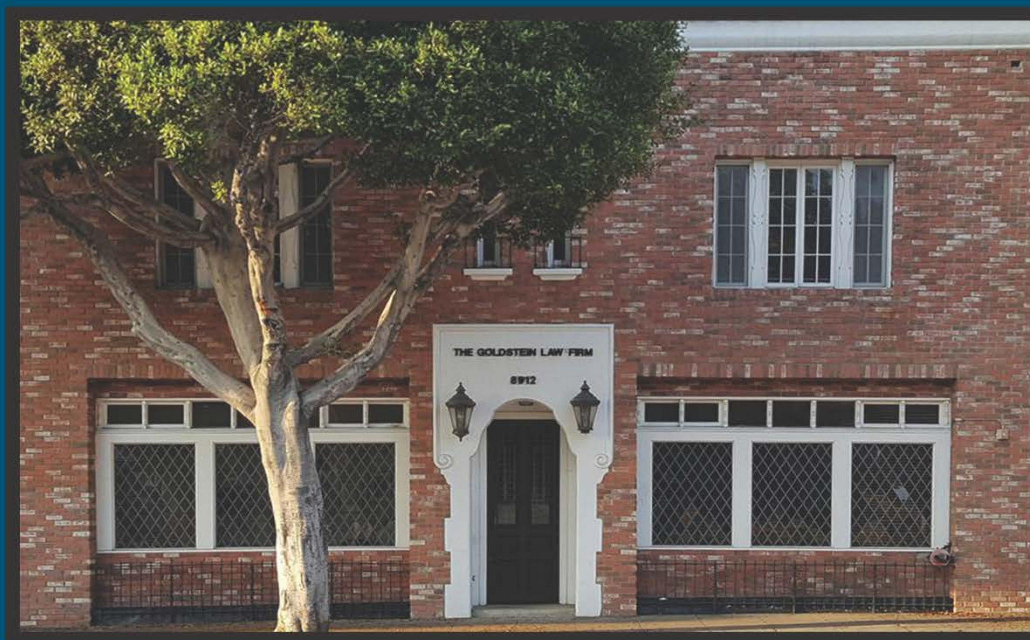

Representing Employers Since 1977

"An ounce of prevention is worth a pound of cure"

"AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE."- BENJAMIN FRANKLIN
"FOR EMPLOYER'S PREVENTION IS HAVING UPDATED EMPLOYEE HANDBOOKS; LEGALLY ENFORCEABLE ARBITRATION AGREEMENTS; LAWFUL EMPLOYMENT AND WAGE AND HOUR POLICIES AND PRACTICES; AND 'REAL-WORLD' TRAINING."- THE GOLDSTEIN LAW FIRM

I. GOOD NEWS FOR EMPLOYERS:PRE-DISPUTE ARBITRATION IS FINALLY SAFE FROM ANY MEANINGFUL ATTACK BY THE TRIAL LAWYERS

On May 21, 2018 in a 5-4 opinion with Justice Neil Gorsuch writing the opinion for the majority, the U.S. Supreme Court in *Epic System Corporation v. Jacob Lewis; Ernst & Young LLP v. Stephen Morris and the National Labor Relations Board v. Murphy Oil USA, Inc.* made clear that the Federal Arbitration Act must be enforced and neither the Federal Arbitration Act's saving clause nor the provisions of the National Labor Relations Act (NLRA) suggests otherwise. The Court held that the provisions of the NLRA that protected an employee's right to collective action did not make unlawful arbitration agreements whereby employees agreed as a condition of employment to waive their right to participate in and/or to take collective actions through class actions against their employers.

THIS IS GOOD NEWS FOR EMPLOYERS AND EMPLOYEES WHO WANT A FAIR AND JUST RESULT

This good news for employers and employees who want a fair and just result in the resolution of their disputes is that arbitration is a much more efficiency process for resolving disputes than the ponderous procedure laden and overcrowded court system. The reason employers favor arbitration is because arbitrators, who are jointly selected by counsel for the employer and employee, are usually former judges and attorneys and are more skill at determining factual issues and applying the law to the facts than lay jurors.

The good news is that any attempt by the California Legislature or Courts to make pre- dispute arbitration agreements between employers and employees unlawful or that burden the arbitration process will be found to be unlawful for employers who engage in interstate and or international commerce.'

We believe that standards for determining whether an employer is engaged directly or indirectly in interstate and or foreign commerce and covered by the Federal Arbitration Act can be derived from federal laws, such as the National Labor Relations Act and Fair Labor Standards Act.

II. <u>California Supreme Court Kills the Gig Economy With Its Dyanamex Operations West, Inc. Decision Defining the "Independent Contractors"</u>

The California Supreme Court decision in *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* dramatically changed the basis for determining whether workers were properly classified as employees or independent contractors. Instead of continuing to use the multifactor tests for making this determination – with the right of control being a major factor – the Court decided to join the state courts and administrative agencies that are now applying a test referred to as the "ABC test" in determining if the California wage orders, minimum wage, meal breaks, rest periods, and overtime applied to a given set of employees.

The Supreme Court used the definition of "Employ" in the California Industrial Wage Orders that is defined as "suffers or permits to work" and the definition of "Employee" that means any person employed by an employer, to determine that all persons who perform work for employers are presumptively "employees." In order to be an independent contractor in California and excluded from the classification of employee under the wage orders and to properly be considered an independent contractor, the "hiring entity" now must establish: (A) that the worker is free from control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work; and in fact; (B) that the worker performs work that is outside the usual core of the hiring entities business; and (C) that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity. ("ABC test")

The Court then used the following example of an independent contractor relationship that would pass muster under the new ABC test: E.g. If a business "hired" a plumber to fix its plumbing or an electrician to fix an electrical wiring problem, these individuals would be performing work that is outside of the usual core of almost all businesses and the work would be performed by workers engaged in an independent trade, occupation or business that would not be of the same nature as the "hiring" entity.

The Court then applied these principles to the following set of facts. Dynamex is a nationwide same-day courier and delivery service that operates a number of business centers in California. Dynamex offers on-demand same-day pick-up and delivery services to the public generally and also has a number of large business customers—including Office Depot and Home Depot for whom it delivers purchased goods and picks up returns on a regular basis. Prior to 2004, Dynamex classified its California drivers as employees and compensated them pursuant to this state's wage and hour laws. In 2004, Dynamex converted all of its drivers to independent contractors after management concluded that such conversion would generate economic savings for the company. Under the current policy all drivers are treated as independent contractors and are required to provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability, as well as taxes and workers compensation insurance.

Dynamex had contracts with its "independent contractor" drivers allowing the drivers to choose the sequence of making their deliveries and permitted them to hire other drivers to make deliveries. Dynamex obtained its own customers and set the rates to be charged to the customers. Dynamex drivers were paid a flat fee or an amount based on a percentage of the delivery fee Dynamex received from the customer.

In short, this decision is significant because it re-writes the long-standing rules governing independent contractor relationships, and makes these relationships much harder to prove.

How to Deal with the *Dynamex Decision* that Sets New Rules for Classifying Employees and Independent Contractors.

1. If you are an existing business that utilizes the services of independent contractors to perform work that is a regular part of your core business, you should immediately convert these workers to employees to avoid creating additional liability.

2. You will not be able to create an independent contractor relationship by the terms of a *cleverly worded* independent contractor agreement *unless* the relationship will stand up under the Court A, B, C test outline above.

3. Claiming that you don't exercise any control over the person performing the work will *still* create an independent contractor relationship if you "suffer or permit" the person to perform work that is part of your core business and the person performs work in a skills trade, occupation and or business.

4. To meet the Court's new A, B, C test you have to have an independent contractor agreement drafted in accordance with its terms; demonstrate that you have no control over the method and means by which the services are performed; and also showing that the independent contractor is not performing work that is part of the employer's core business, but is customarily engaged in an independently established trade, occupation or business.

5. Consult with The Goldstein Law Firm as to how to deal with the *Dynamex* decision and its effect on members of your workforce who have been classified as independent contractors or owner operators.

III. Can Employers Who Are Sued Because of a Bad Hiring Decision in an Age of Ban the Box Secure Insurance Coverage for Negligent Hiring, Supervision and Retention Lawsuits?

Since January 1, 2018, employers have been prohibited from asking job applicants on their employment applications and initial interviews whether they had been convicted of a felony or other crimes. Of course, once an employer makes a firm offer of employment to the applicant conditioned on the applicant passing a background check, the employer can ask this question and can consider the information discovered during the background check. An employer may consider the criminal convictions of the applicant in deciding whether to maintain or to withdraw the job offer. The employer can withdraw the job offer if the employer believes that there is some nexus between the applicant's past criminal history and the job the applicant is being hired to perform. This can be a difficult decision especially where the applicant is otherwise qualified, and many people have a natural instinct to give a person who has paid their debt to society a second chance.

A problem for an employer arises when an employer makes a decision made in good faith, knowing the applicants criminal history, hires the applicant

and the applicant who is now an employee commits a crime during the course of his or her employment causing serious damages to another employee, customer or third party.

At present California law does not provide a safe harbor provision for "Good Samaritan Employers" who knowingly hire convicted felons that would limits an employer's liability for negligent hiring, supervision or retention. Therefore, decisions to hire applicants with criminal records could create serious unfunded potential liabilities for employers because general liability insures had been rejecting claims for damages for negligent hiring, supervisor and retention as uninsurable Insurers have taken the position that the damages are the result of an intentional criminal act of the employee and are therefore excluded from insurance coverage under their policies that cover "negligent" acts only.

However, in *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction, Inc.* the California Supreme Court issued a decision on June 4, 2018 answering a question of California law posed to the Court by the Ninth Circuit Court of Appeals in *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction, Inc. (9th Cir.2016) 834 F. 3d 998,1000.* The question in *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction, Inc(L&M)., supra.* was whether an insurer had a duty to defend and indemnify an employer damages from claims that included negligently hiring, retaining and supervising an employee who allegedly intentionally injured a third party in the commission of a criminal act.

The facts in *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction, Inc.* were as follows: L&M in 2003 hired Donald Hecht as an assistant superintendent and assign him to a project with the San Bernardino School District. In 2010, Jane Doe, a 13-year old student at a school in the district, sued in state court alleging that Hecht had sexually abused her. L&M tendered the defense of the case to its insurer and the insurance carrier defended under a reservation of rights and contended that it had no obligation under the general liability policy to indemnify L&M for any damages.

The California Supreme Court advising the Ninth Circuit Court of Appeals ruled that under California law, absent an applicable an exclusion in the policy, employers may legitimately expect coverage for such claims under

comprehensive general liability insurance, even though the acts by the perpetrator were intentional, just as they do for other claims of negligence.

What the *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction, Inc.* California Supreme Court Means for California Employers.

1. If you decide to hire a job applicant with a criminal history and are sued for negligent hiring, retention or supervision because the employee intentionally commits a criminal act that harms a third person immediately tender the claim for coverage to your insurance carrier under your general liability policy and any other policies that you believe might provide coverage.
2. If your insurance carrier denies coverage or agrees to defend you under a reservation of rights, but does not unequivocally agree to indemnity you for damages for the claim based on California Supreme Court's decision, consult an insurance coverage attorney who can advise you whether or not you are entitled to coverage based on the terms of your general liability policy and any other insurance policies your business carries.
3. If you have difficulty retaining insurance coverage counsel The Goldstein Law Firm will recommend insurance coverage counsel that regularly represent insureds in securing coverage from insurance carriers.

Upcoming Events:

- Summer Goldstein Law Firm Seminar, Cerritos,- July 12, 2018
- Summer Goldstein Law Firm Seminar, Oakland- July 18, 2018
- California Payroll Conference, Monterey – October 24, 2018
- Employers Group – Anaheim, Burbank, Ontario, San Diego, West Los Angeles, San Francisco – Fall 2018

THE GOLDSTEIN LAW FIRM PRACTICE AREAS

Employment Law, Wage and Hour Law, Labor Law, Class Actions,

Business Litigation, Contract Disputes, Arbitrations, Corporate and Transactional Law, Shareholder Disputes, Commercial Law, Appellate Law, Corporate Investigations, Wrongful Death, Training & Workshops

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