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

ATTORNEYS AT LAW

LABOR & EMPLOYMENT LAW NEWSLETTER

8912 BURTON WAY • BEVERLY HILLS, CALIFORNIA 90211

(310) 553-4746 • cgoldsteinesq@gmail.com; josephgoldsteinesq@gmail.com

MAY – JUNE 2018

Representing Employers Since 1977

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

I. California is known for its Earthquakes. On April 28, 2018, the California Supreme Court created its own "Earthquake" by dealing a "Death Blow to the "Gig Eonomy" and most independent contractor agreements

On April 28, 2018 in an 82-page unanimous opinion, the California Supreme Court in *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* decided to dramatically change 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 – state courts, administrative agencies and employers are now to apply 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 show.

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 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.

4. Showing the following facts: meeting the Court's A, B, C test above; having an independent contractor agreement drafted; and demonstrating 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. <u>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.</u>

II. <u>A new California Supreme Court Case *Alvarado v. Dart Container Corp. of California* will impact the way Employer Calculate Overtime for Non-Exempt Employees who receive Flat Sum Bonuses</u>

In *Alvarado v. Dart Container Corp*., the employer paid employees a flat sum $15 bonus for every week end shift the employ completed. The employer made the *innocent* mistake of folding the bonus into the employees' regular rate of pay, but calculating the employee's overtime rate of pay based on *all hours worked by the employee*.

The Court decided that the lawful way to calculate the impact of the flat sum bonus was by dividing the employee's straight time hours by the amount of the flat sum bonus, adding that amount to the employees' straight time hourly rate of pay and then multiplying the hourly rate of pay by time and one half.

As an example, if an Employer pays employees a flat sum bonus of $30 for completing a project during the workweek. The employee's regular rate of pay is $15 per hour. The employees worked 50 hours during the workweek, *40*

hours at straight time and 10 hours of overtime to complete the project. In order to calculate the employees regular hourly rate of pay for the purpose of calculating overtime, the Employer divides $30 by 40 hours that equals 0.75 cents per hour. The Employer then adds the 0.75 cents per hour to the $15 per hour that equals a regular rate of pay of $15.75 per hour. Then, the Employer multiples $15.75 by 1.5 to calculate the overtime rate of pay. Then, the Employer multiplies 10 hours of overtime by $23.63, which equals overtime compensation of $236.20. Finally, the Employer adds the $236.20 to the regular wages of $600.00, equaling total wages of $836.20.

If you have any questions about "flat sum bonus" calculations or other "bonus" calculations and the impact of the federal and California Wage Order, contact The Goldstein Law Firm.

III. California Legislature is considering AB 3080 to prohibit Employers from requiring applicants and current employees from executing an Agreement to Arbitrate

The California Legislature, in its never-ending quest to support for-profit California businesses, is considering a bill in the Assembly, authored by Assembly Member Gonzalez Fletcher, to prohibit, as a condition of employment, continued employment, or receipt of any employment related benefit, the execution of an Agreement to Arbitrate.

AB 3030 (2018), in its current form, would prohibit "an employer from requiring any applicant for employment or prospective employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act ("FEHA") or other specific statutes governing employment, as a condition of employment, continued employment, or the receipt of any employment-related benefit".

In addition, an employer under the proposed statute would be prohibited from "threatening, retaliating or discriminating against, or terminating any applicant for employment or prospective employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of specific statutes governing employment." Lastly, the author of the

proposed law states that "*Because a violation of these prohibitions would be a crime*, the bill would impose a state-mandated local program."

However, should AB 3080 be signed by Governor Brown after passage in both the Assembly and Senate, this statute would probably be pre-empted by the Federal Arbitration Act ("FAA"), and could be struck down by the United States Supreme Court as running contrary to recent United States Supreme Court case precedent in which the Court has held on numerous occasions that any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" embodied in the Federal Arbitration Act is contrary to that Act, and therefore, pre-empted. See AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 352 (2011)

If there is any doubt among Newsletter readers about the Court's view of FAA preemption, in the strong words of the Court in a prior decision: "No one denies that lower courts must follow this Court's holding in *Concepcion*. The fact that Concepcion was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation. Lower court judges are certainly free to note their disagreement with a decision of this Court. But the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source […] The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." See Directv, Inc. v. Imburgia et al. (2015)

Therefore, should AB 3080 be passed and signed into Law by Governor Brown, Employers who operate in interstate commerce could successfully challenge the statute as being preempted by the FAA. We will keep our Newsletter readers posted on the legislative progress of AB 3080.

Upcoming Events:

- California Metals Coalition Conference, Anaheim – May 10, 2018
- Northern California Employers, San Jose – May 22, 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

The Goldstein Law Firm
8912 Burton Way
Beverly Hills, California 90211
Telephone: (310) 553-4746
Facsimile: (310) 282-8070
cgoldsteinesq@gmail.com
josephgoldsteinesq@gmail.com

Attorney Advertisement, Solicitation and Newsletter