



Summer 2018

## MID-YEAR UPDATE

The following is a brief overview of some of the changes in employment law (limited to changes in federal, California state law or the City/County of Los Angeles) in 2018 which may affect you as an employer:

**Independent Contractor or Employee?** – In *Dynamex Operations West, Inc. v. Superior Court* the California Supreme Court adopted the broad definition of “employee” found in the California Wage Orders – a person who is engaged, suffered or permitted to work. The California Supreme Court also set forth the following “ABC” test for determining independent contractor status. The hiring entity must prove: (A) The worker is free from the control and direction of the hirer in connection with the performance of the work; (B) The worker performs work that is outside the usual course of the hiring entity’s business; and (C) 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. Additionally, and importantly, workers are presumed to be employees and the burden is on the hiring entity to prove that the individual is properly classified as an independent contractor.

**Recommendation:** This case makes it even more difficult for an entity to hire individuals as independent contractors. In particular entities should not have any independent contractors performing work which the entity is in business to provide; nor should individuals who work exclusively (or even predominantly) for the hiring entity be classified as independent contractors. If you want to change an individual’s status from independent contractor to employee this should be reviewed with counsel to minimize potential liability for a prior misclassification.

**Arbitration Agreements** – The United States Supreme Court has upheld individual arbitration agreements between an employer and an employee that include class and collective action waivers. In *Epic Systems Corp. v. Lewis*, the Court found that the Federal Arbitration Act requires arbitration agreements to be enforced as written and rejected arguments that the savings clause of that Act or the National Labor Relations Act (NLRA) compels a different conclusion. Specifically, the Court rejected the National Labor Relations Board’s position that the class waiver violates the employee’s right under the NLRA to take

collective action for “mutual aid and protection.” However, this ruling does not affect the California Supreme Court decision that states that employees can continue to bring “representative” actions in court under the Private Attorneys General Act (PAGA) even if an arbitration agreement with a class/collective action waiver has been signed.

**Recommendation:** If you do not currently have an arbitration agreement with your employees you may want to consider obtaining these agreements (drafted by counsel) after you have reviewed the pros (e.g., faster, more streamlined procedures, no class actions) and the cons (e.g., potential for numerous cases before different arbitrators for which the employer must pay the costs). If you do currently have arbitration agreements these should be reviewed by counsel to ensure that appropriate class/collective action waivers are included, and other language meets legal requirements.

**Minimum Wage** - Los Angeles (City and unincorporated areas of the County) minimum wage increases to \$13.25 per hour for large employers and \$12.00 per hour for smaller employers as of July 1, 2018. California minimum wage increases to \$12.00 per hour (26 employees or more) and \$11.00 per hour (25 or fewer employees) as of January 1, 2019. Please also note that any increase in the statewide minimum wage also affects the required salary for exempt employees which is twice the minimum wage in California.

**Recommendation:** Ensure you are paying the appropriate minimum wage based on your size and location(s).

**Flat-Sum Bonus and Overtime Rate** – The California Supreme Court has adopted the Division of Labor Standards Enforcement (DLSE) policy of determining the per-hour value of a flat-sum bonus by spreading the bonus over the non-overtime hours worked in the pay period in calculating the appropriate overtime pay rate.

**Recommendation:** Check to ensure overtime pay rates are being calculated properly.

**For more information or assistance in complying with these new requirements please contact Jeanne Flaherty or Bradley van Scoyk.**