MEMBER ALERT

Dynamex – New Standards for Determining Whether an Independent Contractor is an Employee

On April 30, 2018, the California Supreme Court issued a significant decision in the case of *Dynamex Operations West, Inc. v. Superior Court.* In Dynamex, the Court expressed concern that employers are misclassifying individuals as "independent contractors" in order to avoid paying employer taxes and/or avoid providing health care benefits. Given these concerns, the Supreme Court has now interpreted the term "employee" for use in certain California Industrial Welfare Commission ("IWC") Wage Orders in a manner likely turning many "independent contractors" into "employees."

Based on this change in the governing legal standards, Members are encouraged to review their independent contractor agreements, in keeping with the standards discussed below and the advice of their general counsels, to help ensure you are not misclassifying individuals as "independent contractors" when they should be considered your employees.

1. Dynamex's New Legal Test for an "Employee"

For individuals covered by IWC Work Orders, the Court states that the term "employee" should now encompass all workers who "would ordinarily be viewed" as working in the employer's business. Exception is made for individuals who have traditionally been viewed as "genuine independent contractors" and who customarily engage only in their own independent businesses. So, if an individual is performing tasks normally associated with a Member's usual business operations (teaching, supervising, transporting, etc., in general or special education settings), *subject to the additional provisions discussed in Section 2 below*, the individual will be considered an "employee" unless the Member can prove all of these elements:

(A) that the individual is free from the control and direction of the Member in connection with the performance of his/her work, both under the contract terms and the actual nature of the performance of services;

(B) that the individual performs work that is outside the usual course of the Member's business; **and**

(C) that the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the Member.

It is important to note that this new rule does not apply to other areas like EDD or workers' compensation, where existing and more limited definitions of "employee" still apply. As to civil wage and hour issues, the new rule might be best summarized this way: If the individual is performing a task or function normally performed by a Member's employees, or is operating under the direct supervision and guidance of a Member's employees, **or** does not regularly perform the same work or services through his/own separate business for other clients, the individual will likely be deemed your employee *if an IWC Wage Order applies to him/her*. As noted below, however, just because they might be considered an "employee" for certain purposes, *that does not mean they are an "employee" for all purposes*.

2. The Applicability of Dynamex to Members/Public Agencies under the Governing Wage Orders

Dynamex has received a great deal of media attention and concern, but its impact on public agencies is more limited than on private employers. While public agencies have long recognized their obligations under the federal Fair Labor Standards Act ("FLSA"), only limited attention has been given to the IWC Wage Orders because many of them expressly state that some or all of their provisions do not apply to state and local public agencies. In addition, to the extent the IWC Wage Orders do apply to Members, they have historically had limited actual relevance due to Education Code standards or collective bargaining agreements that provide the same or greater wage, hour, and workplace standards.

Given the holding in *Dynamex*, however, Members who have "independent contractors" performing services in the following areas, and for the following wage and hour topics, will now likely be governed by the Supreme Court's new legal "employee" standard such that a review of their "independent contractor" status would seem appropriate:

- **Wage Order 4** - **Professional, Technical, Clerical, Mechanical Occupations**. Most public employees (or independent contractors) fall within these provisions given their educational or professional roles. However, the only relevant provisions of Wage Order 4 are found in Sections 1 [Applicability], 2 [Definitions], 4 [Minimum Wage], 10 [Meals and Lodging], and 20 [Penalties], with the primary issues being overtime, exempt/nonexempt status, and "hours worked" for compensation purposes. Uniforms, equipment, meal and rest periods, reporting time pay, and seats are excluded from the applicability of Wage Order 4 to public agencies.

- **Wage Order 9** – **Transportation Industry Professionals**, which includes individuals working for any "establishment" having a purpose of conveying persons or property from one place to another, as well as the warehousing, repair, storage, and maintenance of vehicles. This might include school bus/commercial van drivers and motor pool staff. In addition to the covered issues above under Wage Order 4, for commercial drivers, Wage Order 9 also includes Sections 11 [meal periods] and 12 [rest periods] standards.
- **Wage Order 15** - **Household Occupations**, which include all services related to the care of persons or property within a private household, which might include in-home aides or assistants provided under an IEP if they are providing personal care or assistance. All Sections of this Wage Order apply.
- **Wage Order 17** - **Miscellaneous,** which includes "any industry or occupation not covered by, and all employees not specifically exempted in, the Commission's wage orders in effect in 1997, or otherwise exempted by law. ..." All Sections of this Wage Order apply.

3. A Few Examples of Still Viable "Independent Contractor" Relationships

The Supreme Court opinion notes that the new "employee" standard should not be applied to traditional "genuine independent contractor" relationships. This should be a key point in a review of existing "independent contractor" agreements to determine if an issue of misclassification exists, with a few guiding examples provided.

- Attorneys, accountants, auditors, etc., are historic "independent contractors," even if some school districts/COEs have brought such functions "in house." If a Member does not ordinarily or historically hire employees to fulfill such functions, having them performed by "independent contractors" should present no legal concern unless the individuals (i) are not performing such services for other clients, or (ii) they are regularly conducting their services at the Member's facilities and/or with the use of its equipment/systems.
- One-time/short-term professionals should be of limited concern if they are called upon to address emergency or short-term projects, particularly if the Member does not have employees generally capable and licensed to perform such tasks (i.e., plumbers, electricians, specialty cabling, etc.).

Areas of concern can include:

- Teaching aides, psychologists, occupational and physical therapy aides who provide training or support (particularly to special education students). If their tasks or functions are generally provided in support of students, or in meeting the Member's obligations to students under special education/IEP standards, there can be a concern with classification since such individuals are probably also required to be certificated, or be providing services under the supervision of a certificated employee. Exception would be if the "independent contractor" has (i) unique or special skills targeted for a specific student or a specific training/educational module, and (ii) these services are not generally available through full-time or regular employees,

4. Consequences of Misclassification

If an independent contractor has been misclassified and a complaint is filed either with the Department of Labor Standards Employment or a civil court, the Member may face compensatory exposures (certain unpaid wages or benefits depending upon the Wage Order category into which the individual falls), as well as certain fines, penalties and potential attorney's fees. Thus, the claims can involve significant financial exposure such that contract reviews may result in both sound risk management and prudent cost avoidance.

5. Conclusion

Members use "independent contractors" in many areas. While the Supreme Court opinion has raised concern as to proper classification of individuals performing certain tasks or who only provide services to a single Member, the impact of Dynamex is somewhat limited given its application only to wage orders and exemptions for public agencies with respect to several of the more onerous IWC Wage Order obligations. Nevertheless, staff training regarding proper supervision and oversight of independent contractors is an important way to avoid misclassification disputes. Members should also conduct reviews of their independent contractor agreements to ensure that they have been properly drafted and applied to a given individual. Members may consider a rotating review process throughout the year (as the agreements come up for review/ renewal), to help ensure proper classifications of individuals without imposing an unworkable, immediate review process. If a question as to proper classification arises during a preliminary review, the contract/situation can then be further evaluated (internally or externally) to help ensure compliance with this new and important legal standard.