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Client Alert

Law & the Workplace℠

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Ninth Circuit Extends Reach Of The California Labor Code To Non-Resident Employees Who Temporarily Work In California

In a case of first impression, the United States Ninth Circuit Court of Appeals has held that the California Labor Code extends to non-resident employees who perform work in California, even when that work is performed only on a temporary basis. *Sullivan v. Oracle Corp.*, No. 06-56649, 2008 WL 4811911 (9th Cir. Nov. 6, 2008).

In a relatively short opinion, *Sullivan* requires out-of-state employers to comply with California's Labor Code, generally acknowledged as the most burdensome in the United States, for work performed in California by non-resident employees who worked only briefly or even just temporarily in the state. *Sullivan's* potential consequences are enormous and require all non-California employers who have any employees working in California -- no matter where those employees ordinarily live and work, or the length of their assignment in California -- to assess their compliance with California law and the potential costs of failing to do so.

Background

Plaintiffs, three non-residents of California, brought a putative class action against their employer, software giant Oracle Corporation, for failing to pay overtime as required by California law. Plaintiffs were employed as "Instructors" who traveled to California and other locations throughout the United States to provide software support and training. Two of the three were residents of Colorado, which has its own state overtime law, and the third was a resident of Arizona, where the federal Fair Labor Standards Act ("FLSA") is the governing wage-hour law. The plaintiffs mostly worked in their home states; their annual employment in California ranged only from 5 to 33 days. Although Oracle paid these employees overtime in accordance with Colorado law and the FLSA respectively, due to the enhanced benefits provided under the California Labor Code, the plaintiffs earned less overtime pay under these statutes than they would have under California law.

Believing they were entitled to overtime pay under the California Labor Code for days worked in California, plaintiffs filed a complaint in California state court in which (among other things) they sought to recover the overtime to which they would have been entitled under the California Labor Code. After removing the case to federal court, Oracle obtained summary judgment. On appeal, a three-judge panel unanimously reversed.

The Ninth Circuit's Decision

The Ninth Circuit first considered which state's laws should govern the plaintiffs' claims. Applying what it characterized as a traditional choice-of-law analysis, the court noted that there were material differences between the laws of California, Colorado, and the FLSA regarding the payment of overtime and concluded that California's interest in applying its wage laws to work performed in California trumps any interest Colorado or Arizona might have in the extraterritorial application of their laws. Specifically, given that California law is "by any measure the most advantageous to the employee," the court "fail[ed] to see any interest Colorado or Arizona have in ensuring that their residents are paid less when working in California than California residents who perform the same work." *Sullivan*, 2008 WL 4811911, at *8. The court's holding, moreover, was not limited simply to California's overtime laws. Instead, the court held that "California's Labor Code applies to work performed in California by non-residents of California", thereby extending the *entire* Labor Code to non-resident employees. *Id.* at *10.

In light of the significant ramifications of this decision on myriad employers nationwide, many companies anticipate that Oracle will file a petition for re-hearing *en banc* before the entire Ninth Circuit Court of Appeals.

Sullivan Potentially Has Enormous Ramifications For Employers With Employees Who Travel To And Work In California

Sullivan will have an immediate impact on employers located outside of California who send non-resident employees to work in California, no matter how short their assignment there may be. California's wage and hour laws are unlike those of virtually every other state, and out-of-state employers who temporarily assign non-resident employees to California will need to consider such things as:

- California uses different and more exacting standards in determining whether employees are exempt from its overtime requirements. Employers may not safely assume that employees properly classified as exempt under either the FLSA or another state's laws are also exempt under California law;

- California provides for "daily" as well as weekly overtime; that is, non-exempt employees are entitled to overtime after working 8 hours in a day as well as after 40 hours in a week (and are entitled to double time when they work more than 12 hours in a day);

- California mandates certain meal and rest breaks for nonexempt employees, and imposes a penalty of an additional hour's pay for each violation; and

- California law prohibits "tip credits," use of the "fluctuating workweek," and requires reimbursement for nonexempt employees' travel time even if it occurs outside normal working hours.

In addition, many other issues abound — for example, will California's prohibition of use-it-or-lose-it vacation policies apply to vacation time the employee earned while working in California? Similarly, will its unique laws regarding whether and when an employee may be required to pay for some or all of his or her uniform or equipment apply while the employee is working in California? The uncertainty raised by these issues will make doing business in California harder than it already is and almost certainly will fuel yet another wave of wage-hour class actions.

Conclusion: What Are Out-Of-State Employers To Do Now?

California employers have long suffered under the distinctly pro-employee policies embedded in the Labor Code, and they have long had to deal with the compliance nightmare and potential liabilities raised by the Labor Code and associated regulations. These policies have produced an intense litigation environment, but these effects were largely limited to employers with an identifiably California-based workforce. This may no longer be the case. If followed (even modestly) to its logical conclusion, *Sullivan* will have enormous consequences for companies whose employees perform *any* work in California.

To avoid potential substantial liability, non-California employers, especially those with a traveling workforce, should examine which of their employees travel to California and for how long. To avoid future exposure, these employers should consult California employment law counsel to assess their level of compliance with California law.

If you have any questions about this Client Alert, whether you are compliant with the California Labor Code or whether the *Sullivan* decision will affect your employment practices, please do not hesitate to call upon Proskauer's California Employment Law Practice Group or any of the lawyers who are listed on this Client Alert.

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