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Inside

Ninth Circuit Clarifies California Overtime Pay Laws for Out-of-State Employees in *Sullivan v. Oracle*

By Anna Ferrari

As improvements in transportation and technology have extended employees' commutes and even made telecommuting possible, many employees now report to work outside of their state of residence. Along the same lines, some employees who work and live in the same state may be called to work on a temporary basis outside of their home state. Such arrangements require employers to pay close attention to which state's labor laws apply to these employees. The answers are not always easily determined.

Employers with operations in California recently obtained guidance from the recent case *Sullivan v. Oracle Corporation*[1] as to when the state's wage and hour laws apply to employees who live and work primarily *outside* of California but spend some time working *in* California.

BACKGROUND OF THE CASE

Oracle Corporation ("Oracle"), a large software company with its principal place of business in California, employs several hundred "Instructors" charged with training Oracle's customers on how to operate its software. During 2003 and 2004, Oracle elected to reclassify its Instructors as non-exempt employees entitled to overtime pay. This change came on the heels of a class action lawsuit on behalf of Instructors which alleged misclassification under the California Labor Code and the federal Fair Labor Standards Act ("FLSA").[2] The settlement for this action excluded California law claims "for periods of time [class members] may have worked in the State of California when they were not a resident of the State"; these claims were dismissed without prejudice.[3] The instant case was filed not long after to address these claims.

The plaintiffs, three Instructors residing in Colorado and Arizona, brought a putative class action, seeking damages for the period preceding the reclassification, spanning from 1998 to 2004. During that time, the Instructors would work on a limited basis in California, usually ranging between five and thirty-six days annually. In some years, they would not work in California at all. Similarly, the instructors would be called to work in other states and Canada on a limited

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basis, although they spent the overwhelming majority of that time working in their home states.

The plaintiffs' first claim alleged a violation of Section 510(a) of the California Labor Code, its overtime pay provision, for work performed within California. Second, they asserted that the violations in the first claim also contravened California's unfair competition law, Business and Professions Code Section 17200. Finally, two of the three plaintiffs argued that Oracle's federal overtime pay violations for work performed in the United States were also in breach of Section 17200.[4] The District Court granted summary judgment for Oracle on all claims, holding in pertinent part that California's wage and hour laws do not apply to non-residents who work primarily in other states and that construing the laws in that fashion would violate the due process clause of the Fourteenth Amendment.

CALIFORNIA LABOR CODE CLAIM

On appeal, the Ninth Circuit Court of Appeals was charged with determining whether the overtime pay provision of California's Labor Code applied to work performed in-state by out-of-state residents and, if so, whether this application

Obama Signs Ledbetter Fair Pay Act into Law

By Anna Ferrari

The Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act" or "Act"), recently passed by Congress and signed into law, amends Title VII of the Civil Rights Act ("Title VII") and the Age Discrimination in Employment Act ("ADEA") to relax the statute of limitations on employee pay discrimination claims.[1]

Lilly Ledbetter, previously an employee of Goodyear Tire and Rubber Company, filed a complaint against her former employer with the Equal Employment Opportunity Commission ("EEOC") upon discovering that her pay had been lower than male colleagues, creating a significant disparity spanning two decades. Ms. Ledbetter's claims, challenged on the basis that she did not complain of discrimination within the 180-day statute of limitations period, advanced on appeal to the Supreme Court.[2] At that time, federal circuit courts had divided on the issue of whether the statute of limitations in pay discrimination claims ran from the initial occurrence of a discriminatory act, or whether each subsequent paycheck constituted a separate discriminatory event that renewed the statute of limitations period. The Court held that the only relevant discriminatory event occurred when Goodyear decided Ms. Ledbetter's salary level. Justice Samuel Alito, writing for the five-justice majority, explained that Ms. Ledbetter's claim was untimely because "an employment practice committed with no improper purpose and no discriminatory intent [cannot be] rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period."[3]

Responding to the ruling, Congress drafted and passed the Ledbetter Act, which became the first bill signed into law by President Obama. As amended by the Ledbetter Act, Title VII and the ADEA now provide that a separate unlawful employment act occurs each time discriminatory compensation is paid. In addition, these statutes extend an employer's liability for backpay for up to two years preceding the filing of a pay discrimination charge. Finally, the Ledbetter Act extends these amendments to pay discrimination claims brought under the Americans with Disabilities Act, as well as the Rehabilitation Act of 1973, which prohibits disability-based discrimination against federal employees, within programs in receipt of federal funding, and in the employment practices of federal government contractors.

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violated the due process and equal protection clauses of the Constitution. Judge William Fletcher, writing on behalf of the panel, first disposed of Oracle's contention that the California Labor Code did not cover the work of non-residents working within California, citing state Supreme Court precedent suggesting that the California Labor Code clearly intended to apply to work all work performed within the state.[5]

The court subsequently applied a choice-of-law analysis to determine whether California labor law should be displaced by the labor law of the plaintiffs' states of residence in evaluating their overtime pay claims.[6] Such an inquiry considers whether the relevant California law materially differs from potentially applicable laws from other states and, if so, balances each state's competing interest in having its own law applied to the case.

In this manner, the Ninth Circuit concluded that there were material differences in the terms of the relevant state laws, since Arizona does not recognize a statutory right to overtime pay and Colorado provides for overtime pay after an employee works twelve hours in the day,

Ledbetter Fair Pay Act into Law
Continued from Page 2

The Ledbetter Act greatly expands employer liability for pay discrimination claims, and the EEOC has heralded its passage with a statement that it intends to enhance its enforcement of pay discrimination claims.[4] As Ms. Ledbetter's twenty-year tenure with Goodyear has revealed, management may be held accountable for pay decisions set in place by different employees who may no longer remain employed by the organization. Because the Act applies retroactively from May 27, 2007, the day before the Supreme Court's ruling, employers face an immediate impetus for conducting equity analyses of their pay practices.

Moreover, the Ledbetter Act creates additional complications for federal contractors, who must evaluate their "total employment process," including compensation systems, for discriminatory practices and furnish their findings upon request to the Office of Federal Contract Compliance Programs.[5] The Act raises the stakes for contractors who report such practices, while leaving those who purport not to know about pay disparities at risk of violating their federal contracts. The Hobson's choice now faced by federal contractors further underscores the importance of correcting any disparities in an employer's pay practices. ■

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1 P.L. 111-2 (2009).

2 *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

3 *Ledbetter*, 127 S. Ct. at 2172.

4 Press Release, Equal Employment Opportunity Commission, Acting EEOC Chairman Ishimaru Lauds Final Passage and Signing of Lilly Ledbetter Fair Pay Act (Jan. 29, 2009), available at *http://www.eeoc.gov/press/1-29-09.html* (last accessed Feb. 4, 2009).

5 41 C.F.R. § 60-2.17(b) (2009).

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as opposed to California's eight.[7] It found California to have a clear interest in applying its labor laws to the plaintiffs, since failing to do so would encourage California employers to hire non-resident employees to avoid the expense of overtime pay, disadvantaging California residents. Further, Colorado and Arizona had no interest in applying their own statutes in place of California's, since "California's Labor Code is by any measure the most advantageous to the employee."[8]

Having confirmed that California overtime law does apply to the work performed in California by the plaintiffs, the court took up the issue of whether this application violates the due process clause of the Fourteenth Amendment and the dormant commerce clause. With respect to the due process claim, the court summarily rejected Oracle's argument that a California state court applying California law in this context would violate the Constitution. That Oracle is headquartered in California, and that the work in question had been performed in California, created sufficient contacts with the state so as not to violate due process. The court further held that applying California's labor laws to this case would not result in the differential treatment of out-of-state residents; on the contrary, it would ensure that out-of-state residents working in California receive precisely the same treatment as in-state residents. On this basis, the court found the application of Section 510(a) not to violate the equal protection clause. Accordingly, it reversed the district court's grant of summary judgment for Oracle with respect to this claim.

BUSINESS AND PROFESSIONS CODE SECTION 17200 CLAIMS

The court also reversed summary judgment for Oracle on the plaintiffs' second claim that the violations in the first claim also violated California's unfair competition law. Having found that the predicate underlying violation of Section 510(a) of the California Labor Code could withstand summary judgment, a related unfair competition claim must also be valid.

However, the court declined to find that the coverage of Section 17200 extended to overtime pay violations for work performed outside of California, elsewhere in the U.S. Instead, it affirmed the district court's holding that Section 17200 "does not have extraterritorial application."[9]

IMPLICATIONS FOR WORK PERFORMED IN CALIFORNIA BY NON-RESIDENT EMPLOYEES

Sullivan confirms that employers must comply with California wage and hour laws for all work performed in the state, regardless of whether the employee is a California resident or performs the majority of work responsibilities outside of the state. In light of this clarification and the recent swell in wage and hour class action lawsuits, employers with a presence in California would be well-advised to ensure uniform pay practices for work performed in California, whether by resident or non-resident employees. ■

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1 547 F.3d 1177 (9th Cir. 2008).

2 *Gabel & Sullivan v. Oracle* ("*Sullivan* I"), Case No. SACV 03-348 AHS (MLGx) (C.D. Cal. Mar. 29, 2005).

3 *Sullivan*, 547 F.3d at 1180.

4 Because the class certified in the initial suit excluded these California resident workers with respect to the federal claims, this claim was not precluded in the subsequent litigation.

5 *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (Cal. 1996) (holding that work performed in California by out-of-state employees of an out-of-state employer is covered by the California Labor Code and creating an inference that the work within out-of-state employees of a California employer within California state boundaries is similarly covered).

6 *Wash. Mut. Bank v. Superior Court*, 24 Cal. 4th 906 (Cal. 2001).

7 7 Colo. Code Regs. § 1103-1(4) (2008).

8 *Sullivan*, 547 F.3d at 1185.

9 *Sullivan*, 547 F.3d at 1187 (citing *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214 (Cal. Ct. App. 1999)).

New Family Medical Leave Act Regulations

By La Tanya N. James

The new Family Medical Leave Act ("FMLA") regulations ("Regulations") were effective January 16, 2009. The FMLA, as modified by the National Defense Authorization Act for FY 2008 in January 2008, requires covered employers to provide: (A) up to 12 weeks of unpaid leave in a 12-month period to eligible employees for the birth or placement of a child for adoption or foster care, or when the employees are unable to work because of their employee's own serious health condition, or to care for a spouse, parent, son, or daughter with a serious health condition or for any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active-duty status ("Exigency Leave"); and (B) up to 26 weeks of unpaid leave in a single 12-month period for eligible employees to care for covered service members ("Military Caregiver Leave").

The Regulations include a number of substantive changes to the old regulations as well as new regulations addressing Military Caregiver and Exigency Leaves (the "Military Family Leave Entitlements"). Significant substantive changes are:

The Regulations include a number of substantive changes to the old regulations as well as new regulations addressing Military Caregiver and Exigency Leaves.

REVISIONS TO GENERAL FMLA PROVISIONS

- A clarification that employees may independently settle or release FMLA claims based on past employer conduct without the approval of the Department of Labor ("DOL") or a court, which rejects the Fourth Circuit opinion *Taylor v. Progress Energy*, 415 F.3d 364 (4th Cir. 2005), *vacated*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006), which held that unapproved waivers of claims under the FMLA are unenforceable.
- USDOL provided a revised and new general notice, eligibility notice, and designation notice requirements, including longer deadlines for providing the eligibility notice and designation notice. Prototypes of the general notice and eligibility notice are included as Appendices C and D to the Regulations.
- Employers may now retroactively designate leave as FMLA leave, provided the failure to timely designate leave does not cause harm or injury to the employee.
- Employers now have 5 business days to request a medical certification of the need for leave. If the medical certification is deemed to be incomplete or

vague, employers must describe the deficiencies in writing and give the employee 7 days to cure the deficiencies.

- New medical certification forms allow for the collection of more specific information, such as a diagnosis from the health-care provider.
- Subject to certain requirements, the employer may now contact the employee's health-care provider directly (as opposed to through the employer's chosen health-care provider) to clarify and authenticate the medical certification, as long as the HIPAA privacy rule requirements are met.
- Employers must now count an employee's prior service with the company toward the 12 months needed for FMLA eligibility if the break in service does not exceed 7 years, with certain exceptions.
- A clarification that time spent on "light duty" does not count against an employee's 12-week FMLA leave entitlement.
- Use of intermittent or reduced leave is clarified to explain that missed overtime can be counted against the FMLA leave entitlement if the employee would have otherwise been required to report for duty but for taking the FMLA leave.
- A clarification that employees must follow the employer's usual and customary call-in procedures for reporting an absence, except in unusual circumstances, or FMLA-protected leave may be delayed or denied.
- For fitness-for-duty certifications, an employer may now require that the employee's health-care provider certify that the employee is able to perform a list of essential job functions, as opposed to a "simple statement" that the employee is able to return to work, as long as the employer provides the employee with a list of those essential job functions no later than when the designation notice is provided and the designation notice specifies that the fitness-for-duty certification must address the employee's ability to perform those essential functions.

The Regulations adopt the current FMLA framework for the Military Family Leave Entitlements while adding a few new regulations to address where the Military Family Leave Entitlements differ from the other entitlements under the FMLA

MILITARY FAMILY LEAVE ENTITLEMENTS

The Regulations adopt the current FMLA framework for the Military Family Leave Entitlements while adding a few new regulations to address where the Military Family Leave Entitlements differ from the other entitlements under the FMLA.

With respect to Exigency Leaves, the Regulations provide a definition for a "qualifying exigency" that includes certain issues arising from: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; and (7) post-deployment activities. A

This newsletter addresses recent employment law developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

Editor: Lloyd W. Aubry, Jr., (415) 268-6558

San Francisco

Lloyd W. Aubry, Jr.	(415) 268-6558 laubry@mofo.com
James E. Boddy, Jr.	(415) 268-7081 jboddy@mofo.com
Karen Kubin	(415) 268-6168 kkubin@mofo.com
Linda E. Shostak	(415) 268-7202 lshostak@mofo.com
Eric A. Tate	(415) 268-6915 etate@mofo.com

Palo Alto

Christine E. Lyon	(650) 813-5770 clyon@mofo.com
David J. Murphy	(650) 813-5945 dmurphy@mofo.com
Raymond L. Wheeler	(650) 813-5656 rwheeler@mofo.om
Tom E. Wilson	(650) 813-5604 twilson@mofo.com

Los Angeles

Timothy F. Ryan	(213) 892-5388 tryan@mofo.com
Janie F. Schulman	(213) 892-5393 jschulman@mofo.com

New York

Miriam H. Wugmeister	(212) 506-7213 mwugmeister@mofo.com

Washington, D.C./Northern Virginia

Daniel P. Westman	(703) 760-7795 dwestman@mofo.com

San Diego

Rick Bergstrom	(858) 720-5143 rbergstrom@mofo.com
Craig A. Schloss	(858) 720-5134 cschloss@mofo.com

Denver

Steven M. Kaufmann	(303) 592-2236 skaufmann@mofo.com

London

Ann Bevitt	44-20-7896-5841 abevitt@mofo.com

request for exigency leave must include certification of the active duty status or call to active duty, for the first request, and certification of the need for the leave, including supporting documentation, if available. The Regulations provide an optional form certification for Exigency Leaves at Appendix G. Moreover, the Regulations make it clear that the 12 weeks of leave for an exigency are available to an employee only when the family member is in the National Guard or Reserves or a retired member of the regular armed forces or reserves, and not for family members in the regular Armed Forces.

With respect to Military Caregiver Leave, the Regulations clarify that the 12-month period used for tracking the 26 weeks of leave begins when the employee starts using the leave, regardless of the method used by the employer to determine the employee's 12 weeks of leave entitlement for other FMLA-qualifying reasons. The Regulations also state what information may be requested in a certification for leave to care for a covered service member and provide a prototype of a certification form, Appendix H to the Regulations. Authorized health-care providers who may complete the certification form include Department of Defense health-care providers. Note that second and third opinions are not permitted with respect to certifications under Military Caregiver Leaves.

Employers will likely need to evaluate and revise leave policies, procedures, and notices.

For a copy of the Regulations, see http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763. ■

Anna Ferrari is an associate in our Palo Alto office and can be reached at 650.813.5681 or aferrari@mofo.com.

La Tanya N. James is an associate in our Northern Virginia office and can be reached at 703.760.7335 or latanyajames@mofo.com.

If you wish to change an address, add a subscriber, or comment on this newsletter, please write to:
Wende Arrollado
Morrison & Foerster LLP
12531 High Bluff Drive, Suite 100
San Diego, California 92130
warrollado@mofo.com

www.mofo.com

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