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Never Mind: Ninth Circuit Withdraws Sullivan v. Oracle

February 2009
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Earlier this month, our Employment Law Commentary examined the Ninth Circuit's recent opinion in *Sullivan v. Oracle Corporation*, in which the federal appeals court concluded that California's overtime pay laws apply to work performed in California by employees who both live and work primarily outside the state.[1] In a late-breaking development, the court several days ago withdrew this opinion pending a request to the Supreme Court of California to interpret three legal questions at the heart of the Ninth Circuit's holding.

The three-judge panel certified three questions to the Supreme Court of California:

- Does the California Labor Code apply to overtime work performed in the state by out-of-state plaintiffs in the circumstances of this case?
- Does the state unfair competition law apply to the in-state overtime work of nonresidents working in the state?
- Does the unfair competition law apply to overtime performed outside the state by nonresidents working for a California-based employer if the employer fails to comply with the overtime requirements of the Fair Labor Standards Act?

The appellate opinion, originally published in November 2008, found that California intended its wage and hour laws to apply to out-of-state residents working in California on a temporary basis, and that the labor laws of Arizona and Colorado, the plaintiffs' states of residence, did not require that the plaintiffs be excluded from the coverage of the California Labor Code. By extension, California's unfair competition statute, Business & Professions Code 17200, was available as a remedy for Oracle Corporation's failure to compensate the plaintiffs for overtime work performed in California. However, the Ninth Circuit refused to extend the state's unfair competition law to apply to work performed outside California in violation of the federal Fair Labor Standards Act.

In response, Oracle petitioned the Ninth Circuit to rehear *en banc* its claims that the California statutes did not apply to work performed within California by non-resident employees. The California Employment Law Council, the California Restaurant Association, and the Employers' Group each filed amicus briefs in support of Oracle's petition. The plaintiffs also sought a rehearing on the court's finding that California's unfair competition law could not be invoked as a remedy for federal labor law violations arising out of work performed outside California. The Ninth Circuit dismissed as moot both petitions for rehearing in light of its certification to the California Supreme Court.[2]

In its order on the certification, the Ninth Circuit confirmed that it "will accept and rely on the Court's decision of that question or those questions in any further proceedings in this court." Until the state high court issues a definitive ruling on, or declines to respond to, the certified questions, the federal proceedings shall remain stayed. In the meantime, employers with a California presence must navigate the issue of interstate wage claims without the guidance provided by *Sullivan v. Oracle*.

[1]547 F.3d 1177 (9th Cir. 2008). The full text of the Morrison & Foerster article on this case may be accessed at http://www.mofo.com/news/updates/bulletins/15239.html#1_1.

[2] The order certifying questions to the Supreme Court of California is available at http://www.ca9.uscourts.gov/datastore/opinions/2009/02/17/0656649p.pdf, while the order withdrawing the November 10, 2008, opinion may be found at http://www.ca9.uscourts.gov/datastore/opinions/2009/02/17/0656649o.pdf.