WSGR ALERT

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CALIFORNIA SUPREME COURT EXTENDS OVERTIME LAWS TO OUT-OF-STATE EMPLOYEES WORKING IN CALIFORNIA

The California Supreme Court recently issued a decision with significant implications for employers that have nonresident employees performing work in California on a routine or sporadic basis. In *Sullivan v. Oracle*, the court unanimously held that when an employee crosses into California, even temporarily, the employer must comply with California overtime laws in addition to federal law and the law of the state where the employee is actually "employed" or resides. The court based its decision on California's "strong interest in applying its overtime laws to all nonexempt workers, and all work performed, within its borders." Accordingly, it appears that employees traveling within the state of California will be governed by California's overtime requirements. As California employers already know, "getting it right" is essential, with mistakes often leading to significant liability for back pay and penalties. The court also clarified that employers who fail to pay overtime owed to nonresident employees performing work in California may be subject to actions under California's unfair competition law (UCL). Finally, the court held that the UCL does not apply to claims under the Fair Labor Standards Act for overtime work performed by nonresidents in other states.

Case Summary

Sullivan v. Oracle originally was brought as a class action against Oracle, a large software company with its principal place of business in California. The class was composed of Oracle "instructors," hired as employees on a contract basis to travel throughout the country and train Oracle customers in the use of Oracle software. The class members were nonresidents of California who spent a small amount of their time working and traveling in California. During the period relevant to this lawsuit, Oracle classified its instructors as exempt "teachers" and did not pay them overtime under California or federal law. The instructors alleged that they were misclassified, that they were non-exempt, and that they therefore were entitled to overtime under California law for the work they performed in California. Oracle argued that the instructors were not covered by California law because they resided, worked primarily, and paid taxes in other states. Despite strong and appealing arguments regarding the impracticality of requiring national employers to constantly adjust their pay practices each time an employee works in another state, the California Supreme Court, in responding to a request from the Ninth Circuit to decide the issue, held that California overtime laws apply to employees working in California regardless of the length of their stay or their state of residency.

To reach this conclusion, the court examined the relevant California Labor Code provisions and determined that California's overtime laws "apply by their terms to all employment in the state" and do not "[distinguish] between residents and nonresidents." It also stated that California has a strong public policy interest in applying its overtime laws to all individuals working within the state. Explaining that the purpose of California's overtime laws is to "[protect] health and safety, [expand] the job market, and [guard] against the evils of overwork," the court concluded that California's decision to "regulate all nonexempt overtime work within its borders without regard to the employee's residence is neither improper nor capricious." Indeed, the court expressed concern that excluding "nonresidents from the overtime laws' protection would tend to defeat their purpose by encouraging employers to import unprotected workers from other states."

Thus, the court was clear that California-based employers must pay overtime for all overtime work performed in California by all workers who are non-exempt under the California Labor Code. That said, the court has pointed out repeatedly that its decision was based on the facts before it, and did not expressly state that its holding applied to *any* California employer (that is, even those not based in California). The decision also does not directly address whether other related wage and hour requirements found in California's Labor Code also are applicable to nonresident employees.

Practical Effect

The court's ruling likely creates genuine practical problems for California employers. Typically, only a single state's laws govern an employment relationship. The *Sullivan v. Oracle* decision means that employers at a minimum must examine the exempt or non-exempt status of employees performing any work in California, and ensure that any employee qualifying as non-exempt is paid overtime in compliance with California law. California also has a variety of unique wage

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and hour requirements that an employer now may have to consider every time one of its employees performs any work in California. These include California-specific regulations governing overtime calculations, meal and rest periods, travel time, and paystub requirements, among others.

Thus, if a non-California-based employee works on a short-term project in California or travels to California for training, then the employer will need to ensure that it properly classifies and pays overtime to that employee in accordance with California law for the period of time during which the employee worked or travelled in California, whether it is one day or one week. Indeed, many employers already are complaining that the court's holding, which will almost certainly create additional administrative burdens and payroll costs for employers with mobile workforces, essentially creates a tax on business travel.

Potential Appeal or Legislative Solution

An eventual appeal to the United States Supreme Court is possible, but by no means certain. Such an appeal would presumably raise the question of whether the California Supreme Court's interpretation of the California Labor Code violates the U.S. Constitution's commerce clause by placing an undue burden on interstate commerce. The decision arguably creates a situation where different standards now apply to the same employee as he or she travels throughout the country performing work for his or her employer, particularly if other states follow California's lead. The court acknowledged that it was not asked specifically to address the constitutional issue. Nevertheless, its decision suggests that it considered and summarily rejected this argument, indicating that there was an insufficient showing of an undue burden on interstate commerce based on the facts of this case.

In construing the California overtime laws at issue, the court noted that the "Legislature knows how to create exceptions for nonresidents when that is its intent." Therefore, employers seeking relief from the holding should consider legislative avenues. However, such change is neither certain nor imminent in today's political environment. Whether an appeal or legislative solution is pursued, an employer failing to pay overtime to nonresident, non-exempt employees eligible for overtime under California law on a daily or weekly basis must do so at its peril.

Practical Considerations

In the short term, the California Supreme Court's decision may result in an increase in the number of individual and class claims involving nonresident, non-exempt employees performing work in California. While it is too early to tell, individual claims filed with the California Department of Labor Standards Enforcement may also result in additional audits in this area. Employers, therefore, should quickly and carefully evaluate the implications of having non-exempt employees based outside of California perform work inside California. Because exemption standards in California are more stringent in many respects than under federal law, employers should analyze whether employees traveling to California are still exempt in California even if they qualify as exempt from overtime requirements in their state(s) of residence. For example, employees in California must be engaged in exempt duties more than 50 percent of the time regardless of whether their primary duties are exempt. This quantitative analysis makes it important for employers to re-examine their mobile workforces, including the following:

- Undertake an audit of all employees who engage in business travel in California to determine whether or not these employees qualify for any of California's exemptions. Analyze the exemption status of all such employees under California law even if the employee is exempt under federal law and the laws of the employees' home states.

- Track all hours worked within California by employees who are non-exempt under California law. Given the ambiguity in the court's opinion, employers should also consider tracking all hours worked regardless of location for any week in which an employee will be performing work in California.

- Track all travel time hours of non-exempt employees in California using California law to determine all hours that the employee is subject to the direction and control of the employer, which is important for properly calculating the number of hours worked for overtime purposes. Since the analysis of hours worked during travel is more expansive in California than under federal law, this can be a source of potential liability for employers not exercising caution.

- Carefully consider whether you must comply with other wage and hour laws applicable to California workers, including meal and rest period, vacation, or paystub requirements, for any employee working in California. Undertake measures to appropriately address any such issues.

- Confirm that contracts with payroll providers provide for multi-state paystubs. If not, consider updating such contracts.

- Consider the bottom-line financial impact of including non-exempt employees (under California law) in meetings conducted in California.

- Consider the utility of adopting an arbitration agreement that includes a class action waiver. Such a measure may reduce the risk of a class claim based on the unlawful conduct alleged in *Sullivan*.

If you need assistance in evaluating how *Sullivan v. Oracle* impacts your workforce, or in determining how to comply with California's labor laws, please contact Fred Alvarez, Rico Rosales, Kristen Dumont, Alicia Farquhar, Marina Tsatalis, Laura Merritt, or any other attorney in Wilson Sonsini Goodrich & Rosati's employment law practice.

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