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"ON THE SEVENTH DAY HE (SHE) RESTED" . . . MAYBE

By Brian Martinez

It took 124 years, but the California Supreme Court in *Mendoza v. Nordstrom, Inc.*, No. S224611, 2017 WL 1833143 (Cal. May 8, 2017) finally addressed in detail California's day-of-rest statutes (Labor Code Sections 551, *et seq.*) originally enacted in 1893. Such a seemingly simple statute: "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven." No one knew this could be so complicated.

The case involved retail employees, at least one of whom was asked to fill in for another employee, resulting in his working more than six consecutive days. During this period, the employee's shifts sometimes lasted more than six hours. As one can imagine, such a situation is likely not an uncommon one. The issue is further complicated by California's other day-of-rest statute which prohibits an employer from "caus[ing] his employees to work more than six days in seven" except "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." Before the

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California Supreme Court's *Mendoza* decision, these Labor Code provisions were only sparingly cited in published California state court decisions, let alone treated in depth.

The *Mendoza* decision will likely be of particular interest to retailers, as well as all employers that have any non-exempt employees who work more than a six-hour shift on any given day during a workweek. In particular, the *Mendoza* decision will likely be germane to industries and situations where bursts of around-the-clock work are required: e.g., harvest season, tax season, inventory season, etc. The decision stems from a request by the Ninth Circuit Court of Appeals for clarification on various questions raised by these day-of-rest Labor Code provisions.

In particular, the Supreme Court addressed the following three questions:

1. Is the day of rest required by sections 551 and 552 calculated by the workweek, or does it apply on a rolling basis to any seven-consecutive-day period?

2. Does the section 556 exemption for workers employed six hours or less per day apply so long as an employee works six hours or less on at least one day of the applicable week, or does it apply only when an employee works no more than six hours on each and every day of the week?

3. What does it mean for an employer to "cause" an employee to go without a day of rest (§ 552): force, coerce, pressure, schedule, encourage, reward, permit, or something else? (*See Mendoza v. Nordstrom, Inc.*, *supra*, 778 F.3d at p. 837.)

The Court answered the first question by holding that a day of rest is guaranteed for each workweek while noting that periods of more than six consecutive days of work that stretch across more than one workweek are not *per se* prohibited. The Court answered the second question by holding that the exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek; if on any one day an employee works more than six hours, a day of rest must be provided during that workweek subject to any applicable exceptions. Finally, the Court answered the third question by holding that an employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled; however, an employer is not forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest.

FACTUAL BACKGROUND

The named plaintiff Mendoza was a barista and later a sales representative for Nordstrom in San Francisco and San Diego. The other plaintiff, Gordon, was a sales associate in Los Angeles. At times, Mendoza was asked by a supervisor or coworker to fill in for another employee, resulting in his working more than six consecutive days and during some, but not all, of these periods Mendoza's shifts lasted six hours or less. Gordon also worked on at least one occasion more than six consecutive days and some, but not all, of her shifts lasted six hours or less. The plaintiffs' suits were filed as putative class actions on behalf of nonexempt California Nordstrom employees and the day-of-rest claim was brought pursuant to the Labor Code's Private Attorneys General Act of 2004. The action was removed to federal court by Nordstrom.

The district court granted summary judgment on claims other than the day-of-rest claims. Because PAGA does not require class certification, the court held a bench trial on the merits after the plaintiffs withdrew their class certification motion. After trial, the district court concluded "(1) section 551 guarantees a day of rest on a rolling basis, for any seven consecutive days; but (2) under section 556, the guarantee does not apply so long as an employee had at least one shift of six hours or less during the period, as Mendoza and Gordon did; and (3) Nordstrom did not 'cause' Mendoza or Gordon to work more than six consecutive days because it did not force or coerce them to do so." Accordingly, the district court dismissed the action, leading to an appeal to the Ninth Circuit and an order from that court seeking assistance from the California Supreme Court.

LABOR CODE §§ 551-552: WHEN IS A DAY OF REST REQUIRED?

The first question the California Supreme Court dealt with in detail was the question of "when is a day of rest required"—in other words, whether the protection applies week-by-week or on a rolling basis. Beginning with the text of Sections 551 and 552, the Court found the language "manifestly ambiguous." In addition, the historical background surrounding the enactment of the statutes—dating back to the nineteenth century—took the Court back to prescribed days of rest pursuant to specific religious days of rest. Some of these laws were either struck down or replaced based on free exercise of religion grounds.

The Court was thus forced to consider regulatory IWC Wage Orders. The first wage order was promulgated in 1919 by the IWC and "guaranteed a weekly day of rest for workers in the mercantile industry: 'No person, firm or

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corporation shall employ, or suffer or permit any woman or minor to work in any mercantile establishment more than eight (8) hours in any one day, or more than forty-eight (48) hours in any one week, or more than six (6) days in any one week.'" The second order reviewed by the Court was promulgated in 1943 and added the presumption that Sunday would be the weekly day of rest absent other arrangements by the employer. The Court interpreted the wage orders as guaranteeing a day of rest during every calendar week as opposed to on a rolling basis. The Court also found it telling that subsequent wage orders in the 1950s, 1960s, 1970s, and 2000s continued to support the construction of the statute as guaranteeing of day of rest on a weekly rather than a rolling basis. Finally, the Court found support in the rest of the Legislature's statutory scheme, noting that the Legislature "has expressly defined a 'week' and a '[w]orkweek' as 'any seven consecutive days, starting with the same calendar day each week'" (citing § 500, subd. (b)). In other words, when "this chapter of the Labor Code refers to a week or workweek, it means a 'fixed and regularly recurring period' [] e.g., Sunday to Saturday, or Monday to Sunday, not a rolling period of any seven consecutive days."

However, the Court did note that the day-of-rest provisions are not absolute. The Court singled out two exceptions in particular that "shed light on the nature of the underlying guarantee." "First, the day of rest provisions shall not 'be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires that the employee work seven or more consecutive days, if in each calendar month the employee receives days of rest equivalent to one day's rest in seven.'" "Second, the day of rest guarantee does
not apply 'when the total hours of employment do not exceed 30 hours in any week.'" In instances when an exception applies to the day of rest requirement, Section 510 of the Labor Code "provides, as a fallback, consideration for the hardship in the form of premium pay," including ensuring premium pay for every seventh day worked. Because Section 510 applies to premium pay for the seventh day of work in any one workweek, as opposed to a rolling seven-day period, the provision supports the construction of the day-of-rest statutes as similarly applying to an established workweek. Furthermore, the Court interpreted Section 554 as ensuring that an employer does not incur liability, other than for premium pay, if it reasonably requires an employee to work all seven days of a workweek as long as the day of rest the employee is entitled to is given to the employee on some other day of the calendar month.

LABOR CODE § 556: HOW DOES THE SIX-HOUR SHIFT EXCEPTION APPLY?

Section 556 of the Labor Code provides that "Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." Nordstrom argued in the disjunctive, and the District Court agreed, that as long as an employee is given at least one day of no more than six hours work during a one-week period, the employee may be required to work all seven days and more than 30 hours in the week without a day of rest. The Court disagreed and sided with the employees on this issue.

While the Court noted that the plain language of Section 556 is ambiguous, the Court agreed that plaintiffs' interpretation gave full effect to both the weekly and daily limits. The Court also found support for its interpretation in that its interpretation avoids the absurdity of an employee working six straight eight-hour days followed by a single six-hour day indefinitely without a day of rest. Lastly, the IWC and DLSE also had historically interpreted the six-hour daily exception as being met only if every daily shift during the workweek is six hours or less.

LABOR CODE § 552: WHAT IS THE MEANING OF "CAUSE"?

Section 552 of the Labor Code "provides that an employer may not 'cause his employees to work more than six days in seven.'" The Court held that "an employer's obligation is to apprise employees of their entitlement to a day of rest and thereafter to maintain absolute neutrality as to the exercise of that right." While an "employer may not encourage its employees to forgo rest or conceal the entitlement to rest," it is "not liable simply because an employee chooses to work a seventh day." The Court rested its conclusion on the text of the statue as well as contemporaneous legal understandings of "cause" circa the statute's 1893 enactment.

CONCLUSION

In sum, employers that have any employees who work more than six hours in any given shift will want to take note of this decision. While some questions may remain from the decision, employers should take care to apprise their workforces of this entitlement to rest and to maintain absolute neutrality as to their employees' exercise of that right in order to avoid becoming ensnared by these Labor Code provisions.

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As the statewide statute goes through the California legislative process, employers concerned about the possible effects may want to weigh in.

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