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Court Complicates Wage-and-Hour Law

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In compensating employees, employers traditionally have applied the wage-and-hour laws of the state in which the employee resides and/or performs most of the work. Employers have not generally deviated from this practice, even when an employee performs work in another state for several days. This practice, however, is now unlawful in certain circumstances.

For employees entering California to perform work, the California Supreme Court recently issued an opinion in *Sullivan v. Oracle* that compels employers to revisit their wage-and-hour practices. Specifically, the *Sullivan* court held that employees of California-based employers who are residents of Colorado or Arizona, and primarily work in those states, are nevertheless subject to California overtime laws when they perform work for whole days or weeks in California.

FACTS OF *SULLIVAN V. ORACLE*

Oracle Corp., a California-based employer, employed the three named plaintiffs as instructors who train its customers on how to use its software. Two of the plaintiffs were Colorado residents; the other was an Arizona resident. Each of the plaintiffs worked in the state in which they resided, and Oracle applied the wage-and-hour laws of those states to the plaintiffs when they performed work outside of their resident states, including in California. For years, Oracle did not pay the plaintiff instructors overtime because they classified them as exempt, as teachers, from California and federal overtime law. From the three years of work history in evidence, the most number of days that any of the plaintiffs worked in California was 110 days; the fewest was just 20 days.

In 2003, Oracle's instructors sued the company in a federal class action alleging misclassification and sought unpaid overtime compensation. Shortly thereafter, Oracle reclassified its instructors and began paying them overtime under the California Labor Code (in 2003) and the FLSA (in 2004). In 2005, the federal action was settled and the claims of the plaintiff class dismissed with prejudice, except for the claims concerning nonresident instructors.

NINTH CIRCUIT'S PRIOR DECISION

The nonresident employees of Oracle filed three claims: (1) overtime compensation under the Labor Code; (2) the same claim as one for restitution under the Unfair Competition Law; and (3) restitution under the UCL for compensation due under the FLSA. See *Sullivan v. Oracle* (9th Cir. 2008). The Ninth Circuit U.S. Court of Appeals ruled that "California has chosen to apply its Labor Code equally to work performed in California, whether that work is performed by California residents or out-of-state residents." The Ninth Circuit further ruled that overtime work of nonresidents can form the predicate harm for a California UCL claim. Finally, the Ninth Circuit concluded that the UCL "does not apply to the claims of nonresidents of California who allege violations of the FLSA outside California."

Subsequently, however, the Ninth Circuit withdrew its opinion and asked the California Supreme Court to decide the underlying questions of California law, on which it had found no directly controlling precedent. The court noted the answers to its questions would have both "considerable practical importance" because "[a] large but undetermined number of California-based employers employ out-of-state residents to perform work in California," and possibly also "an appreciable economic impact on the overall labor market in California, given the competitive cost advantage out-of-state employees may have over California-resident employees if overtime pay under California law is not required for work they perform in California." The Supreme Court of California granted the Ninth Circuit's request.

CALIFORNIA SUPREME COURT DECISION

The California Supreme Court considered the applicability of California overtime laws to work performed by out-of-state employees for California-based employers by first looking to the language of California Labor Code §510, which provides that "[a]ny work ... shall be compensated at the rate of no less than one and one-half times the regular rate of pay." The *Sullivan* court then cited language in California Labor Code §1171.5, which provides that California's wage laws apply to "all individuals ... who are or have been employed[] in this state." Based on the language of these provisions, the *Sullivan* court concluded that the meaning of the California Labor Code provisions was clear.

The court distinguished the case from dicta in *Tidewater Marine Western v. Bradshaw*, which states "[i]n some circumstances, state employment law explicitly governs employment outside the state's territorial boundaries," and that Oracle used to argue that overtime law of an employee's home state follows residents wherever they go throughout the United States. The *Sullivan* court explained that the *Tidewater* decision merely suggested

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that California laws might not apply to "nonresident employees of out-of-state businesses who 'enter California temporarily during the course of the workday.'" The court distinguished the situation at issue by explaining that nothing in *Tidewater* suggests that out-of-state employees of a California-based employer who enter California for entire days would be without the protection of California overtime laws.

Oracle argued that the application of California wage-and-hour laws to visiting, nonresident employees would impose practical burdens on employers. However, the court dismissed these concerns by explaining that its holding was limited to California overtime laws, indicating that "one cannot necessarily assume the same result would obtain for any other aspect of wage law." The *Sullivan* court also impliedly limited its holding to California-based employers, as it explained that burdens on out-of-state businesses are conjectural, and in any event, present an issue not before the court.

The court then engaged in a conflict of laws analysis. While California overtime laws differ from the Colorado and Arizona overtime laws Oracle asserted were applicable to the plaintiffs, the court explained that neither Colorado nor Arizona has asserted an interest in regulating overtime work performed in other states. Because the California Legislature has expressed an intention of promoting the public policy of preventing the evils associated with overwork, the *Sullivan* court concluded that failing to apply California overtime laws would impair California's interests more than applying California overtime laws would impair Colorado or Arizona's interests.

IMPACT FOR EMPLOYERS AND EMPLOYMENT PRACTITIONERS

The California Supreme Court's decision is limited to the application of California overtime laws to Colorado and Arizona employees who perform work within California for California-based employers, but plaintiffs' attorneys will argue that the opinion has broader implications.

California overtime laws are among the most protective for employees in the nation, providing employees "daily" overtime (one and a half times the regular rate of pay for all hours worked in excess of eight within a day and double the regular rate for all hours worked in excess of 12 within a day), among other nuances. Employment practitioners and employers should familiarize themselves with the importance of the decision, especially as the plaintiff's bar will argue that *Sullivan* applies retroactively.

For California-based employers, it is now clear that Colorado and Arizona employees must be paid in accordance with California overtime laws for full days of work performed within California — though it is uncertain whether the same conclusion applies to partial days of work performed within California. The plaintiff's bar can be expected to argue that *Sullivan*'s reasoning provides no meaningful distinction between partial and full days of work within California. As a result, California-based employers may face California overtime liability for even a few hours of work performed within California by Colorado and Arizona employees.

The court's holding does not necessarily apply to employees who are based in states other than Colorado or Arizona. The conflict of laws analysis looked specifically to Colorado and Arizona law, and a similar analysis must be applied to other states' overtime laws. Employers, however, should be aware of these potential arguments.

Another issue stemming from the *Sullivan* decision is whether other wage-and-hour provisions apply to out-of-state employees who perform incidental work within California's borders. For example, employee-plaintiffs may argue that an employer must treat an employee, who is properly classified as exempt under his resident states' laws but would not be exempt under California's wage-and-hour laws, as non-exempt when working within California's boundaries. Though the court did not so hold, and expressed that such an assumption "is of doubtful validity," the plaintiff's bar is apt to claim that the reasoning in *Sullivan* suggests California-based employers must apply California's other wage-and-hour protections to work performed by out-of-state employees within California, including meal and rest period requirements, minimum wage requirements, and others.

The *Sullivan* decision also has considerable implications for non-California-based employers. Although the *Sullivan* court explicitly limited its decision to "the circumstances of this case," it is anticipated that employee-plaintiffs will argue in future cases that a logical extension of its reasoning suggests that similar conclusions may result for non-California-based employers. The court declined to opine on the different burdens that a non-California-based employer may face in applying California overtime laws to nonresident employees working in California, but the plaintiff's bar will undoubtedly seek to obtain judicial rulings that the California Supreme Court's conflict of laws analysis suggests no reason for why a different conclusion would result for non-California-based employers.

Further complicating matters for employers and the attorneys who represent them, there is now a possibility that multiple states' overtime laws will apply to an employee's work. For example, Washington has held that its overtime laws protect its employees when working outside the state. If a Washington employee enters California, it is uncertain how a court would address the conflict of laws analysis, but it is certainly possible that both California and Washington overtime laws would apply (in addition to the Fair Labor Standards Act's protections).

Amid the uncertainty, prudent employers may prefer to avoid sending non-California employees to work in California. Although the *Sullivan* court could not possibly have intended to further burden California's already battered economy, this is likely the safest course until courts provide further guidance on how broadly the *Sullivan* decision will be applied.