

Certain Nonresidents Who Perform Work in California Are Governed by California Wage and Hour Laws – Including Daily Overtime Rules

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In a much-anticipated decision, the California Supreme Court has expanded the scope of California's complex wage and hour laws to nonresident employees who perform work in California. While the decision leaves more than a few questions unanswered, it will require a great many employers to review their overtime and other payroll practices. Perhaps just as importantly, the decision will likely open the door to lawsuits, including class actions, regarding prior overtime and payroll practices.

The case, *Sullivan v. Oracle Corp.*, __ Cal. 4th ___, No. S170577 (June 30, 2011), has had a tortured history. In the case, several Arizona and Colorado residents who were employed as instructors by Oracle, which is headquartered in California, filed suit, alleging that they were entitled to overtime under California law on those occasions when they performed services in California. Oracle had treated the instructors as exempt employees and did not pay them overtime. Because the issue was a novel one, involving interpretation of California state laws, the U.S. Court of Appeals for the Ninth Circuit certified issues for the California State Supreme Court to decide.

As employers with operations in the state know, California law differs from the federal Fair Labor Standards Act ("FLSA") in many ways. Overtime exemptions under California law are analyzed differently than under the FLSA, turning not on what an individual's "primary" duties are, but on the duties in which they are "primarily" engaged (*i.e.*, spending more than 50 percent of their time). In addition, California law provides for daily overtime for work performed by non-exempt employees beyond eight hours in a day, and for double time for work performed beyond 12 hours in a day. California law also requires employers to provide meal and rest breaks to non-exempt employees.

Addressing this issue for the first time, the California Supreme Court concluded that California's overtime laws, in fact, apply to those nonresident employees who travel to, and perform services in, California. The Court concluded that the state's overtime laws make no distinctions between residents and nonresidents, and explained that it would defeat the purpose of those laws if employers could simply "import unprotected workers from other states."

The decision is limited to "California-based" employers. However, the California Supreme Court did not provide a definition for this term. As such, employers based outside California should not ignore *Sullivan*. There is every reason to believe that nonresident workers of employers based outside California will contend that they, too, should be covered by California's wage and hour laws when working in the state. And, based on the broad language in *Sullivan*, there is every reason to believe the California Supreme Court might agree.

What Employers Should Do Now

Employers should review their payroll practices for exempt and non-exempt employees, to avoid running afoul of *Sullivan* and California wage and hour laws when sending employees to work in California. Among other things:

- When sending employees classified as “exempt” to California, employers will want to determine whether those individuals are properly classified as “exempt” under California law and, if not, treat them as non-exempt employees during those periods of time when they are working in California; and
- When sending “non-exempt” employees to California, employers will want to ensure that:
 - they treat those employees in compliance with California wage and hour laws, including providing daily overtime and complying with California meal and rest break laws; and
 - they are complying with California law requiring payment for travel time. (Indeed, the *Sullivan* decision would suggest that “non-exempt” employees traveling to California for work will need to be compensated for their travel time, in accordance with California law, as soon as they reach the California border – a tricky issue, to say the least, particularly for employees traveling by air.)

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