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CALIFORNIA EMPLOYERS MUST COMPLY WITH CALIFORNIA OVERTIME LAWS FOR OUT-OF-STATE EMPLOYEES WORKING IN CALIFORNIA

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Assume you are a California-based employer with employees living and working in several states. Occasionally, employees who neither live nor regularly work in California perform short-term assignments in California.

Perhaps, for example, certain non-exempt employees attend annual meetings or trainings in California. When that happens, you adjust their schedules so that they do not work more than 40 hours in a week. They do, however, work more than eight hours per day while in California. Do you have to pay them overtime? Yes, you do.

In a series of decisions spanning the last three years in the case of *Sullivan v. Oracle Corp.*, both state and federal courts, including, most recently, the United States Court of Appeals for the Ninth Circuit, grappled with this and closely related issues. The employee-plaintiffs in *Sullivan* were Oracle instructors who lived and worked in Arizona and Colorado, but who also worked in California occasionally. They claimed they were owed overtime for

all work performed in California that exceeded eight hours per day or 40 hours per week.

The Ninth Circuit ultimately certified three questions to the California Supreme Court, so that the state court could decide critical issues of state labor law that would impact the outcome of the federal court case. Last June, the California Supreme Court decided those questions as follows:

- "The California Labor Code does apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs ... such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week."
- An employer's failure to pay legally required overtime to its employees as described above can give rise to a cause of action under California Labor Code 17200, which prohibits "unlawful ... business act[s] or practice[s]."
- California Labor Code 17200 "does not apply to overtime work performed outside of California for a California-based employer

by out-of-state plaintiffs ... based solely on the employer's failure to comply with" federal overtime laws. In reaching this decision, the California Supreme Court left open the possibility that out-of-state employees who are "paid (or underpaid) in California" might have a Section 17200 claim. The court did not discuss what it means to be paid "in California."

In the Ninth Circuit's most recent *Sullivan* decision, issued December 13, 2011, it applied the state court's ruling to the plaintiffs in the federal case, over Oracle's objection that applying California's Labor Code to nonresidents would violate the U.S. Constitution. The Ninth Circuit held that the California Supreme Court's answers to the certified questions were conclusive.

Also, just one day after the Ninth Circuit ruled, another federal court in California applied the decision and held that the location of payment issue, referenced in passing by the

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California Supreme Court, should not affect the outcome of an overtime claim for employees who have never worked in California. In *Wallace v. Countrywide Home Loans*, the Central District of California – citing the line of *Sullivan* decisions – stated that “a singular focus on the location of payment of nonresident employees by a California-based employer would lead to absurd results.” However, neither *Sullivan* nor *Wallace* determined whether the location of payment would affect the outcome of an overtime suit brought by nonresident employees who occasionally worked in California for a California-based employer, but whose claims related solely to work performed outside of California. Although all other issues raised in the *Sullivan* case seem to be settled now, we can expect to see more litigation on this remaining “location of payment” issue.

Finally, although the question was not before the court, employees working for employers not based in California are likely to argue that they too should be entitled to overtime for all hours worked in excess of eight in each day they perform work in California. Although the California Supreme Court’s decision might be viewed as supporting that argument, the decision was specifically limited to the *Sullivan* facts and involved a detailed choice of law analysis. Before ruling on *Sullivan*’s applicability to employees of an out-of-state employer, a court would have to perform a similar analysis based on the specific facts of the case.

What is the bottom line?

- If you are a California-based employer with out-of-state employees who occasionally perform work in California, you must pay them overtime according to California state overtime laws for

all work performed in California. Unclear at this time is whether the location of payment might create additional obligations relating to out-of-state work and, if it does, what it means to pay an employee “in California.”

- If you are a California-based employer with out-of-state employees who never work in California, you must pay them overtime according to federal or applicable state law, not California state law.

If you have any questions about the *Sullivan v. Oracle Corp.* decision, please call Amy Komoroski Wiwi or Joy N. Eakley at 973.597.2500. We also would be pleased to provide you with assistance with respect to other employment practices and workplace compliance issues.

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