

UPDATE: NINTH CIRCUIT WITHDRAWS DECISION ON APPLICATION OF CALIFORNIA LABOR CODE TO OUT-OF-STATE WORKERS; CERTIFIES ISSUE TO CALIFORNIA SUPREME COURT

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We reported in our Winter 2009 *Commercial Disputes Observer* on the panel decision of the Ninth Circuit Court of Appeals in *Sullivan, et al. v. Oracle Corporation*, 547 F.3d 1177 (9th Cir. November 6, 2008). In that decision, a panel of the Ninth Circuit determined that an employer which employs out-of-state residents to perform work in California was required to pay overtime pursuant to the provisions of the California Labor Code. Recently, the Ninth Circuit Court of Appeals withdrew its Opinion, and certified three questions of California law to the California Supreme Court, requesting the California Supreme Court to decide those questions.

The three specific issues certified to the California Supreme Court are:

1. whether the California Labor Code applies to overtime work performed in California for a California-based employer by non-California resident employees, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week;
2. whether California's unfair competition law applies to the overtime work of non-California residents when they are working in the state; and
3. whether California's unfair competition law applies to overtime work performed outside of California for a California-based employer by non-California resident employees if the employer failed to comply with the overtime provisions of the Fair Labor Standards Act.

The Ninth Circuit panel which issued the *Oracle Corporation* decision acknowledged that there was no directly controlling precedent on the question of whether the overtime law of California or the overtime laws of the home states of the plaintiffs in the *Oracle Corporation* case should apply to work performed by the plaintiffs in California for a California-based

employer. The panel said that the answers to the questions it certified to the California Supreme Court would have "considerable practicable importance," because a large number of California-based employers employ out-of-state residents to perform work in California. It further acknowledged there would be an appreciable economic impact on the overall labor market in California, given the competitive cost advantage that an employer might gain by employing out-of-state employees instead of California-resident employees, if California's overtime pay provisions did not cover the out-of-state employees for their in-California work.

The California Supreme Court is not required to accept the certification of these questions from the Ninth Circuit Court of Appeals. However, the panel of Ninth Circuit judges which issued the decision in *Oracle Corporation* clearly thought the import of these issues was significant enough, from an economic perspective, and the law was unclear enough, that the California Supreme Court should be given the opportunity to decide these questions. Therefore, the panel exercised the infrequently-used process of certifying these questions to the California Supreme Court.

We will keep you updated in future Observers and Alerts as to the ultimate outcome of this case. However, for the time being, there is no clear answer as to whether or not non-California residents who work on a temporary basis in California must be paid in accordance with the provisions of the California Labor Code. If the California Supreme Court decides these issues in conformity with the now-withdrawn decision of the Ninth Circuit, employers can expect to see numerous claims seeking overtime filed by non-California residents who perform work in California.

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