

# California Wage/Hour Update



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## Federal Decision Awards Overtime To Non-Residents Performing Work In California

By Ron S. Brand (Irvine)

A federal appeals court recently handed down a significant decision addressing the application of the overtime provisions of California's Labor Code to work performed in California by non-resident employees. The case has important consequences for employers who hire non-residents to perform work in California. *Sullivan v. Oracle Corporation*.

### Background

Oracle Corporation, a large software company, employs hundreds of workers to train Oracle customers in the use of its software. Oracle calls these employees "Instructors," and requires them to travel to destinations within the United States away from their city of domicile for the purpose of performing work for Oracle. For a number of years, Oracle classified these Instructors as "teachers" who are exempt from the overtime provisions of California's Labor Code (Labor Code) and the federal Fair Labor Standards Act (FLSA).

In 2003, Oracle reclassified its California-based Instructors and began paying them overtime under the Labor Code. Oracle's reclassification of its Instructors may have been prompted by a 2003 class action in federal district court in California brought by Instructors claiming that Oracle misclassified them under the Labor Code and the FLSA. The class action was settled, but excluded from the settlement current and former Instructors who may have worked in California when they were not a resident of California.

In *Sullivan*, three non-residents of California who performed some of their work as Instructors in California, brought a would-be class action in California state court against Oracle seeking damages under the Labor Code. Oracle eventually had the case removed to federal district court on jurisdictional grounds. The Instructors brought three claims against Oracle. Through their first two claims, the employees alleged that Oracle failed to pay overtime for work performed in California to Instructors domiciled in other states who worked complete days in California.

The district court dismissed all of the claims. On the first and second claims, the district court held that the Labor Code does not apply to non-residents who work primarily in other states. The employees appealed the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit.

The Court of Appeals addressed two questions: 1) whether the overtime provisions of the Labor Code apply to work performed in California by non-residents; and 2) if the Labor Code does apply to such work, whether its application violates the United States Constitution.

### The Labor Code Applies To Work Performed In California By Non-Residents

The Court of Appeals unequivocally held that the overtime provisions of the Labor Code are clearly intended to apply to work done in California by non-residents. The Court of Appeals based its ruling on the plain language of the overtime provisions of the Labor Code, the public policy behind such provisions, and the seminal case of *Tidewater Marine Western, Inc. v. Bradshaw*. In *Tidewater Marine Western, Inc.*, the

California State Supreme Court held that California's employment laws implicitly extend to employment occurring within California's state law boundaries.

The Ninth Circuit also held that California has an interest in the effect compensation for non-residents working in California will have on the compensation of California residents. The Court reasoned that if a California employer may avoid the requirements of the Labor Code by simply hiring non-residents, California residents will be substantially disadvantaged in the labor market by the cheaper labor that will thereby be made available to California employers.

### The Labor Code's Application Does Not Violate The U.S. Constitution

Oracle also argued that the Labor Code should not be applied to employees' work in California because to do so would violate the Due Process Clause and the Dormant Commerce Clause of the United States Constitution. The Ninth Circuit rejected both arguments.

The Due Process Clause essentially prevents a state's substantive law from being applied in an arbitrary or fundamentally unfair way. The Court of Appeals held that applying the Labor Code to employees' work in California was neither arbitrary nor fundamentally unfair. The Court noted that Oracle is headquartered and has its principal place of business in California, the decision to classify Instructors as "teachers" and to deny them overtime pay was made in California, and the work in question was performed in California.

The Dormant Commerce Clause prohibits a state from passing legislation that improperly burdens or discriminates against interstate commerce. The Court determined that applying the Labor Code to work in California did not improperly burden or discriminate against interstate commerce because California has chosen to treat non-residents equally with its own residents.

### Our Advice

As a federal decision, the *Sullivan* decision is not legally binding on California state courts as "precedent," but state courts nonetheless are permitted to adopt the decision as "persuasive." Accordingly, California employers that hire non-residents to perform work in California should, at a minimum, abide by the overtime provisions of the Labor Code and pay those individuals for all overtime hours worked (unless an overtime exemption applies under California's more stringent requirements).

As an additional precaution, California employers that hire non-residents to perform work in California should also abide by all other applicable provisions of the Labor Code. In this age of increasing and costly wage-and-hour lawsuits, an ounce of prevention is worth a pound of cure.

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# The Explosion of Overtime Claims (Part 2)

By John K. Skousen (Irvine)

In our last issue we looked at some of the most important timekeeping problems that employers should be aware of, in order to keep from being engulfed in the virtual tsunami of overtime claims being filed in recent years.

In this issue we'll explore some other problem areas and offer some specific advice.

## Negligent Supervision and Management Policies

Poor supervisory habits magnify the risk of liability for overtime claims. Such habits lead to errors that are repeated each day and continue month after month, resulting in substantial cumulative liability. Here are a few examples:

- The supervisor's failure to monitor timekeeping or to require prior authorization before overtime is worked may lead to disputes regarding whether overtime was worked or paid properly.
- Issuing employees keys or codes to gain access to the work offices or permitting them to take work home after hours or during weekends. This privilege can be abused and may result in exaggerated overtime claims which are difficult to refute.
- Poor management training and control of work performed by parol clerks and lower-level supervisors, leading to overtime errors. This could include not calculating overtime properly: incorrectly calculating the regular rate for salaried non-exempt employees; or failing to use a weighted average method of calculating overtime for work weeks when employees have been working under more than one hourly rate of pay.

To make sure supervisors are doing their jobs, institute internal procedures such as periodic audits by upper management, accounting, or human resource professionals to ensure that problems are caught before they lead to huge cumulative liability.

## Intentional Fraud

Stealing overtime by fabricating timekeeping is fraud and a crime. Employers with loose controls but having the most philanthropic and supportive programs for employees can be easy victims. There are other enticements to claiming unpaid overtime. In California, unpaid overtime draws interest at the rate of 10% per annum, which is a better rate of return than many financial institutions will yield.

The frequent publication of successful overtime claims or settlements, coupled with many employee advocates inciting spurious claims with promises of big payoffs, make the overtime cultivation industry a big business. Attracted by the lure of a cash award, employees may begin to "farm" overtime from the onset of employment, with tactics such as: 1) marking down unworked overtime; 2) engaging in schemes such as punching other employees' timecards; 3) deliberately failing to punch out their own timecard, then requesting that a supervisor rely on their inflated account of hours worked when the time card is corrected by the supervisor on a later date; or 4) making electronic modifications to previously documented time.

Some employees deliberately exploit positions that require honesty, including accurate timekeeping for work performed without close supervision. And there are employers who do not have good systems to monitor the employees' practices to confirm their honesty. Timekeeping professionals typically have technology with fraud detection or prevention systems, although some employers don't like to pay the additional cost of such safeguards. You should consider whether losses could be offset by expending the necessary capital to obtain technology to detect and curtail employees who are engaged in timekeeping and overtime fraud.

Sometimes when precautions are not taken, fraud can be detected later. It's a fairly common occurrence during wage and hour litigation that an employee's dishonest timekeeping activities are discovered for the first time. These activities, if proved convincingly, could result in severe offsets against claimed wages. But it's better to avoid overtime claims in the first place than to defend them.

## Our Advice

Employers should take the initiative to anticipate, prevent, and challenge overtime claims, if necessary.

Conduct periodic management training, check timekeeping at regular intervals (daily, weekly, pay period), build systems that encourage scrutiny and authentication, and even hire private detectives or forensic experts, when sophisticated patterns of misconduct are detected.

For more information, email the author at [jskousen@laborlawyers.com](mailto:jskousen@laborlawyers.com) or call 949.851.2424

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We're interested in your opinion. If you have any suggestions about how we can improve the *California Wage/Hour Update*, let us know by contacting your Fisher & Phillips attorney or email the editor at [mmitchell@laborlawyers.com](mailto:mmitchell@laborlawyers.com).

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