A Presumption In Favor Of 'California' Employees

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A startling headline in a news release from the U.S. Department of Labor on Oct. 22, 2014, states: "US Department of Labor investigation finds Silicon Valley technology employer owed more than $40,000 to foreign workers; Investigation finds employer paid as little as $1.21 per hour in Indian rupees to employees."

According to the DOL, its investigators learned that "the technicians were flown in from the employer's office in Bangalore, India, to assist with the installation of the company's network and server during the company headquarters move from Foster City to Fremont in late 2013."

The workers from Bangalore were in Silicon Valley for up to two months. Even though their home country of employment apparently remained India, the DOL determined that Electronics for Imaging, doing business as EFI, had apparently overlooked key provisions about coverage of the Fair Labor Standards Act. The FLSA applies to foreign citizens working in the U.S. if they work for "a substantial period of time and perform covered nonexempt work … A worker who … spends more than 72 hours in the U.S. on a single visit is considered to have spent a substantial period of time in the U.S."[1]

Although the facts in this case sound dramatic and unusual, the underlying issues of proper pay practices for work completed in California and the accompanying potentially dispositive choice of law issues have been the subject of major litigation.

Before this most recent headline-grabbing example of legal issues with paying workers even temporarily rendering services in California, two illustrative and notable high-profile wage-and-hour cases had laboriously worked their way through

California and federal courts. One of these, Sullivan v. Oracle, turns on the analogous question of the application of California's labor laws to residents, not of Bangalore, but of places like Colorado or Arizona. The other, Ruiz v. Affinity Logistics, explores a key issue of California law vs. Georgia law to determine who is an employee. The trend is clear: the law most protective of employees will be applied. The result, with potentially dramatic financial implications, may be whether overtime pay is due, or whether certain workers are employees or independent contractors (who are not covered by labor laws). A look at the course of these cases will be instructive to employers.

Sullivan v. Oracle[2]

Donald Sullivan and the other plaintiffs in this case were nonresidents of California who worked as instructors in California for several days during the years in question for Oracle (a large software company with its principal place of business in California). In a crisp summary of the key facts regarding Sullivan, the Ninth Circuit notes in its December 2011 opinion (now known as Sullivan V, given its complex procedural history through the federal courts and the California Supreme Court):

> Plaintiff Donald Sullivan worked as an Oracle Instructor from June 1998 to January 2004. During this period, Sullivan resided in Colorado. During 2001, Sullivan worked in Colorado "on at least 150 days"; he worked in California "on 32 days"; … During 2002, he worked in Colorado "on at least 150 days"; he worked in California "on 12 days"; … During 2003, he worked in Colorado "on at least 150 days"; he worked in California "on 30 days"….

The Ninth Circuit provides similar summaries for the other named plaintiffs, in each case noting the days worked in California. While the number of days worked in California was far fewer than the number of days worked in other states, the court swiftly concludes that the nonresident workers are entitled to overtime pay pursuant to California law for work in excess of eight hours per day or 40 hours per week, basing its reasoning on the California Supreme Court's June 2011 opinion, known as Sullivan IV[3], provided in response to questions of state law that had been certified by the Ninth Circuit, the first of which is:

> First, does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week?

This California Supreme Court opinion notes that the Ninth Circuit "asked us to decide the underlying questions of California law, on which it had found no directly controlling precedent" and also flags the practical importance of the issues because of the large number of California-based employers that employ out-of-state residents to perform work in California. The California Supreme Court's answer to the question it poses: "Do the Labor Code's overtime provisions apply to work performed in California by nonresidents?" is unambiguous:

> The question whether California's overtime law applies to work performed here by nonresidents entails two distinct inquiries: first, whether the relevant provisions of the Labor Code apply as a matter of statutory construction, and

> second, whether conflict-of-laws principles direct us to apply California law in the event another state also purports to regulate work performed here. These inquiries lead to the conclusion that California law does apply.

The California Supreme Court's analysis is notable for its emphatic reiteration of the protective rationale for the overtime wage laws. At four different places in the opinion, a striking phrase, "the evils of overwork" is used, like a dramatic oratorical flourish: (1) "[T]he overtime laws serve important public policy goals, such as protecting the health and safety of workers and the general public, protecting employees in a relatively weak bargaining position from the evils associated with overwork, and expanding the job market by giving employers an economic incentive to spread employment throughout the workforce." (2) "California's overtime law … regulates evenhandedly … guarding against the evils of overwork." (3) "California's interests … are in protecting health and safety … and preventing the evils associated with overwork." (4) "To permit nonresidents to work in California without the protection of our overtime law would completely sacrifice, as to those employees, the state's important public policy goals of protecting health and safety and preventing the evils associated with overwork."

While Oracle attempted to argue the conflict-of-laws issue, the California Supreme Court briskly applies the governmental interest analysis to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and declares: "to subordinate California's interests to those of Colorado and Arizona unquestionably would bring about greater impairment."

A similar and highly determinative issue of Georgia law vs. California law as applied to employees is raised by the whole sequence of four Ruiz v. Affinity Logistics opinions[4], involving drivers who had been classified as independent contractors.

Ruiz v. Affinity Logistics

The four Ruiz v. Affinity Logistics opinions begin with the California district court's initial ruling after a three-day bench trial in 2009. The plaintiffs were truck drivers who performed home delivery services for Sears in the San Diego area, and the trial concerned the limited issue of whether or not they should have been classified as employees rather than independent contractors. The district court applied Georgia law to the case, since the independent contractor agreements between the drivers and Affinity (the company that contracted with Sears for the work the drivers performed) specified that Georgia law governed. Affinity was a Georgia corporation with its principal office located in Marietta, Georgia. Applying Georgia law, the district court found that the plaintiffs had the burden of proof to rebut, with a preponderance of the evidence, the presumption that they were properly classified as independent contractors. With frequent references to Georgia law, and a weighing of various facts, the district court concludes "that this evidence does not establish, by a preponderance of the evidence, an employer-employee relationship."

In the second opinion in the sequence, the Ninth Circuit vacated and remanded with a focus on the choice of law issue. The Ninth Circuit finds the district court's choice of law analysis to be incomplete. The Ninth Circuit notes that, "[T]he district court should have then considered (1) whether applying Georgia's law 'is contrary to a

fundamental policy of California,' and then (2) 'whether California has a materially greater interest than [Georgia] in resolution of the issue,'" (emphasis in original), pointing out that the shifting burden of proof under Georgia law is in direct conflict with California law, which presumes the existence of the employment relationship.

The Ninth Circuit also invokes language from the California Supreme Court on the multifactor test for determining employment status, and the remedial statutory purpose behind the law. "The California Supreme Court recognized that this test 'must be applied with deference to the purposes of the protective legislation' that the worker seeks to enforce" (emphasis in original).[5] The Ninth Circuit also finds that California has a far greater interest than Georgia in the outcome of the case, given that the work took place in California, the drivers lived in California, and they entered into their contracts in California.

Back in the district court on remand, now applying California law, the burden of proof shifted to Affinity to prove that presumed employees were independent contractors. This third opinion in the sequence revisits much of the evidence discussed in the first opinion and weighs the factors for deciding such cases: most importantly, the right to control the manner and means of accomplishing the result desired. A host of secondary factors are also listed and analyzed, and the district court once again rules that Affinity has prevailed and that the drivers were appropriately characterized as independent contractors.

Back in the Ninth Circuit, for round four, the opinion opens with a weary remark: "This is the second time this case is before us." After quickly summarizing the procedural history of the case and noting that the district court applied California law and concluded the drivers were independent contractors, the Ninth Circuit reverses, finding that "Affinity had the right to control the details of the drivers' work," and that the secondary factors also support this finding. "We therefore reverse the district court's decision that the drivers were independent contractors and hold that they were Affinity's employees under California law."

As a result of this conclusion, the drivers could proceed with state law claims for sick leave; vacation, holiday and severance wages; and reimbursement for workers' compensation fees. The Ninth Circuit finds that the district court erroneously evaluated the evidence, which the Ninth Circuit characterizes as "overwhelmingly" indicating the drivers were employees. The opinion is heavily factual, but it is permeated with skepticism about the formalities that were created by Affinity to convert the former employees to independent contractors. For example, the Ninth Circuit states, "While 'purporting to relinquish' some control over the drivers by making the drivers form their own businesses and hire helpers, Affinity 'retained absolute overall control' over key parts of the business." The Ninth Circuit also notes, "The district court clearly erred by not giving enough weight to the fact that Affinity required drivers to create these businesses as a condition of employment."[6]

The 2014 Ninth Circuit opinion is studded with references to the seminal California Supreme Court case S.G. Borello & Sons Inc. v. Dep't of Industrial Relations[7], which has influenced the development of case law on independent contractor/employee classifications in California. Although the workers in Borello were cucumber harvesters, the framework outlined in the case underlies the

reasoning of many courts since its publication in 1989. Underlying the California Supreme Court's firm declaration that the cucumber harvesters were employees of the grower is the court's observation that the law must be applied "with deference to the purposes of the protective legislation." In looking at the facts in the record, the court states, as to the sharefarmers and their families, "Without a doubt, they are a class of workers to whom the protection of the Act is intended to extend."

Technology workers from Bangalore, software instructors from Arizona and Colorado, truck drivers in San Diego, California, and cucumber harvesters in Gilroy, California — cases involving workers as varied as these have helped form a body of law that all California employers as well as out-of-state employers sending employees to work in California should note. A presumption in favor of California's protective labor legislation will operate to affect many cases. For this reason, it is imperative for companies, whether located in California or not, to consult California employment counsel when hiring employees or engaging workers to perform work in this state.

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[1] U.S. Department of Labor Wage and Hour Division Field Operations Handbook (5/16/02), Section 10e01.

[2] Sullivan v. Oracle, 662 F. 3rd 1265 (9th Cir. 2011).

[3] Sullivan v. Oracle, 51 Cal. 4th 1191 (2011); 127 Cal. Rptr. 3d 185; 254 P. 3d 237.

[4] Ruiz v. Affinity Logistics, 697 F. Supp. 2d 1199 (S.D. Cal. 2010); Ruiz v. Affinity Logistics, 667 F. 3d 1318 (Ninth Cir. 2012); Ruiz v. Affinity Logistics, 887 F. Supp. 2d 1034 (S.D. Cal. 2012); Ruiz v. Affinity Logistics, 754 F. 3d 1093 (Ninth Cir. 2014).

[5] 667 F. 3d at 1324.

[6] 754 F. 3rd at 1103-1104.

[7] 48 Cal. 3d 341; 256 Cal. Rptr. 543; 769 P. 2d 399 (1989).