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Labor and Employment Alert: Is There No Rest From Wage-Hour Class Actions For Weary Employers in California?

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Any employer who has done business in California is familiar with the state's byzantine wage-hours laws and the immense liability for even minor violations. The complexity of these laws – and the potential exposure facing employers – has not been lost on the Ninth Circuit Court of Appeals as the recent case of *Mendoza v. Nordstrom* demonstrates. There, the Ninth Circuit asked the California Supreme Court for guidance on three questions related to California's rarely litigated "day of rest" law.

California law provides that employees are entitled to one day's rest in seven and that no employer shall "cause" an employee to work more than six days in seven. Employees who do not work more than 30 hours per week, or who do not work more than six hours in "any" day of the week, are exempt from these requirements.

In *Mendoza*, two former Nordstrom employees brought a class action against Nordstrom for alleged violations of the day of rest requirements. One employee had worked seven consecutive days three times during his employment; the other employee had once worked seven consecutive days. With just these four potential violations, the employees sought to represent a class of all Nordstrom employees in California for four years. The district court held that Nordstrom did not violate the day of rest requirements because several shifts were less than six hours and because the only reason they worked on other shifts was because they had agreed to pick up additional shifts at a co-worker's or supervisor's request. The employees appealed to the Ninth Circuit.

The Ninth Circuit determined that the Labor Code provisions at issue were ambiguous, and the differing interpretations would lead to either no liability for Nordstrom or to exponential liability. As the Court put it, "the obligations of thousands of California employers, and the rights of tens of thousands of California workers, are at stake." So rather than decide the case on the merits, the Ninth Circuit certified three questions to the California Supreme Court:

1. California Labor Code section 551 provides that “[e]very person employed in any occupation of labor is entitled to one day’s rest therefrom in seven.” Is the day of rest calculated by the workweek or on a rolling basis for any consecutive seven-day period? (Employees may work seven days in a row across two different work weeks.)
2. California Labor Code section 556 exempts employers from providing such a day of rest “when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof.” Does that exemption apply when an employee works less than six hours in any one day of the applicable week, or does it apply only when an employee works less than six hours in each day of the week? (In other words, can an employee work 7 days if he works 8-8-8-~~5~~-8-8-8, or does the employee have to work under 6 hours each day in those 7 days for there not to be a violation?)
3. California Labor Code section 552 provides that an employer may not “cause his employees to work more than six days in seven.” What does it mean for an employer to “cause” an employee to work more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else? (So does an employer violate the law if it allows an employee to swap shifts or pick up an additional shift?)

The Supreme Court can refuse to accept the certification request. But this seems unlikely given the tremendous potential impact on California’s employers – especially in the retail and hospitality industries where 7-day schedules and shift-swaps are not uncommon. As the Ninth Circuit realized, “The consequences of any interpretation of the day-of-rest statutes will have profound legal, economic, and practical consequences for employers and employees throughout the state of California and will govern the outcome of many disputes in both state and federal courts in the Ninth Circuit.”

We will keep you apprised of any developments. In the meantime, contact your Vorys lawyer if you have questions about navigating the California wage-hour maze.