Applicability Of California Wage Laws To Nonresidents Subject To Review

In *Sullivan v. Oracle Corp.* (first reported by a Fenwick & West at http://www.fenwick.com/publications/6.5.4.asp?mid=40&WT.mc_id=EB_112008_web#cali), a three-judge panel of the Ninth Circuit Court of Appeals held that California's overtime laws applied to work performed in the state by nonresident employees. A group of Oracle employees who resided outside California but traveled into the state periodically to perform work for Oracle sued the company, claiming that they were entitled to the benefits of California's more favorable overtime laws (*e.g.*, daily overtime) for the work they performed in California. The Ninth Circuit agreed, but later withdrew its decision in response to a petition for review, and asked the California Supreme Court to clarify application of California's overtime and other wage/hour laws to nonresident employees who perform work in the state.

Recognizing that a "large but undetermined number of California-based employers employ out-of-state residents to perform work in California," the Ninth Circuit noted that the state court's ruling "will have considerable practical importance."

Release Of Claims For Overtime Wages Upheld

Obtaining a full release of claims from an employee who claims that he or she was not properly paid wages is complicated by California Labor Code § 206.5, which prohibits conditioning a release for wages that are undisputedly owed. However, in *Chindarah v. Pick Up Stix, Inc.*, a California court of appeal confirmed that an employee may release a claim for unpaid wages where there is a bona fide dispute over whether any wages are owed.

In connection with a class action lawsuit for unpaid overtime based on alleged misclassification of workers as exempt from overtime, several of the defendant's current and former employees signed settlement agreements that included a release of claims for unpaid overtime and other Labor Code violations. The settling plaintiffs later attempted to revive their claims, alleging that the releases were void under Labor Code § 206.5 because a court or jury might ultimately conclude that overtime wages are owed (in short, they argued that any settlement of an overtime dispute violates 206.5). The trial court disagreed, and determined that the releases were valid because the parties disagreed that wages were actually owed (*i.e.*, there were bona fide disputes over whether any wages were due). The court of appeal affirmed.

The *Chindarah* ruling is in accord with several federal court decisions in California, and validates the ability of employers to seek releases of wage claims where the amount owed is in dispute (provided the employer gives consideration for the release).

NEWS BITES

Employee Free Choice Act Re-Introduced In Congress; Contrary Legislation Proposed

The Employee Free Choice Act ("EFCA") bill, previously defeated in 2007, has been given new life under the Obama administration and was recently re-introduced into both houses of Congress. The EFCA would make it easier for unions to be certified as bargaining representatives by allowing unions to bypass the well established NLRB secret ballot election process and instead obtain certification upon a showing of majority support through a "card check" (*i.e.*, signed union authorization cards). In addition, the bill seeks to impose tight deadlines for bargaining over a first contract; it requires an arbitration panel to set initial contract terms if the union and employer cannot agree on a contract within 120 days; and it mandates increased penalties against employers who engage in certain unfair labor practices.

In response and in opposition to the EFCA, the primarily Republican-sponsored Secret Ballot Protection Act ("SBPA") was recently introduced. The SBPA seeks to validate the NLRB secret ballot election process by making it an unfair labor practice for an employer to recognize or bargain with a union that has not been certified by secret ballot election, and for a union to cause or attempt to cause an employer to recognize or bargain with a union that has not been certified by such an election.

The EFCA has strong support in Congress and in the new administration. However, this issue is likely headed for a very intense debate in Congress in light of the attempt to overturn well-established union election procedures.

COBRA Subsidies Available To Involuntarily Terminated Employees

As part of the federal American Recovery and Reinvestment Act stimulus package, certain low to moderate income employees (as well as their spouses and dependent children) who were/are involuntarily terminated between September 1, 2008 and December 31, 2009 are eligible for a 65 percent subsidy for the cost of health care continuation coverage under COBRA for up to 9 months following termination. Employers must pay for the subsidy, but will be

reimbursed through a payroll tax credit. The new law also gives employers the option to allow terminated employees to switch from a more expensive group health plan program (such as a PPO) to less expensive alternative (such as a HMO). Employers must notify all employees who have a qualifying event during the period of eligibility (September 1, 2008 through December 31, 2009) of their eligibility for the subsidy, including those who previously declined COBRA coverage.

Fenwick & West's comprehensive summary of the subsidy is available at http://www.fenwick.com/docstore/Publications/Corporate/Execu-Comp_02-23-09.pdf and the federal Department of Labor dedicated web page on the topic is available at http://www.dol.gov/ebsa/cobra.html.

Changes To Alternative Workweek Rules Implemented

Effective February 20, 2009, California's alternative workweek rules have been amended to give employers more flexibility in setting up alternative workweek schedules ("AWS"). The new rules broadly define the "work unit" for purposes of an AWS to include not only an entire division or department, but also a job classification, a shift, a separate physical location, or a recognized subdivision. The law also states that a single employee under certain circumstances may comprise a "work unit." In addition, the new law clarifies that employers may give employees an option to work the AWS or a regular 8-hour shift, and can also permit employees to switch between an AWS (*e.g.*, four 10-hour days) and a regular schedule (*e.g.*, five 8-hour days) on a weekly basis.

EEOC Issues Proposed Genetic Discrimination Regulations

The EEOC recently issued proposed regulations to interpret and implement the Genetic Information Nondiscrimination Act of 2008, which: (i) prohibits employment discrimination based on genetic information, (ii) restricts acquisition and disclosure of such information, (iii) requires that such information be kept confidential, and (iv) prohibits retaliation. Once finalized, the regulations will provide needed guidance on the scope of the new law, which will become effective on November 21, 2009. The proposed regulations can be found here: http://eeoc.gov/policy/regs/index.html.

Whistleblower Protections Expanded For Employees Of Federal Contractors

In addition to the COBRA subsidy, another important aspect of the federal stimulus package for employers is increased whistleblower protection for employees who report mismanagement, waste, danger to public health or safety, or abuse or unlawful activity concerning an employer's use of stimulus funds. The regulatory scheme requires the exhaustion of administrative remedies with the agency responsible for the administration of the funds – rather than the DOL – prior to the initiation of a lawsuit. Employers that receive stimulus funds and are subject to these whistleblower obligations must post a notice of employee rights and remedies provided by the new law, and should also review their existing whistleblower protections to ensure compliance.

DOL Enjoins Shipment And Sale Of Video Games Until FLSA Violations Corrected

Underscoring the broad enforcement powers of the DOL under the Fair Labor Standards Act ("FLSA"), the DOL recently entered into a consent injunction with a video game development company which prohibits the company from selling or shipping products until it compensates employees for overtime and otherwise fully complies with the FLSA. In *Chao v. Fooptube, LLC*, a federal district court in Utah enforced the consent injunction, which the DOL sought under the FLSA's "hot goods" injunction provision. This is a sobering reminder of how FLSA violations can significantly impact employers and their ability to operate.

Budget Increase For DOL Will Likely Lead To Stepped-Up Enforcement Efforts

The Obama administration plans to increase the DOL budget by $600 million in 2010 for purposes of, among other things, strengthening labor standards enforcement. Stating that worker success is "key to the success of the American economy," President Obama promised, "the Department of Labor will once again stand up for working families and be an advocate for everyday people." The DOL's increased budget may open the door for greater scrutiny of employers in the form of DOL audits and enforcement actions.

Starbucks Sued For Failing To Safeguard Employee Information

In *Krottner v. Starbucks Corp.*, an employee filed a class action against the coffee giant, claiming that the company failed to adequately protect the personal data – including names and Social Security numbers – of approximately 97,000 employees when a Company laptop was stolen from one of its stores. Although Starbucks immediately notified employees of the theft and offered to pay for one year of credit monitoring, the complaint alleged that such practices would not adequately protect employees from identity theft. The complaint also alleged that Starbucks had previously misplaced another laptop which contained the personal information of 60,000 employees. As this case demonstrates, employers must be extremely vigilant in ensuring that confidential employee information is adequately safeguarded.