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California Supreme Court Answers Critical Questions on Jurisdictional Scope of Certain Labor Laws and Minimum Wage Compliance for Employers Utilizing Non-Hourly Wage Units

Client Alert | July 1, 2020

On June 29, 2020, in response to a request from the Ninth Circuit, the California Supreme Court provided guidance on pressing questions of California employment law in *Oman v. Delta Airlines, Inc.*, No. S248726, ___Cal.5th___ (*Oman*). The Court issued a unanimous opinion on (1) the scope and applicability of California Labor Code Sections 204 and 226, which respectively govern the timing of wage payments and the content of wage statements, and (2) compliance with state minimum wage laws for employers who pay their employees on a non-hourly basis. The Court held that Labor Code Sections 204 and 226 apply to employees only if California is the principal place of their work, meaning the employee either works primarily in this state during the pay period, or does not work primarily in any state but has his or her base of operations in California. (*Id.* at [pp. 10, 13].) The Court then held that although employers who pay on a non-hourly basis may "average" wages across the unit of payment to determine minimum wage compliance, they may not engage in "wage borrowing," meaning, "borrowing compensation contractually owed for one set of hours or tasks to rectify compensation below the minimum wage for a second set of hours or tasks." (*Id.* at [p. 19].) The decision provides both local and multi-state employers with long-awaited guidance on two important issues of California wage-and-hour law.

A. Flight Attendants Sue Airlines Claiming That Their Wage Statements and the Timing of Their Wage Payments Violated California Law and That They Were Not Paid Minimum Wage for All Hours Worked

Plaintiffs Dev Anand Oman, Todd Eichmann, Michael Lehr, and Albert Flores are current or former flight attendants for Delta Airlines, Inc ("Delta"). In 2015, they filed a putative class action in federal court alleging that Delta violated several California labor laws. Plaintiffs alleged that Delta failed to pay its flight attendants in accordance with the state's minimum wage laws, provide comprehensive wage statements required under California Labor Code Section 226, and timely pay wages within the semimonthly schedule provided in Labor Code Section 204. The district court ultimately granted summary judgment to Delta on all issues. First, the district court concluded that Delta's compensation plan—which involved a complex, multi-factor formula intended to compensate for a

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"rotation" of work—did not violate California's minimum wage laws. It then determined the Labor Code provisions governing pay periods and wage statements did not apply to Plaintiffs because the multi-jurisdictional nature of their work and the short duration of their time in California were insufficient to warrant application of California law.

Plaintiffs appealed the decisions to the Ninth Circuit. Before deciding the appeal, the Ninth Circuit certified the following three questions of California state law to the California Supreme Court (*id.* at [p. 4]):

> *(1) Do sections 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time*?
>
> *(2) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time?*
>
> *(3) Does the* Armenta/Gonzalez *bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty?*

The California Supreme Court accepted the request, continuing its recent pattern of accepting certified-question appeals from the Ninth Circuit, particularly on labor and employment issues. *Oman* was decided alongside two companion cases, *Ward v. United Airlines, Inc*., and *Vidrio v. United Airlines, Inc*., No. S248702, ___ Cal.5th ___ (together, *Ward*), which similarly concerned the applicability of state labor laws to flight attendants primarily based outside the state's territorial jurisdiction.

B. The Court's Opinion in *Oman* Offers Clarity on the Geographical Scope of Certain California Labor Laws and Compliance with State Minimum Wage Requirements

Justice Kruger authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Chin, Corrigan, Liu, Cuéllar, and Groban concurred. The Court addressed the first and third questions certified by the Ninth Circuit, commencing with the question concerning the reach of Labor Code Sections 226 and 204, which respectively address the content of wage statements and the mandatory timing of wage payments. The Court, relying on its decision in the companion *Ward* case, unanimously held that an employee was not entitled to the protection of either section unless California was the principal place of that employee's work during the relevant pay period. (*Oman, supra,*___ Cal.5th ___ at [pp. 10, 13].) The Court clarified that California would be the principal place of an employee's work if the employee either (1) works primarily in California during the pay period, or (2) does not work primarily in any state but has his or her base of operations in California. The Court reasoned that any other conclusion would lead to impractical and burdensome results for multi-state employers and, importantly, lacked any reasonable policy justification. Because the proposed class of Delta employees included individuals like Plaintiff Dev Oman who neither performed their work predominantly in California nor were based in the state for work purposes, they were not entitled to the protections of Sections 204 and 226. (*Id.* at [p. 7].) The Court also clarified for the Ninth Circuit that the location or residence of the employer is irrelevant to the analysis of the applicability of Section 226 (and by implication, irrelevant to the applicability of Section 204 as well). (*Ibid.*)

The remainder of the Court's opinion addressed the Ninth Circuit's questions regarding the permissibility of Delta's compensation scheme in light of California's minimum wage laws, with the Court ultimately determining that Delta complied with California's minimum wage requirements. The Court, however, chose not to resolve the Ninth Circuit's question

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of whether California minimum wage laws applied under the factual circumstances of the case.[1] (*Id.* at [pp. 13–14].) Instead, the Court's analysis centered on the substance of California's minimum wage laws themselves, specifically the issues involved in determining if a compensation scheme that does not pay employees an hourly wage, but instead pays per task or other "method of compensation," complies with such laws.

In analyzing that issue, Justice Kruger focused on the nature of the contractual obligation between the employer and employee with respect to pay. (*Id.* at [pp. 19–20].) Her premise was simple: the employer's first obligation is to pay all employees at least the hourly minimum wage for those units compensated under the contract, whether those units are day, task, piece, or some other metric. (*Id.* at [pp. 20–21].) The Court held that determining whether the employer had satisfied its contractual obligation could be done by "translat[ing] the contractual compensation into an hourly rate by averaging pay across those tasks or periods." (*Id.* at [p. 21].) For example, an employer that pays in daily units can average pay across all hours worked in a day to determine if the resulting hourly wage meets the minimum required. Delta easily satisfied this obligation; the parties did not contest that Delta's flight compensation rates, when averaged, far exceeded the minimum wage requirements. (*Id.* at [pp. 24–25].)

Justice Kruger, however, emphasized that this was not the end of the inquiry. The employer must meet its minimum wage obligations while also paying for each task, day, or other unit at the contractually promised rate. The Court used the seminal case of *Armenta v. Osmose*, *Inc*. (2005) 135 Cal.App.4th 314 (*Armenta*), to illustrate this concept. (*Oman, supra*,___ Cal.5th ___ at [pp. 21–22].) In *Armenta*, the employer agreed to compensate employees for hours engaged in specified "productive tasks" at a rate well above the minimum wage threshold, but did not compensate for work that was not captured by the "productive tasks" category. (*Ibid.*) The employer there argued that there was no minimum wage violation because the employees' total wages, when averaged across the total amount of time spent on productive and non-productive tasks, exceeded the minimum wage. (*Id.* at [pp. 18–19].) The Court of Appeal rejected that argument and held that wages for productive tasks could not be averaged, or "borrowed," in Justice Kruger's words, to satisfy the employer's minimum wage obligations for the non-productive tasks, because to do so would essentially provide the employer a discount on the rate it agreed to pay the employee for contractually-covered work. (*Ibid.*)

The Court ultimately distinguished *Armenta* in analyzing Delta's compensation scheme. Unlike *Armenta*, Delta's payment scheme, although based on a complex formula with particular inputs, did not provide specific compensation for any particular hour of work; instead it offered a guaranteed level of compensation for each rotation. (*Id.* at [p. 28].) Justice Kruger reasoned that there were "no on-duty hours for which Delta contractually guarantees certain pay—but from which compensation must be borrowed to cover other un- or undercompensated on-duty hours," and as such, "the concerns presented by the compensation scheme in *Armenta* . . . are absent here." (*Ibid.*)

This holding serves as an important clarification for employers: Averaging wages across hours worked is not a per se improper way to determine minimum wage compliance, provided the averaging is done across the contractually agreed-upon unit of payment. What is impermissible is wage borrowing—using wages in excess of the minimum wage for the contracted-for hours to meet minimum wage requirements for other hours worked that are not covered by the contractual arrangement.

C. Justice Liu's Concurrence Reiterates the Importance of Contractual Interpretation

Justice Liu's concurring opinion, joined by Justice Cuéllar, addressed only the third question certified by the Ninth Circuit and centered on the first step in the Court's analysis—identifying the nature of the contractual commitment between the employer and employee. (*Oman*, *supra*, ___Cal.5th___[conc. opn. of Liu, J.], at [p. 1].) Justice Liu

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directed courts to give adequate attention to interpreting the parties' mutually-understood contractual obligations, as those obligations are key to determining whether wages have been unlawfully borrowed. (*Id.* at [p. 3].) He further cautioned against allowing employers to circumvent their wage obligations by simply inserting minimum wage floors into their employment contracts. (*Ibid.*)

D. Implications of the Court's Decision for Employers

The Court's decision resolves open questions with respect to the extraterritorial reach of Sections 226 and 204, but does not address those same issues with respect to California's minimum wage provisions. Still, the Court's decision does clarify that what was once perceived as an outright prohibition on averaging wages in determining minimum wage compliance is now more precisely understood as a bar on borrowing wages in a manner that contractually undercompensates an employee. Further, the Court's emphasis on contractual interpretation underscores the importance of clear contractual drafting: going forward, employers with California operations should stay current on court decisions involving the interpretation of the scope of contractual employment terms, including for pay plans with so-called hourly backstops, which have become increasingly common in industries where the dominant unit of pay is something other than hourly pay.

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[1] The Court did not resolve the Ninth Circuit's certified question concerning the applicability of California's minimum wage laws to all work performed in California for an out-of-state employer by an employee with limited working hours in California. (*Id.* at [pp. 13– 14].) The Court determined that the question of applicability was immaterial based on its preliminary determination that, regardless, Delta would have been in compliance with those laws. (*Ibid.*)

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