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July 19, 2017

Attention California Employers: Action Required for Ensuring Compliance with California's "Day of Rest" Requirements

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Under California law, employees are entitled to "one day's rest therefrom in seven," unless certain statutory exceptions apply. In *Mendoza v. Nordstrom, Inc.*, 2 Cal. 5th 1074 (2017), the California Supreme Court addressed several ambiguities in the statutory language, giving employers much needed guidance on how to comply with California's day of rest requirements. As noted below, employers should review their handbooks and scheduling policies to ensure they are in compliance with these requirements, as clarified by the Court.

By way of background, California Labor Code section 551 entitles employees to "one day's rest therefrom in seven," and section 552 similarly prohibits an employer from "caus[ing] his employees to work more than six days in seven." Section 556 creates an exception to these requirements for employees whose "total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof."

On their face, these statutes contain a few ambiguities. For example, does an employer have to give its employees at least one day off in *any seven-day period*, or just in a given "*workweek*" as that term is defined by the employer (*e.g.*, Sunday to Saturday, or Monday to Sunday)? For section 556's exception to apply, does an employee have to work six hours or less just *once* a week, or six hours or less *every day* of the week? And what does it mean for an employer to "cause" an employee to work more than six days in seven in violation of section 552? At the request of the Ninth Circuit, the California Supreme Court answered these questions.

How Often Employees Must Receive a Day of Rest

First, the Court found that employees are guaranteed one day of rest in each workweek (as defined by the employer), not in any given seven-day period. This means that an employer may schedule an employee to work *more* than six days in a row if the days stretch across multiple workweeks so long as the employee gets one day of rest in each such workweek. Thus, employers may theoretically schedule employees to work up to 12 days in a row in certain circumstances. For example, if the workweek is defined as Sunday through Saturday, an employer could schedule an employee to work daily from the first Monday of a month through the second Friday without running afoul of sections 551 and 552:

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
OFF	work	work	work	work	work	work
work	work	work	work	work	work	**OFF**

The Court warned against doing this on a regular basis, however, and noted that pursuant to section 554, the employee must average at least one day's rest for every seven days in each calendar month. The Court also observed that under section 554, if and when the nature of the employment "reasonably requires" that the employee work all seven days in a workweek, the employee is entitled to overtime premium pay for all work performed on the seventh day of the workweek pursuant to section 510.

On balance, the Court's holding on this issue is generally favorable to employers. It gives employers more flexibility in terms of scheduling, and it means they need not undertake the administrative burden of ensuring employees never work more than six days in a row.

The Exception for Part-Time Employees

Second, the Court found that in order for section 556's exception to the day of rest requirement to apply, an employee must not work over six hours on *any* day of the workweek. If, on any one day, the employee works more than six hours, he is entitled to a day of rest during that workweek (subject to other exceptions that may apply).

Notably, the Court declined to address whether section 556's language is conjunctive or disjunctive: *i.e.*, whether an employee must work not more than six hours every day ***and*** not more than 30 hours total that week, or whether the employee must work not more than six hours every day ***or*** not more than 30 hours total that week, for the exception to apply. In other words, would the exception apply if an employee worked 5.5 hours per day for seven days (38.5 hours total), satisfying the daily requirement but not the weekly requirement? Would it apply if an employee worked three hours per day for six days and eight hours on the seventh day (26 hours total), satisfying the weekly requirement but not the daily requirement? Or must ***both*** the weekly and daily requirements be satisfied? The Court expressly declined to reach this question because it was not presented by the Ninth Circuit. Thus, to minimize risk, the conservative approach would be to allow only those employees who work 30 hours or less in a workweek ***and*** six hours or less in every shift of that workweek work all seven days of the week (unless another exception squarely applies).

"Causing" an Employee to Forego His Day of Rest

Third, the Court clarified what it means for an employer to "cause" an employee to go without a day of rest in violation of section 552. It held that an employer may *not* "induce" or "encourage" an employee to forgo the day of rest, but that the employer *may* permit an employee, fully apprised of the entitlement to rest, to choose not to take a day of rest, so long as the employer "maintain[s] absolute neutrality as to the exercise of that right." The Court did not provide much guidance on precisely what would be considered "inducing" an employee to forgo rest, except to say that both *express* requirements and *implied* pressures could be considered inducement. As a practical matter, it may be difficult for an employer to show that it maintained "absolute neutrality" and did not expressly or impliedly pressure an employee who chooses to work a seventh day. Therefore, unless another statutory exception squarely applies, employers should consider obtaining written consent from the employee showing that he was fully apprised of his entitlement to rest and is forgoing the day of rest by choice.

Next Steps for Employers

Ensuring compliance with California's day of rest statutes is important because the Labor Code attaches various penalties to day of rest violations. For example, violations constitute a misdemeanor under section 553 and also expose employers to civil penalties under section 558 ($50 per pay period per employee for the first violation, and $100 per pay period per employee after that).

In light of the foregoing, employers with employees in California should:

1. Review employee handbooks to ensure that the company's workweek has been clearly defined. (If an employer does not define a workweek, the Division of Labor Standards Enforcement has stated that it

"will treat each workday as starting at midnight, and each workweek as starting at midnight on Sunday, so that Sunday is the first day of the workweek and Saturday the last.")

2. Revisit employee handbooks to make sure employees are fully apprised of their statutory entitlement to a day of rest.

3. Educate supervisors, managers, and anyone involved in employee scheduling of these requirements to aid them in the scheduling process, to help them decide who to ask to cover another employee's shift, and to safeguard against unduly influencing an employee's decision to forgo entitled rest days (including rewarding them in some way).

4. Given the lack of guidance as to what it means to "induce" an employee to forgo his day of rest, get a written consent from any employee who wishes to forgo his day of rest as evidence that it was his independent choice to do so.