GRUBE BROWN & GEIDT LLP

SAN FRANCISCO
601 Montgomery Street, Suite 1150
San Francisco, CA 94111
tel: 415.603.5000 | fax: 415.840.7210

LOS ANGELES
633 West 5th Street, Suite 3330
Los Angeles, CA 90071
tel: 213.358.2810 | fax: 213.995.6382

CALIFORNIA SUPREME COURT CLARIFIES "DAY OF REST" STATUTES

May 11, 2017

By Tom Geidt

This week the California Supreme Court clarified the Labor Code's confusing statutes granting employees "one day's rest in seven." In *Mendoza v. Nordstrom, Inc*., Case No. S224611, two former Nordstrom sales employees brought a class and PAGA action against the company, alleging they sometimes were scheduled to work seven days in a row in violation of California law.

The federal Ninth Circuit, perplexed by the ambiguities in California's day-of-rest law, asked the State Supreme Court to address several questions. In its unanimous response, the Court made three rulings:

1. Employers can require employees to work seven or more consecutive days, so long as they give employees at least one day of rest in every "workweek."

2. The day-of-rest rules protect part-time employees who work more than six hours on *any one* day of a workweek, subject to whatever other exceptions might apply.

3. Employers may not "induce" employees to forgo a day of rest to which they are entitled. However, an employer does not violate the law if it permits or allows an employee to choose to work the seventh day after having been "fully apprised" of his or her rest day entitlement.

The Relevant Statutory Provisions

For nearly a century, California has required that employees be given "one day's rest in seven." These provisions, now found in Labor Code sections 550-556, were originally enacted for religious reasons and for the protection of women and children. As the Supreme Court observed, these Labor Code provisions are "manifestly ambiguous."

Section 551 of the Labor Code states: "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Section 552 states: "No employer of labor shall *cause* his employees to work more than six days in seven." (Emphasis added.)

A third provision, Section 556, contains an exemption from these requirements for certain part-time employees. It states: "Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours *in any one day* thereof." (Emphasis added.)

Another section contains exceptions for emergencies or work performed "in the protection of life or property from loss or destruction." Labor Code §554. This section also allows employers to require that employees work seven days in a week if the "nature of the employment reasonably requires" such work, and if the employer allows the employees in the calendar month to receive "days of rest equivalent to one day's rest in seven" – in other words, four or five days off over the course of the month, depending on the number of days in the month.

Finally, a separate overtime provision of the Labor Code specifies that when a non-exempt employee performs work in all seven days of the same workweek, the employer must pay time-and-one-half for the first eight hours worked on the seventh day and double time for any hours worked beyond eight in that day, regardless of how many or few hours the employee worked in the preceding six days of the workweek. Labor Code §510.

Discussion of the Court's Holdings

Nordstrom's established workweek ran from Sunday to Saturday. The two plaintiffs alleged that Nordstrom sometimes scheduled them to work seven or more consecutive days. They argued that the day-of-rest statutes were meant to prohibit Nordstrom from allowing employees to work any seven consecutive days, on a rolling basis, whether or not those days crossed two calendar weeks or "workweeks." Otherwise, so the plaintiffs argued, Nordstrom could require them to work as many as 12 days in a row, from Monday of the first week through Friday of the following week.

The Court rejected plaintiffs' argument. Examining the legislative history of the statute and the wage orders, as well as the "seventh day" overtime provision, the Court concluded that these provisions can best be harmonized by determining the day-of-rest entitlement on a week-by-week basis rather than a rolling basis. The Court commented that this interpretation subjects employees and employers to a single set of consistent day-of-rest requirements, thereby facilitating the scheduling of work.

On the scope of the part-time exclusion in Section 556, however, the Court sided with the plaintiffs. Nordstrom argued that so long as an employee is given at least one day with no more than six hours' work during the workweek, the employee may be required to work all seven days without a day of rest. The Court found this interpretation unreasonable. It held that the exemption applies only to those who never exceed six hours of work on any of the seven days of the workweek.

Thus, for example, an employer could schedule an employee to work four hours per day for all seven days of a workweek (28 hours in total) and not run afoul of the day-of-rest requirements.

However, if the employee works more than six hours on any one day of the week, the employee is entitled to a day of rest in that week, unless some other statutory exception applies.

The Court observed that the "double-negative syntax" of Section 556 makes it unclear whether the daily (six-hour) and weekly (30-hour) limits are meant to be conjunctive or disjunctive – that is, whether employees are entitled to a day of rest (1) if they work more than six hours in any one day of the week *or* more than 30 hours in the whole week; or (2) only if they work more than six hours in any one day of the week *and* more than 30 hours in the week. This will need to be decided in a later case.

On the third question – what does it mean to "cause" an employee to work for seven days without a day of rest? – plaintiffs argued that whenever an employer "allows, suffers, or permits" an employee to work a seventh day, it has caused the employee to do so. Contrarily, Nordstrom argued that unless the employer "requires, forces, or coerces" seventh-day work, it has not caused the employee to work all seven days.

The Court rejected both arguments and adopted a middle-ground interpretation. It concluded that an employer's obligation is to apprise employees of their entitlement to a day of rest and thereafter maintain "absolute neutrality" as to the exercise of that right. An employer may not affirmatively require, encourage, or otherwise "seek to motivate" its employees to forgo a rest day, or conceal the entitlement to a rest day. However, an employer is not liable simply because an employee chooses to work a seventh day.

Practical Ramifications

The Court's decision provides some much-needed clarity for employers on how to administer and apply the day-of-rest provisions, and how to reconcile them with the seventh-consecutive-day overtime statute. It also affords employers some scheduling flexibility – the rolling seven-day rule sought by plaintiffs would have hampered that flexibility.

In the past, the Labor Code's day-of-rest provisions have not been strictly enforced. This is likely due to the statutory ambiguities (now partially cleared up) and the absence of a statutory penalty for a violation. Because of this decision, however, we are likely to see more day-of-rest claims in the future.

Therefore, employers should be mindful of these requirements when scheduling non-exempt employees. In particular, employers who wish to allow full-time employees to work on all seven days of a workweek must satisfy the Court's newly-announced notification requirement, ensuring that employees have been fully apprised of their rest day entitlement.

While it is true that the day-of-rest statutes do not specify a monetary penalty for a violation, aggrieved employees may pursue civil penalties under the Private Attorneys General Act ("PAGA") on behalf of all other aggrieved employees. The civil penalty for a violation would

likely be $100 per affected employee per pay period. (Labor Code §2699(f)(2)). Any person who commits a day-of-rest violation also could be found guilty of a misdemeanor (as the Supreme Court noted in its decision), although the Labor Code's misdemeanor provisions are seldom criminally prosecuted.

If you have any questions about this decision or how it may apply to your business, please do not hesitate to contact us.

****

Tom Geidt
Telephone: 415.603.5003
Email: tomgeidt@gbgllp.com