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Employee Benefit Plan Review

Twin Decisions Impact Employers with Workforces in – or Traveling to – California

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The California Supreme Court's recent opinions in *Oman v. Delta Air Lines, Inc.*[1] and *Ward v. United Airlines, Inc.*,[2] clarify when, and under what circumstances, employees who even occasionally work in California are entitled to the protection of certain California wage-and-hour laws. The companion decisions hold the following:

- *No CBA Exception to the Itemized Wage Statement Requirement.* California Labor Code Section 226 ("Section 226") does not contain an exception for collective bargaining agreements under the Railway Labor Act ("RLA"), though the analogous wage statement requirement in Industrial Welfare Commission ("IWC") Wage Order 9 does contain such.
- *Employees Entitled to California Wage Statements and Payment Laws.* An employee is entitled to a Section 226 itemized wage statement and the protections of California Labor Code Section 204 ("Section 204"), establishing certain specific deadlines for twice-monthly pay, if that employee either 1) performs the majority of his or her work during the relevant pay period within California *or* 2) if the employee does *not* perform the majority of his or her work during the relevant pay period in any particular state but the employee is based in California for work purposes.
- *Other Factors Are Irrelevant.* The employer's location, employee's residence, location where the employee receives his or her pay, and the state that the employee (or employer) pays taxes to are irrelevant for this analysis.

Despite the clarity on these points, the decisions leave certain other questions unresolved – such as when employees are required to be paid California-compliant wages – and further chips away the protections of federal labor law in favor of a multistate patchwork quilt of regulations. Although unionized employers (especially airlines and railroads, both governed by the RLA) could formerly rely on national-scale collective bargaining agreements providing a consistent framework for operations, *Oman* and *Ward* continue the growing trend of imposing California law on every employer operating in the state. The decisions also open the door for applying more substantive protections of California law to even those employees only occasionally working in the state.

BACKGROUND

Oman and *Ward* arise from multiple class action lawsuits brought by pilots and cabin

crew generally alleging that their employers failed to issue Section 226 wage statements, failed to pay minimum wage for all hours worked and failed to timely pay wages. The airlines prevailed on summary judgment, with the respective courts holding that Section 226 and Section 204 did not apply to the class members and (in *Oman*) that Delta's pay system complied with California law. The plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit, and the Ninth Circuit, presented with unsettled questions of California law, certified questions to the California Supreme Court.

RLA Exception Holding

The California Supreme Court first turned to the argument that the airlines had no obligation to issue Section 226 itemized wage statements because of the exception contained in IWC Wage Order 9, governing employees in the transportation industry. Wage Order 9 requires that employers provide employees with an itemized wage statement, but it does *not* apply to "employees who have entered into a collective bargaining agreement under and in accordance with the provisions of the Railway Labor Act[.]" The airlines argued that because Wage Order 9 and Section 226 both contain itemized wage statement requirements, harmonizing Wage Order 9 and Section 226 required reading the RLA exception into Section 226.

The court squarely rejected this argument. The court noted that Section 226 predated the operative version of Wage Order 9 and that the IWC added the RLA exception to Wage Order 9 in 1976 – the last time the Wage Order was updated. Section 226, in comparison, has endured "many more changes" at the California Legislature's hands since that time, indicating that the Legislature's non-action was deliberate. Thus, the court refused to imply an RLA exception to Section 226 when the Legislature purposefully omitted it.

Section 226 and 204 Holdings

Prior to *Oman* and *Ward*, case law was a series of presumptions in favor of, and against, applying California law. The first presumption is that California law is intended to apply only within the state and not to conduct occurring outside of the state, while the second presumption is that courts generally interpret California's statutes to fully apply to conduct occurring within the state. These two presumptions, coupled with subsequent case law and the remedial nature of the Labor Code, left open questions about how to treat situations that did not fit neatly within either category, such as application of California law to maritime workers working off of the California coast and to nonresident employees working in California for days and weeks at a time.

The decisions leave perhaps the most critical question unresolved: What are employers' minimum wage obligations under the holdings?

With presumptions unhelpful, the court turned to the purpose of the statutes at-issue to determine the scope of their application. Because Section 226 is intended to guarantee that employees are paid correctly and adequately, Section 226 is necessarily connected to the location where the work is performed. However, such a simple "job situs" test leaves out critical nuances – for example, airline pilots and cabin crew "do not perform the bulk of their work in any one state," thus, a "job situs" test would leave them unprotected by any state's law.[3]

As California's wage-and-hour laws are construed in favor of offering employees protection, the court established a new test to determine whether Sections 226 and 204 apply. Under the new test, employees are covered under Section 226 and 204 (which has the same geographic reach as Section 226) if, during the pay-period at-issue, the "employee works the majority of the time in California," or, if they do not work a majority of their time in any state, "the employee has a definite base of operations in California, in addition to performing at least some work in the state for the employer."[4] Stated differently, Section 226 and 204 do not apply to "pay periods in which an employee works only episodically and for less than a day at a time in California unless the employee works primarily in [California] during the pay period, or does not work primarily in any state but has his or her base of operations in California."[5] The employer's location, employee's residence, where pay is received and where taxes are paid has no bearing on the analysis.[6]

Averaging Holding

Finally, the court examined Delta's particular pay practices in light of California's prohibition on "wage borrowing," the practice of taking pay owed under contract for one set of hours to average out underpaying the minimum wage for another set of hours.[7] An example of "wage borrowing" is paying an employee $50 per hour for the first four hours of work and $0/hour for the second four hours of work, equaling an average hourly rate of $25/hour (well in excess of the minimum wage). The issue with "wage borrowing" is that even though it theoretically satisfies the minimum wage requirement for each hour worked, "it does so only at the expense of reneging on the employer's contractual commitments" to the employee – to pay a

fixed hourly wage in excess of the minimum wage.[8]

The court explained that Delta's cabin crew were paid a certain amount per rotation, each of which contained a certain number of duty periods, flights, etc.[9] The compensation calculation ensured that under any one of four different formulas used to calculate the ultimate pay per rotation, each formula always resulted in payment of a sum which, if reduced to an hourly rate, exceeded the applicable minimum wage. Because Delta's contractual obligation was to pay "per rotation," and each rotation was guaranteed to be compensated at a rate greater than the minimum wage when broken down, no impermissible wage borrowing occurred. While the payment arrangement was "relatively unusual," it was not unlawful.[10]

Unresolved Questions and Future Implications

While *Oman* and *Ward* are helpful in framing employers' considerations involving California operations, no matter how brief, the decisions leave perhaps the most critical question unresolved: What are employers' minimum wage obligations under the holdings?

Although the court held that employees are entitled to Section 226-compliant wage statements if the employee works primarily in California during the pay-period *or* does not work primarily in any state but is based in California, the court did not state whether employees are entitled to California-compliant wages during those pay periods. For example, if wage obligations did follow the same test, a pilot not working primarily in any state but based in California would have to be paid California-compliant wages even if the pilot only flew into/out of California once during that pay period and operated elsewhere for the remainder of the pay period. This concern is even greater for international carriers whose operations mean, by default, that employees are not working primarily in any one state. The court left open the possibility that wage obligations may also operate in the same manner as Section 226 wage statement obligations.

The threat of class or representative actions alleging hypertechnical violations of Section 226 is undoubtedly heightened for employers under the new holdings. Each violation of Section 226 is punishable by a $50 penalty per employee for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, up to an aggregate of $4,000 per employee, and employees are "entitled" to costs and reasonable attorneys' fees in an action to recover Section 226 penalties.

Conclusion and Considerations

Given the severe penalties and hypertechnical nature of Section 226, employers should carefully examine California operations and determine, with the assistance of counsel, whether certain employees must receive California-compliant itemized wage statements and be paid on a certain time schedule. In certain industries, the holdings in *Oman* and *Ward* may make adopting non-traditional pay models attractive in order to comply with California law while continuing to remain operationally viable on a national and international scale.

Notes

1. No. S248726, __ Cal. 5th __ (2020).
2. No. S248702, __ Cal. 5th __ (2020).
3. *Ward* at 24-25.
4. *Id.* at 35.
5. *Oman*, Slip Op. at 32.
6. *Ward*, Slip Op. at 35.
7. *Oman*, Slip Op. at 19.
8. *Id.*
9. *Id.* at 24.
10. *Id.* at 31-32 (internal citation omitted).

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