Updates
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The Ninth Circuit Clarifies When California Law Applies to Employees With Remote Workplaces

Two recent decisions clarified the circumstances under which California law applies to remote workers. In *Bernstein v. Virgin America, Inc.*, ___ F.3d ___, 2021 WL 686281 (9th Cir. 2021), the U.S. Court of Appeals for the Ninth Circuit affirmed the application of California wage-and-hour laws to employees performing work outside of California under specific circumstances.

The *Bernstein* Decision

Prior case law established that California's wage-and-hour laws apply to non-California residents when they perform work in the state of California. In *Bernstein*, the Ninth Circuit addressed the converse question. Specifically, the decision addressed whether certain California wage-and-hour laws applied to employees who spent the majority of their working hours outside of California.

The lower court had certified a class of airline employees who worked in California for approximately 31.5% of their working hours. The remainder of their working time was spent out of state. However, none of the employees in the class worked more than 50% of their time in any one state, and none spent more of their time working in a state other than California. Accordingly, these employees were considered to be based in California.

The Ninth Circuit agreed that California law regarding waiting time penalties, overtime, meal and rest breaks, and wage statements applied to the flight attendants who worked the greatest percentage of their hours within California. The decision was an expansion of a prior California Supreme Court decision, *Ward v. United Airlines* , 9 Cal.5th 732 (2020), which found that California wage statement requirements applied to California-based employees even if they did not perform the majority of their work in any one state.

The court, however, determined that Virgin was not subject to heightened Private Attorney General Act (PAGA) penalties. This was because no law or authority had previously established that California wage-and-hour law applied to California-based employees who worked the majority of their working hours outside of the state. Accordingly, the Ninth Circuit felt Virgin should not be subject to heightened penalties for violations that occurred before the company had reason to believe California law applied under the circumstances presented.

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