

**In This Issue:**

November 2009

Federal district court in California holds that time spent interviewing by staffing agency employees for temporary customer work assignments is compensable under California Law. However, time spent preparing for and commuting to the client interviews is not compensable.

## **Staffing Companies Face Potential Exposure for Interview Time**

**By Michael F. McCabe and Elizabeth Staggs Wilson**

In a putative class action pending in the federal court for the Northern District of California, *Sullivan v. Kelly Services, Inc.* (Case No. C 08-3893 CW), Judge Claudia Wilken, ruling on cross motions for summary judgment, has held that the time spent interviewing by a Kelly Services employee seeking temporary work assignments with Kelly Services' clients is compensable under California law. However, Judge Wilken also ruled that the time spent preparing for and commuting to the client interviews was not compensable, nor was Kelly Services required to reimburse the employees for expenses incurred in attending the interviews.

The plaintiff in *Sullivan*, asserted four causes of action for: (1) failure to pay the California minimum wage for the time spent attending, preparing for and traveling to and from interviews with Kelly Services' customers; (2) failure to reimburse her for expenses incurred in connection with the interviews; (3) provision of inaccurate wage statements and (4) unfair business practices. In a prior action between the same parties, Judge Wilken had granted summary judgment in favor of Kelly Services on plaintiff's claim that Kelly Services failed to immediately pay all wages due at the end of each temporary assignment, holding, in part, that that plaintiff's employment relationship remained ongoing in between assignments.

The court found that under the facts of this case, the employees were "subject to the control" of Kelly Services and Kelly Services "suffered or permitted" the employees to work in connection with the interviews. The court distinguished this case from other circuit court of appeals decisions that held that time spent in job interviews by independent job applicants (non-temporary workers) was not compensable, by focusing on the role played by Kelly Services in the interview process. The court also rejected several defense arguments: that the client interviews were "voluntary," instead finding that the failure to interview would prevent the employee from being considered for 50% of the job assignments; and that the employees were not employed in between work assignments, instead finding this argument inconsistent with the position taken by the employer in the prior action between the parties.

In addition, the court refused to apply the “primary benefit” analysis available under federal law, which provides that time spent for the primary benefit of the employee, not employer, is not compensable. The court, relying on a California Department of Labor Standards Enforcement opinion letter found that the federal law test is less protective of employees’ rights than is California law.

In denying the plaintiff’s motion for summary judgment for waiting time penalties and her claim for damages under California Labor Code Section 226 for inaccurate wage statements, the court found that the plaintiff had not submitted evidence that Kelly Services acted willfully in not compensating plaintiff for her interview time, as Kelly Services did not believe the time was compensable. The court also found an absence of evidence that Kelly Services acted knowingly and intentionally in providing wage statements that did not include compensable time.

If this decision is upheld and/or adopted by state courts in California or elsewhere, staffing companies may face claims for unpaid wages for time spent by their employees interviewing with their clients for assignments. Unless a staffing company can show that its employees are not under their control in connection with the interview process or that they do not “suffer or permit” such activity by their employees, they will face potential liability for the time employees spend interviewing and be required to compensate employees for their time according to applicable minimum wage rates. This could result in staffing companies not allowing, or limiting, the ability of candidates to interview with clients in advance of the commencement of assignments, or require a staffing company to increase the rates charged to its customers for this added expense.

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