

## In This Issue:

September 2010

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## Staffing Client Interview Pay Issue Spreads in California

By George Reardon

Staffing firm clients in California should take note of a possible trend by plaintiffs' counsel seeking payment for time temps spend interviewing for potential placement with clients.

### The Class Actions

A new California class action, *Gore v. ABTI Inc., et al*, No. BC443878 (Cal. Super. Ct. filed Aug. 30, 2010), has been filed under California's wage payment law for the failure of a staffing firm to pay temporary employees for time spent interviewing with clients.

In a similar ongoing suit, *Sullivan v. Kelly Services*, No. C 08-3893 CW (N.D. Cal. 2009), a federal judge in California ruled last year that temporary employees' client interview time (but not their commuting expenses or time for preparation and travel) was time worked for which wages must be paid under California law. The case is currently pending. Confirmation or rejection of that seminal ruling as governing law by higher courts may take a long time, but at least one plaintiff's lawyer has decided to launch this new case right away.

Other suits may follow, as it is unclear how many staffing firms pay for client interviews and that staffing clients, unsatisfied with staffing firm quality guarantees, have been demanding pre-assignment interviews for all skill levels with increasing frequency over recent years.

### The Theories

The plaintiffs' theory in the two pending cases relies on a particular aspect of California wage payment law – that interview time is compensable because of the allegedly high degree of control that the staffing firms exerted over employees in the client interview process.

Both complaints also advance in passing the concept that the employees giving

interviews are essentially selling (and thus working) for staffing firms by competing to be picked for assignments by clients. This theory, while possibly helpful in California, may gain more traction under the federal Fair Labor Standards Act, which applies nationwide and links time worked to benefits conferred on the employer, in addition to the control aspect that California law emphasizes.

Ironically, the staffing industry's traditional position that an employment relationship continues during idle periods between active assignments can prevent staffing firms from asserting in client interview cases that candidates are not their employees while on interviews. Indeed, the *Kelly* case grew out of an earlier case involving termination pay, in which the interim employment relationship had been vigorously asserted by Kelly as proof that no "discharge" occurs when temporary assignments end.

## The Exposure

This issue is not inherently as financially dangerous as many other kinds of wage/hour claims. Interviews occur only at the beginning of each assignment, not throughout them. Although interviews may involve several candidates for each assignment, the total time spent interviewing by these candidates is relatively small compared to the hours and wages involved in ongoing wage payment issues like meal breaks, donning and doffing requirements, and systematic off-the-clock practices. However, in California, wage payment violations can also lead to related claims for pay stub inaccuracies, waiting time penalties, and civil penalties, which can magnify the exposure and make class actions worthwhile for plaintiffs' counsel. And sometimes, as in the *Kelly* case, one issue can lead to others.

## What To Do

Short of discontinuing client interviews, staffing firms could follow two alternate strategies in response to this emerging issue.

One is to start paying temporary employees for client interviews. No law forbids voluntary wage payments that turn out not to have been legally required, and the employees are actually doing something for the pay. The pay rate could be the minimum wage instead of the person's usual pay rates, as long as that rate is disclosed and agreed to by the temporary employee before client interview commitments are accepted. Competitive pressures and client expectations may suppress attempts to bill staffing clients for such time, so some of these interviews may end up as pure staffing firm expense. To the extent clients agree to be billed for them, the frequency of requests for interviews may decline.

Staffing firms may worry that beginning to pay for client interviews might be viewed as an admission that the past practice of nonpayment was improper. But, even if that is a risk, the longer a staffing firm pays for interviews, the smaller its exposure to past wages will be and the less attractive it will be as a potential defendant, since the law limits the period for which back wages can be recovered. And establishing an agreed-to minimum wage for interviewing would remove the risk of having a court rule that each employee's last, average, or typical pay rate would be the proper measure of wages owed.

The other strategy is to hope for favorable controlling court opinions and to make operational changes in the meantime that would make any suit involving the issue more difficult for potential plaintiffs to win on the facts. Such measures might include abandonment of all expressions of the "employed between assignments" theory, procurement of waivers or acknowledgements from temporary employees that reflect the non-payment policy, emphasis on the voluntariness of interviewing, and actual reduction of the degree of control that placement staff exert over temporary candidates sent for interviews.

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George Reardon is Special Counsel in Littler Mendelson's Houston office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Reardon at greardon@littler.com.