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Walking Blindfolded through California's Regulatory Minefields

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Small business owners in California are a brave bunch. Not only must they navigate the perpetually changing seas of federal regulation, but they must also traverse a particularly treacherous minefield under California law. Yet, at least they can rest assured that they won't be sued if they act in accordance with best available guidance from state regulators—right?

Well, maybe not! After all, California's regulatory environment is somewhat like the topsy-turvy world of Alice and Wonderland's rabbit hole. In many cases, you will find that perfectly reasonable conduct—that you might assume to be permissible anywhere else in the world—may get you in a load of trouble here.

Of course, that's largely true because the Legislature is seemingly incapable of passing a bill without including a new cause of action, authorizing someone to sue over something. Still, however cumbersome California law may be, one would think that you could at least trust that you stand on firm legal footing when relying on official guidance from a state agency. But, you may be wrong—that is, depending on what the California Supreme Court says in Mendoza v. Nordstrom.

In that case a former employee of Nordstrom is suing the company for allowing him to work seven days straight. The former employee alleges that this was a violation of the California Labor Code's Day of Rest statutes, which provide that an employee is "entitled," and an employer must allow a day of rest, "one day therefrom in seven." That requirement has been on the books since the late Nineteenth Century, and in its current wording since before 1950. But it has always been understood as requiring a day of rest once for each fixed workweek—not on a rolling basis, as the employee argues in this case. And for years, the Department of Labor Standards Enforcement has provided guidance that reinforced this understanding.

Specifically, DLSE has long said that, if an employee's workweek begins on Monday, and ends on Sunday, the employee can work from Wednesday through Sunday, and through Friday of the

following workweek, without incurring overtime pay. The guidance specifically says that, in that scenario, an employee may work 10 days in a row without earning overtime. Of course, that would certainly lead any reasonably prudent employer to think it was safe to schedule an employee 10 days in a row—affording day's off on a fixed weekly basis. Nonetheless, the employee in this case maintains that Nordstrom committed a misdemeanor offense in allowing him to work that sort of schedule.

As the National Federation of Independent Business argued in a recently filed amicus brief, it's simply unfair to hold businesses liable for conduct that state regulators said was permissible. Indeed, there are serious due process concerns with springing regulatory surprises on small business owners who have acted in accordance with best available guidance. Further, it's absurd to think that DLSE would encourage business owners to walk into regulatory traps.

Equally absurd is the notion that an employer should be sued for accommodating an employee's request to work as many hours as possible—or simply for asking an employee if they might like to take a shift on a day otherwise scheduled for rest. But that is exactly what will happen if the Supreme Court holds that an employee cannot choose to waive his or her "entitle[ment]" to a day of rest. And here as well, this interpretation stands at odds with official guidance from DLSE, which has long indicated that employers may work on the seventh day of a workweek with overtime pay.

Further, the radically paternalistic rule advocated by the employee in this lawsuit would force employers to reject requests from employees to work on the seventh day of a workweek regardless of whether the employee has compelling reasons for wanting to take on more work. As NFIB pointed out in its brief—joined by the Cato Institute, Reason Foundation and a handful of employees who want the prerogative to choose to work seven-days a week when it suits them—there are many legitimate reasons why an employee may want to work on the seventh-day of a workweek. Indeed, an employee might be saving for an engagement ring, a wedding, a college tuition bill, or a trip to Europe. Alternatively, an employee might want to work as much as possible during a pay period because he or she plans to take-off time for exams, or for a vacation, in the near future.

There is simply no reason to think that the Legislature would have intended to deny employers the flexibility necessary to accommodate those requests. What is more, if employees are denied the right to choose to engage on work on the seventh day of a workweek, then employers would be forced to adopt policies flatly prohibiting even exempt employees from engaging in work on the seventh day of a workweek (even from checking their e-mails). That would not only be difficult for employers to enforce in practice, but it would be an inconvenience for salaried employees who may want the flexibility to work a little on the weekend in order to free-up their schedules for the following week. For all of these reasons, California employers should keep their eye on Mendoza v. Nordstrom in the coming months.