

CALIFORNIA HIGH COURT TAKES ON KEY EMPLOYMENT LITIGATION ISSUES

By

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The Problem. As many multi-state employers are learning to their dismay, California's wage and hour laws are not the same as those established by federal law. In recent years, companies doing business in California have been plagued with lawsuits challenging their wage and hour practices. These cases, both class actions and individual ones, have targeted a wide variety of industries, running the gamut from insurance companies, to restaurants, drug stores, retail and fast food chains, to auto suppliers, and more.

By far the most common complaint is that the employers have improperly classified employees as exempt from state overtime laws. Thus, for example, plaintiffs' class action attorneys argue that on-site managers of a fast food chain really spend most of their time on non-management tasks and so are entitled to overtime, even though they have the title "managers."

The dispute centers on standards or "wage orders" promulgated by the state Industrial Welfare Commission. These wage orders govern how to determine if an employee is exempt and thus not entitled to overtime. While the standards differ somewhat according to the particular industry involved, the basic premise is the same. For example, anyone employed in "technical, clerical, mechanical, or similar occupations" is entitled to hourly overtime unless employed in an "administrative, executive or professional" capacity. 8 CAL. CODE REGS., § 11040. Generally, exempt employees are those whose duties involve office or non-manual work directly related to the employer's management policies or general business operations, who regularly and customarily exercise discretion and independent judgment, or who perform work along specialized or technical lines under only general supervision. *See, e.g.*, 8 CAL. CODE REGS., § 11040(1)(A)(2)(4). The meaning of these terms is hotly debated.

Many such wage and hour overtime cases have been filed, often with shocking results. For example, in 2001, a Northern California jury assessed \$90 million in unpaid overtime against Farmers Insurance Exchange for allegedly mis-classifying (and under-paying) 2,400 claims adjusters as exempt salaried employees instead of hourly wage earners. *See, e.g., Insurer Hit With \$90M Overtime Award*, www.cbsnews.com/stories/2001/07/11/national/printable300916.html; *see also Bell v. Farmers Insurance Exchange* (2001) 87 Cal.App.4th 805. In a similar case, Amerco agreed to a multi-million dollar settlement

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to resolve a pending overtime compensation action against a subsidiary, U-Haul International. See www.members.tripod.com/alanhawk/fi-452.html.

Are Officers And Directors Personally Liable For These State Overtime Violations? Until now, the employer has traditionally been the sole defendant in these wage and hour cases. Now, however, that is open to debate. As of the summer of 2003, the ante has been raised. The California Supreme Court has agreed to hear a case where it will decide whether directors, officers, or upper level management can be *personally* and *individually* liable for their company's wage and hour violations. *Reynolds v. Bement*, formerly published at 107 Cal.App.4th 738 (opinion superseded by grant of review), *review granted* 7/23/03, Case No. S115823.

The intermediate state court of appeal had concluded that, though the word "employer" used in the wage orders may sometimes include upper management, only the actual *employer entity* is responsible for wage and hour violations. The issue presented, as framed by the Supreme Court, is whether officers and directors of a corporate employer may be civilly liable for "causing the corporation to violate" the statutory duty to pay minimum and overtime minimum wages, either because the officers and directors "fall within the definition of employer" in the relevant wage order, or on some other basis. The facts in the *Reynolds* case are far from ideal, from the employer's perspective.

The *Reynolds* case is not yet fully briefed, and, given the public importance of the issue, many organizations are expected to weigh in with *amicus* briefs. The California Supreme Court not only welcomes friend-of-the-court briefs but relies heavily on them. Since it only accepts issues of widespread public importance, the court is profoundly concerned with the potential industry-wide consequences of its contemplated rulings. Frequently, friends of the court provide a better and broader perspective than the parties, who are confined to the particular case and facts in issue and often lack the "big picture" view. See Christina J. Imre, *Friendly Persuasion: The Role Of The Amicus Brief In Supreme Court Practice*, May 2001, 23 CEB CIV. LIT. RPTR. 80.

May These Wages and Hour Lawsuits Proceed As Class Actions? Another related, burning issue up for decision by the state high court is whether these wage and hour lawsuits are suitable for treatment as class actions. *Sav-On Drug Stores, Inc. v. Superior Court (Rocher)*, formerly published at 97 Cal.App.4th 1070 (opinion superseded by grant of review), *review granted* 7/17/02, Case No. S106718. Class action status is typically a threshold question that can make or break the plaintiffs' ability to pursue the case. One of the most hotly disputed questions in these matters is whether the individual employee truly qualifies as exempt from the overtime laws. At issue in *Sav-On* is whether, and when, a court may decide that issue on a class-wide basis.

In *Sav-On*, the answer of the intermediate court of appeal was "no," that class treatment was inappropriate in these cases. It concluded that whether an individual class member is exempt depends on his or her individual duties, and this must be decided on a case-by-case basis, which precludes certification of a class, virtually as a matter of law. However, dozens of such cases have been certified in California courts. The *Sav-On* matter has been fully briefed and is awaiting oral argument in the state high court.

Of late, many have questioned whether California is creating an increasingly-hostile environment for businesses large and small. The state Supreme Court's decisions in *Reynolds* and *Sav-On* may go a long way toward answering that question.