National Association of Manufacturers

Quentin Riegel

Vice President, Litigation and

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Law Department

October 11, 2007

The Honorable Ronald M. George, Chief Justice,
and the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Harris v. Superior Court of Los Angeles County (Liberty Mut. Ins. Co.)*
Supreme Court Case No. S612754
Court of Appeal, Second Appellate District, Case Nos. B195121 and B195370
Amicus Letter in Support of Petition for Review

Dear Chief Justice George and Associate Justices:

The National Association of Manufacturers ("NAM") submits this letter as *amicus curiae* in support of the petition for review in *Harris v. Superior Court of Los Angeles County* pursuant to Rule 8.500(g) of the California Rules of Court.

INTEREST OF *AMICUS CURIAE*

The NAM is the nation's largest industrial trade association, representing thousands of small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM has more than 600 corporate members in California alone.

The NAM's appellate litigation program focuses judicial attention on major cases affecting manufacturers. The NAM advances manufacturers' interests in the courts to ensure that manufacturers are treated fairly by the legal system, and that the laws are applied in a reasonable, common-sense fashion that do not impose unfair pressures and burdens on manufacturers.

The classification of employees under the overtime provisions of federal and state law is very important to our members, as an error in such a classification could result in

substantial liability for violation of the Wage Orders. Any change in the way that California interprets the administrative exemption in Wage Order 4-2001 affects retrospective liability as well as prospective planning, budgeting, employee relations and competitiveness. The court of appeal in this case has issued a ruling that throws considerable doubt into the expectations that manufacturers have had over the interpretation of the administrative exemption, and the NAM files this amicus letter to bring to this Court's attention our perspective on why this decision should be reviewed.

ARGUMENT

I. This Case Affects Many More Employees Than Insurance Claims Adjusters

If the court of appeal's decision stands, disputes like this one are likely to recur. Among other things, the administrative exemption applies to any employee (1) whose job involves "office or non-manual work directly related to management policies or general business operations," (2) who "customarily and regularly exercises discretion and independent judgment," (3) who is "employed in a bona fide executive or administrative capacity," and (4) who is "primarily engaged in duties that meet the test of the exemption." Wage Order No. 4-2001. Jobs that fall under the administrative exemption in the manufacturing sector include work in many functional areas, including finance, statistics, purchasing, safety and health, human resources and labor relations. See 29 C.F.R. § 541.201(b).

Classification of workers under the administrative exemption, according to the lower court's ruling, turns on whether such workers primarily do work "at the level of policy or general operations," not simply the day-to-day carrying on of the company's operations. *Harris v. Superior Court*, 64 Cal. Rptr. 3d 547, 560 (Cal. Ct. App. 2007). In this specific case, even though claims adjusters plan, represent the company, advise management, and negotiate, all of which the FLSA cites as examples of "administrative operations of the business," 29 C.F.R. § 541.205(b) (2000), those duties do not satisfy the stringent test used by the court of appeal, because they supposedly do not relate to policy or general operations. This overly stringent test, if applied beyond the insurance context and into the manufacturing environment, would result in the overturning of scores of decisions from the past half-century and would violate the principle of *stare decisis*.

For example, this overly stringent test would conflict with a decision like the one in an Illinois case, *Walsh v. Brad Foote Gear Works, Inc.*, 36 Lab. Cas. (CCH) P65,293

(N.D. Ill. 1959), where a cost estimator was held to be covered by the administrative exemption because his job of preparing cost estimates involved determining the type of material to be used, the machine to be employed, and the steps to be followed in the production process.

Similarly, the field inspector for an oil pipeline company who was held by the court in *O'Dell v. Alyeska Pipeline Service Co.*, 856 F.2d 1452 (9th Cir. 1988), to be covered by the administrative exemption because his duties included *representing* the company in contracts with state inspectors, *making recommendations* for waivers of specifications, and *negotiating* with the project supervisor to handle any site discrepancies, would *not* be exempt under the court of appeal's overly stringent test, because his duties would not sufficiently relate to policy or general operations.

In a final example, the expediter and materials inspector who was held to be an exempt administrative employee in *Hartwell v. E. I. Du Pont de Nemours & Co.*, 14 Lab. Cas. (CCH) P64,241 (S.D.N.Y. 1947), because he performed duties that required technical training and determined whether vendor products conformed to specifications, even though he was not responsible for determining the method of inspection or for the specifications themselves, would fail to meet the overly narrow standard imposed by the court of appeal for the administrative exemption.

Additionally, the test used by the court of appeal ignores the fact that, under the FLSA effective as of the Wage Order's date, employees do not necessarily need to "participate in the formulation of management policies or in the operation of the business as a whole" to be doing work "directly related to management policies or general business operations" and thus be covered by the administrative exemption. 29 C.F.R. § 541.205(c) (2000). In fact, the FLSA states that employees need only *affect* policy or have the responsibility to *carry out* policy to be doing work "directly related" to management policies or to general business operations. *Id.* Certainly the aforementioned duties of planning, representing the company, advising management, and negotiating fall within this reasonably broad definition.

The lower court's restrictive interpretation of the administrative exemption would throw into question the classification of many jobs in the manufacturing sector in California.

II. Interpretations of the Wage and Hour Laws Should be Consistent and Predictable

Many California manufacturers also have operations in other states, and must develop payroll systems to satisfy various state statutory and regulatory requirements. They have labored under federal regulations that have been frozen in time for more than 50 years, until the U.S. Department of Labor finally updated them in 2004. The outdated, confusing and complex rules required workers and employers to spend years in court to determine a worker's status under the wage-and-hour laws.

Although major changes were made to the FLSA overall in 2004, only minor changes were made to the administrative exemption, with its language still mirroring that of California's Wage Order 4-2001. The federal regulation defines an administrative employee as one whose "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers . . . ." 29 C.F.R. § 541.200(a)(2) (2007). California's Wage Order has the word "policies" after "management," as did the pre-2004 FLSA. In regard to claims adjusters, the Ninth Circuit recently noted, in a case where it held that nearly 2,000 former and current claims adjusters were exempt, that "[f]or more than 50 years, the Department of Labor has considered claims adjusters exempt from the Fair Labor Standard Act's overtime requirement." *Miller v. Farmers Ins. Exch. (In re Farmers Ins. Exch.)*, 481 F.3d 1119, 1124 (9th Cir. 2006). With such a longstanding interpretation made by the Department of Labor and supported by the courts, one wonders on what basis the court of appeal could hold that claims adjusters are no longer covered by the administrative exemption.

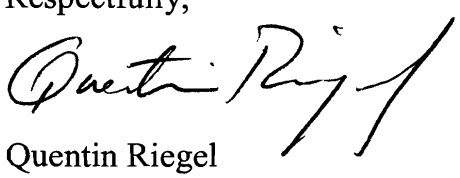
Regardless of the court of appeal's motivation, because state regulations with respect to the administrative exemption are so similar to the current and past federal regulations, and because California requires that they be construed in the same manner, any case that departs from settled principles and expectations deserves particularly close scrutiny. Manufacturers are in a quandary as to how to comply with standards that are so clear in written form but so uncertain in judicial interpretation.

CONCLUSION

All companies need certainty and predictability in the law to reasonably conduct business. The court of appeal's decision leaves much uncertainty as to what test applies in classifying an employee under the administrative exemption. That uncertainty will lead to increased litigation by plaintiffs hoping to take advantage of the unsettled state of the law in this important area, and could needlessly cause many manufacturing companies to reevaluate job classifications that had heretofore been fully vetted and properly classified.

For the foregoing reasons, the NAM urges the Court to grant Liberty Mutual's petition for review.

Respectfully,



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cc: All Counsel of Record (see attached proof of service)

PROOF OF SERVICE BY MAIL

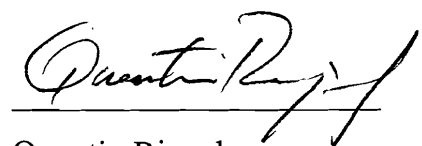
I am employed in Washington, District of Columbia. I am over the age of 18 and not a party to the within action. My business address is 1331 Pennsylvania Avenue, NW, Suite 600, Washington, DC 20004.

On October 11, 2007, I served the foregoing document described as AMICUS LETTER OF NATIONAL ASSOCIATION OF MANUFACTURERS on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as set forth in the attached Service List.

I am "readily familiar" with my office's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at 1331 Pennsylvania Avenue, NW, Suite 600, Washington, DC 20004 in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing affidavit.

I declare under the penalty of perjury that the forgoing is true and correct.

Executed on October 11, 2007, at Washington, District of Columbia.



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Harris v. Superior Court of Los Angeles County (Liberty Mut. Ins. Co.)

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