Docket No. 09-16370

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON CAMPBELL and SARAH SOBEK, *et al.*, Plaintiffs-Appellees,

v.

PRICEWATERHOUSECOOPERS LLP, Defendant-Appellant.

Appeal From The United States District Court
For The Eastern District Of California
The Honorable Lawrence Karlton
No. 06 CV-02376-LKK-GGH

BRIEF AMICUS CURIAE OF EMPLOYERS GROUP, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT PRICEWATERHOUSECOOPERS LLP

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Employers Group, the Chamber of Commerce of the United States of America, and the California Chamber of Commerce all certify that none of them has a corporate parent, and that no publicly held corporation owns 10% or more of the stock of any of them.

Dated: November 9, 2009

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STATEMENT OF CONSENT TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-2(a).

INTRODUCTION

This wage-and-hour class action has extremely important implications for many California employers, and not just those employing accountants. This is because the District Court's ruling arguably could be extended to serve as the basis for a suit claiming that unlicensed employees working in any of the other professions enumerated in the Wage Order were improperly classified as exempt. The ruling also could serve as the basis for any argument that any employee treated as qualifying for the Administrative Exemption was misclassified. Thousands of California employers could be subject to these types of claims if the District Court's ruling is allowed to stand.

In granting summary adjudication to Plaintiffs-Appellees Jason Campbell and Sarah Sobek ("Plaintiffs"), the District Court ruled as a matter of law that a class of accounting professionals employed by Defendant-Appellant PricewaterhouseCoopers LLP ("PwC"), who had not yet obtained their Certified Public Accounting ("CPA") licenses from the State of California, were precluded from meeting the criteria for exemption from California overtime requirements set forth in the Professional Exemption and the Administrative Exemption of California Wage Order 4-2001 ("Wage Order").

The crux of the Court's ruling hinged on two purely legal determinations. First, the Court articulated a new "general supervision" requirement for the Administrative Exemption that places emphasis on the extent to which an employee's work is reviewed, rather than the extent to which the employee is supervised while the employee is working.

Second, the District Court made an unprecedented and unsupported determination regarding the relationship between subsection (a) of the Professional Exemption – which articulates a path to exemption involving a threshold showing of licensure in one of eight enumerated professions, including accounting – and subsection (b) of that exemption, which articulates a different path to exemption involving a threshold showing that is unrelated to licensure. The District Court held that unlicensed accounting professionals were precluded as a matter of law from qualifying for exemption under the alternative test set forth in subsection (b) merely because they worked in one of the professions articulated in subsection (a).

If upheld, the District Court's Order in this regard ("Order") will yield unpredictable and costly results for California employers relying on the professional and administrative exemptions. The potential impact of the Order is not limited to unlicensed professional accountants or to accounting firms.

The District Court's newly-articulated concept of "general supervision" will cause utter confusion in the employer community regarding its meaning and application, and potentially exclude from the reach of the exemption thousands of employees traditionally considered exempt administrators. Moreover, it is likely that the plaintiffs' bar will attempt to extend the Court's Professional Exemption determination to provide that, as a matter of law, an unlicensed employee working in any of the professions enumerated in the Wage Order can never qualify for the professional exemption. Finally, the District Court's determination certainly will cause a flood of additional wage-and-hour litigation in California, and thereby provide an impetus for employers to leave the State.

For these and other reasons set forth more fully below, the District Court's Order should be reversed.

STATEMENT OF IDENTITY OF AMICI, THEIR INTEREST IN THE CASE, AND THEIR AUTHORITY TO FILE

The **Chamber of Commerce of the United States of America** ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents 300,000 direct members and indirectly represents over three million businesses and business organizations of every size and in every industry sector and geographic region of the country. The U.S. Chamber has

been a voice for the business community for more than ninety years. To fulfill this role, the U.S. Chamber frequently files *amicus curiae* briefs in the Supreme Court of the United States, in this Court, and in other courts around the country in cases of vital concern to American business.

The **California Chamber of Commerce** ("CalChamber") is non-profit business association with over 15,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues.

CalChamber often advocates before federal and state courts by filing *amicus curiae* briefs in cases that impact California employers and employees. The proper classification of employees under California's wage and hour laws is a subject that continues to be litigated. As such, CalChamber submits this brief on behalf of its employer members seeking to find clear guidance on how to properly apply California's wage and hour laws.

The **Employers Group** is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes in virtually every industry, which collectively employ nearly three million employees in the state. The Employers Group has a vital interest in seeking clarification and guidance from this Court regarding employment issues for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is uniquely able to assess the potential impact and implications of the District Court's Order in this case. This is particularly true where, as here, the Order on appeal has the potential for impacting many different industries in California beyond accounting. The Employers Group has members in all or virtually all of these industries, and can provide unique insight into the practical ramifications of the District Court's Order on employers and employee alike.

If upheld, the District Court's Order will have widespread implications extending well beyond PwC and California's accounting

industry. The District Court's Professional Exemption ruling was entirely a matter of statutory interpretation that in no way hinged on facts particular to the accounting profession, and, as a result, may impact employees in each of the remaining seven professions listed in subsection (a) of the exemption. The District Court's Administrative Exemption ruling has an even wider potential reach. Indeed, virtually every employer in California invokes the Administrative Exemption as a basis for exemption of some of its employees.

The District Court's erroneous rulings regarding these exemptions cast doubt on long-standing employment practices of thousands of employers, as well as the exemption status of hundreds of thousands of California employees. In the present economic climate, this uncertainty may, for some employers, prove to be too great a cost of doing business in California. For these reasons, the members of the Employers Group, the U.S. Chamber and the CalChamber all have a substantive interest in this matter.

ARGUMENT

I. THE DISTRICT COURT'S ORDER CONFUSES CALIFORNIA EXEMPTION ANALYSIS AND UNFAIRLY PUNISHES EMPLOYERS FOR HAVING RELIED ON THE WAGE ORDER'S PLAIN LANGUAGE.

It is no easy task for California employers to apply the complicated set of statutory, regulatory and judicial guidance in determining whether their employees should be classified as exempt from California overtime requirements. In making this determination under the Wage Order's administrative and professional exemptions, employers have for years rightfully focused, first and foremost, on the plain language of the Wage Order.

The District Court, however, took the unprecedented step of disregarding the plain language of the Wage Order on which California employers have relied for so long, and fashioning an entirely new meaning of the administrative and professional exemptions. If upheld, this judicial usurpation of legislative authority will cause widespread confusion in the employer community in California and lead to potentially absurd results. California employers should not be punished for having followed the plain guidance of the Wage Order.

A. The District Court's Erroneous "General Supervision" Determination, If Upheld, Will Yield A Confusing Regulatory Framework That Could Preclude Many Employees From Being Administratively Exempt.

The District Court's Administrative Exemption determination focused on the requirement, set forth in subsections (d) and (e) of the exemption, that employees "perform" work and "execute" assignments and tasks "under only general supervision." *See* Order at 37:24-41:2; Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(d)-(e). Despite this language, which plainly and clearly hinges the "general supervision" requirement on the employee's level of supervision *while she performs her work*, the District Court created an entirely new definition of the concept. In contrast to the definition contained in the Wage Order, the Court-created definition focuses on the degree to which the employee's work is reviewed *after it has been performed.* Citing to inapposite position titles from the California Division of Labor Standards Enforcement ("DLSE") Enforcement Policies and Interpretations Manual,[1] and applying its own "common sense," the Court determined that "general supervision" means "supervision in the form of review or approval of overall results and conclusions." Order at 38:14-39:4.

[1] The DLSE Manual has been held to be an unenforceable underground regulation issued in violation of the Administrative Procedures Act. *Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal.4th 557,* 576 (1996).

This invented definition of "general supervision," if upheld, will be extremely confusing for employers to follow because of the District Court's failure to have provided any guidance regarding its meaning or application. Indeed, nowhere in its Order did the Court define what constitutes the "review or approval of overall results and conclusions." More significantly, nowhere in its Order did the Court define what constitutes *more* than "only general supervision" under this new framework – the very issue with which employers are most concerned when determining whether to classify their employees as administratively exempt. Thus, not only did the District Court inappropriately and unnecessarily attempt to re-write the Administrative Exemption's "general supervision" requirement in a manner that disregards the plain text of the Wage Order, it failed to finish what it started and provide an indication of what does, *and does not*, constitute "only general supervision."

Without more, employers will be forced to resort to pure guesswork in making their day-to-day exemption determinations. Employers are entitled to more guidance than this when attempting to comply with the requirements of the Wage Order.

In addition to confusing employers, the District Court's "general supervision" definition is highly susceptible to causing thousands, if not tens

of thousand, of employees traditionally considered to be exempt to fall outside of the scope of the exemption. Though the Court's new definition of "general supervision" is far from clear, the Court did suggest that where an employee's work is reviewed on an *interim* basis, the employee is subject to more than "only general supervision." *See* Order at 39:15-18.

Thus, under the District Court's newly-created standard, an employee might not satisfy the newly-articulated "general supervision" requirement if, for example, the employee's work is reviewed at any point before the final product is completed, or with an eye towards details that underlie, but are not a part of, the "overall" results or conclusions. If this were the case, because review of interim results and conclusion is an extremely common practice, the administrative exemption determinations previously made by virtually every California employer potentially are subject to attack.

The employment of marketing managers in large corporations provides an instructive example of the potentially absurd effect of the District Court's ruling. These employees are traditionally responsible for developing their companies' strategic marketing plans and, therefore, perform work that is extremely important to the running of their businesses. In most cases, these employees would easily meet the traditional battleground elements of the Administrative Exemption, including, for

example, subsection (b)'s requirement that they "customarily and regularly exercise discretion and independent judgment" in the performance of their duties. *See* Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(b). Yet most such employees – and, indeed, most employees at all levels of work in California – are often subject to the review of significantly more than just their "overall results and conclusions."

A vice president of marketing, for example, may review a marketing manager's work periodically before it is finalized and ready for approval. The vice president may also request to see some of the work underlying the marketing manager's "overall results and conclusions" in order to understand or otherwise substantiate them. And, in turn, the vice president's related proposals are likely reviewed several times before they are finalized and sent to the company's board of directors for approval.

Such scenarios are common in all industries and at all levels, and the District Court's new definition of what constitutes "only general supervision," if upheld, would dramatically increase the probability that previously-made determinations that employees are administratively exempt will be attacked.

For California employers, however, these are not mere hypothetical situations, but real questions that they will have to answer regarding

hundreds of thousands of employees. Indeed, as to the traditionally administratively exempt position of marketing manager alone, the exempt status of an estimated 31,000 California employees previously considered exempt would be subject to attack if the District Court's Order is upheld. *See* www.labormarketinfo.edd.ca.gov (visited on October 9, 2009).

Given the number of other California employees who are subject to similar levels of supervision, the overall number of individuals impacted in California by the court's "general supervision" determination could easily reach the tens or even hundreds of thousands. This will no doubt lead to a dramatic increase in wage-and-hour litigation against California employers (*see* Part B, *infra*).

Amici understand that the American Institute of Certified Public Accountants ("AICPA") intends to file a brief *amicus curiae* demonstrating how the District Court misunderstood the Auditing Standards promulgated by the AICPA as it relates to the supervision of unlicensed accountants.[2] Nevertheless, *Amici* wish to emphasize two points.

First, the Auditing Standard that relates to supervision, AU § 311.11, clearly provides that the extent of supervision appropriate in a given instance varies with a number of factors, including the complexity of the subject

matter and the qualifications of the accountants assigned to it. The need for this flexibility is closely related to the fact that AU §§311.03 and 311.05 require that each audit be planned in light of the particular circumstances pertinent to the client.

Second, in reaching its conclusion that audit associates cannot qualify for the Administrative Exemption because they operate under more than "general supervision," the District Court erroneously relied on two subsections of AU § 311. Order at 39:10-15. However, at most, these provisions merely state that the work of audit associates is to be "reviewed" and that significant matters encountered by those assisting in the audit should be brought to the attention of the partner in charge of the audit "so that he may assess their significance." This is fully consistent with these assistants working only under "general supervision."

This conclusion is further supported by other subsections of AU § 311, which the Opinion did not mention. Thus, AU § 311.12 provides that assistants "should be informed of their responsibilities and the objectives of the procedures they are to perform." This guidance further demonstrates that the Auditing Standards do not compel a conclusion that unlicensed

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[2] The AICPA Auditing Standards relied upon by the District Court are part of the record.

accountants must be subjected to a level of supervision that precludes qualification under the Administrative Exemption.

B. The District Court's Professional Exemption Determination, If Upheld, Will Unfairly Punish Employers For Following The Wage Order's Plain Language.

As set forth more fully in PwC's Opening Brief, the District Court's Order concluded that the unlicensed accounting professionals at issue in this case are precluded as a matter of law from qualifying as exempt under subsection (b) of the Professional Exemption for the sole reason that they work in one of the professions enumerated in subsection (a) of that exemption. *See* Order at 32:17-33:4. The District Court's Order in this regard ignores the plain language of the Professional Exemption, which imposes no such limitation and clearly signifies – as the court acknowledged – that an "employee" may qualify as professionally exempt by satisfying subsection (a) "or" subsection (b). *See* Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(a)(i)-(ii); Order at 18:22-19:3.

The District Court's determination is extremely susceptible to argument that it should apply with equal force to unlicensed employees working in the other seven professions enumerated in subsection (a) of the Professional Exemption – law, medicine, dentistry, optometry, architecture, engineering and teaching. None of the Court's core justifications for holding

as it did are specific to the profession of accounting; rather, they all relate to the historical development of the Wage Order and, in particular, the historical relationship between subsections (a) and (b) of the Professional Exemption. It is therefore highly likely that, should the Court's order be affirmed, the Plaintiffs' bar in California will quickly file a flood of lawsuits alleging that unlicensed employees working in these professions have been misclassified as exempt.[3]

Should the District Court's holding ultimately be extended to apply to unlicensed employees working in the other professions enumerated in subsection (a) of the Professional Exemption, the long-standing reliance by California employers on the plain language of the Wage Order will be unfairly disrupted. Indeed, for many years California employers have classified their unlicensed professionals working in the enumerated professions of subsection (a) as exempt by way of subsection (b) based on the clear language of the Wage Order that permits such an approach.[4]

For example, California healthcare providers that employ medical residents – who traditionally have a medical degree but not a California medical license – historically have classified them as exempt "learned"

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[3] See Section II, *infra*.

[4] The "learned profession" exemption was added to the Wage Orders in 1989. Order at pages 20-21, and 22-23.

professionals pursuant to subsection (b), provided that they also meet the criteria of the exemption set forth in subsections (c) through (g). The "learned" Professional Exemption set forth in subsection (b) is likely the *only* exemption applicable to first year medical residents, as individuals in California may not become licensed physicians (and thus become exempt pursuant to subsection (a) of the exemption) without first completing one to two years of residency training. *See* Cal. Bus. & Prof. Code § 2096.

But if the District Court's Order is extended to unlicensed physicians, the ability to treat these highly trained medical school graduates, legally engaged in the practice of medicine,[5] as exempt may be subject to attack. As a result, the exempt status of the thousands of physicians who work as first-year current medical residents each year in California may be in jeopardy. *See* www.nrmp.org (visited October 15, 2009).

The District Court's Order may also impact the professions enumerated in subsection (a) that do not have an "experience requirement" before licensure. Law firms, for example, have long considered their associates to be exempt pursuant to subsection (b) during the period in which they work after graduation, but before bar exam results are announced

[5] Medical residents are, by law, allowed to engage in the practice of medicine without a license for up to three years in California. *See* Cal. Bus. & Prof. Code §§ 2065-66.

and licensure is obtained. Similarly, experienced attorneys who are licensed in other states and relocate to California also are treated as exempt professionals while they await California bar exam results. If the District Court's Professional Exemption determination is upheld and extended to the legal profession, these practices could be turned on their heads with bizarre and unintended results.

Such results were not lost on the District Court when it issued its Professional Exemption determination. The District Court acknowledged the "difficulties" that its Professional Exemption determination poses to employees in other professions. Order at 15, n. 4. But despite realizing how broadly its Order could apply, the District Court claimed to "express no opinion" as to the Order's effect on unlicensed employees working in the other enumerated professions. *Id.* at 33:5-8.

California employers cannot take comfort in the District Court's assurances when making their employee classification decisions. Regardless of these assurances, the District Court's Professional Exemption determination will be seized upon by plaintiffs' lawyers as a means to challenge the classification of unlicensed professionals in *each* of the other enumerated professions. California employers should not be required to

bear the burden of such litigation for having faithfully followed the plain language of the Wage Order.

Indeed, a change as abrupt, unprecedented and conflicting with the language of the Wage Order as this one should not be the result of judicial maneuverings; it should instead come from the California Legislature so that employers in the industry receive adequate notice. This would allow employers an opportunity to participate in the process and to adjust their practices if required.

II. IF UPHELD, THE DISTRICT COURT'S ORDER WILL GENERATE SUBSTANTIAL LITIGATION AND CAUSE EMPLOYERS TO CONSIDER LEAVING CALIFORNIA.

Wage-and-hour class action lawsuits such as this one, which allege the misclassification of large groups of employees as exempt from overtime requirements, are on the rise in California. In the past three years, accounting firms such as PwC have had to defend against no less than 18 such wage-and-hour class action lawsuits in California. Many of these lawsuits involve the very same category of employees that are at issue in this matter – non-licensed accountants performing "attest," or audit work – as well as multiple other categories of employees.[6]

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[6] *See* http://goingconcern.com/2009/07/30/List%20OT%20Accounting%20Cases.pdf.

Accounting firms are not alone in facing increasing numbers of wage-and-hour class actions. Professional services firms and other employers in almost every industry in California have been subjected to an increasing amount of litigation, both class actions and individual lawsuits, challenging the exempt status of countless numbers of employees. Indeed, since 2005, California employers have been sued in well over **2,000** wage-and-hour class action lawsuits, with the number of lawsuits increasing each year.[7]

In the great majority of these cases, the high cost of litigation is crippling to employers and prevents them from fully asserting their defenses

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[7] These statistics have been drawn from Courthousenews.com, a news database created by a network of correspondents who compile comprehensive reports on new civil cases filed in federal and state courts. The statistics cited in this brief were obtained from Courthousenews.com's California database on October 2, 2009, and reflect cases filed the following superior courts: Alameda, Alpine, Amador, Butte County, Calaveras County, Colusa County, Contra Costa County, Del Norte County, El Dorado County, Fresno County, Glenn County, Humboldt County, Imperial County, Inyo County, Kern County, Kings County, Lake County, Lassen County, Los Angeles County, Madera County, Marin County, Mariposa County, Mendocino County, Merced County, Modoc County, Mono County, Monterey County, Napa County, Nevada County, Orange County, Placer County, Plumas County, Riverside County, Sacramento County, San Benito County, San Diego County, San Francisco County, San Joaquin County, San Luis Obispo County, San Mateo County, Santa Barbara County, Santa Clara County, Santa Cruz County, Shasta County, Sierra County, Siskiyou County, Solano County, Sonoma County, Stanislaus County, Sutter County, Tehama County, Trinity County, Tulare County, Tuolumne County, Ventura County, Yolo County, and Yuba County. The cited statistics also reflect

through trial. Indeed, among the wage-and-hour class actions filed in California over the past five years in which class certification was granted, 89% of the cases resulted in settlement due to the high costs of litigation, and only 4% yielded class-wide trials.[8]

If the District Court's Order is upheld, the number of wage-and-hour class action lawsuits filed in California will increase exponentially. As alluded to above, the potentially wide reach of the Court's Administrative Exemption determination will open the door to a flood of litigation asserting that some of the most traditionally exempt administrators – such as the aforementioned exempt marketing manager – have been misclassified. Such litigation will increase in all industries and at all levels throughout California. Likewise, the District Court's Professional Exemption determination will result in a flood of litigation against employers that have hired workers engaged in the enumerated professions and treated them as exempt.[9]

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cases filed in the U.S. District Courts for the Central, Eastern, Northern and Southern Districts of California.

[8] *See Year-End Update on Class Actions: Explosive Growth in Class Actions Continues Despite Mounting Obstacles to Certification*, at http://www.gibsondunn.com/publications/pages/year-endupdateonclassactions.aspx (visited on 10/8/2009).

[9] Neither the fact that Amici are concerned that members of the plaintiffs' bar may attempt to rely on the District Court's Order in an effort to "push the envelope," nor the examples contained in this Brief should be construed

While California employers do not dispute their obligation to pay overtime wages to those employees whose job duties render them non-exempt, at bottom it makes little sense to uphold a District Court ruling that, on its face, fails to follow the plain language of the Wage Order and disregards the long-standing California requirement that exemption determinations be made based on an analysis of employees' individual job duties. This is particularly the case where, as here, the result of upholding such a decision would be to increase dramatically California employers' exposure to wage-and-hour class action lawsuits and the extremely high costs of defending them. Such lawsuits are a driving motivation for employers to leave California, something that a state facing an unemployment rate of over 12% can ill afford.

CONCLUSION

For all of the foregoing reasons, Amici Curiae respectfully request that the Court reverse the opinion below.

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as an admission that the decades-long reliance by California employers on the clear language of the Wage Orders was inappropriate or created liability.

Dated: November 9, 2009

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32-1

Pursuant to Circuit Rule 32-1, Amici curiae hereby certify that the text of this Brief is double spaced, uses a proportionately spaced typeface, and contains a total of 4,672 words, based on the word count program in Microsoft Word.

Dated: November 9, 2009

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 9, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Brenda K.Millsap
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