

## **The *Sav-On* Decision: Where Do Employers Go from Here?**

**August 31, 2004**

The California Supreme Court has finally issued its long-awaited decision in *Sav-On Drug Stores, Inc. v. Superior Court*. For the first time, the state's highest court has specifically addressed the use of class actions for resolving employee claims for unpaid overtime. In a unanimous ruling that essentially provided a road map for plaintiffs seeking class certification of their wage and hour claims, the Supreme Court affirmed the trial court's determination that class certification was supported by substantial evidence. While noting that its analysis was confined to an assessment of whether the trial court had abused its discretion by ordering class certification based on the record before it, the Supreme Court nonetheless appeared to approve class actions as a vehicle for pursuing overtime claims based on the alleged misclassification of a group of employees.

Plaintiffs in *Sav-On* sought certification of a class consisting of the retail chain's operating managers (OMs) and assistant managers (AMs) in California, all of whom had been classified by the company as exempt from the overtime requirements of state law and, accordingly, had not been paid for overtime work. The underlying legal issue was whether the exempt classification was appropriate in light of how the employees in these two classifications actually spent their time.

Plaintiffs alleged that *Sav-On* had a uniform policy of misclassifying its OMs and AMs as exempt. In support of their position, the plaintiffs offered evidence that the company used the same OM and AM job descriptions at all of its stores, and deemed each class member exempt based on the job description rather than on any consideration of the work actually performed.

The company argued, however, that numerous factors, including store location, size, sales volume, and number of employees affected each class member's duties and so created individual issues as to whether the exempt classification was correctly applied to any given OM or AM.

The Supreme Court upheld the trial court's class certification order because the plaintiffs had presented evidence that could support a conclusion that misclassification was the rule rather than the exception. The Supreme Court also made a point of noting California's public policy "favoring the use of the class action device."

The implications of this decision are potentially significant for employers in California. It is likely that overburdened trial courts, seeking to avoid multiple lawsuits on similar claims, will rely on the decision in ordering class certification in any case where a factual showing comparable to that made by the *Sav-On* plaintiffs has been established.

The bottom line? The good news is that *Sav-On* also offers employers a road map for developing a record to defeat class certification. While a number of California employers, particularly in the retail industry, have already reclassified many employees, now is a good time for all employers in California to undertake a comprehensive review of their policies and practices regarding how they classify employees. Not only has *Sav-On* added fuel to the firestorm of overtime class actions in California, but the new Fair Labor Standards Act regulations have just taken effect.

Some steps to consider:

- Conduct an audit of your job descriptions and exempt/non-exempt classifications, but be very careful how you do this. Otherwise, you run the risk of creating a paper trail that could be used against the company in a later proceeding. Before undertaking such an audit, consult with employment counsel to determine the most effective way to proceed so as to minimize the risk of any adverse fall-out.
- Have employees sign off on their job descriptions, acknowledging that the company expects them to be performing exempt managerial duties during most of their work time.
- Establish a mechanism by which employees can voice any concerns they might have as to whether they are being permitted by their managers to perform the exempt functions of their job.
- Have your managers complete an annual self-evaluation, where they will have an opportunity to extol their achievements. It is a safe bet that most employees will emphasize their management skills, not how good they were at keeping the shelves properly stocked or ringing up sales.
- Establish training programs that emphasize the employees' managerial duties and make clear the company's expectations.
- Establish a record of having analyzed every job, particularly those that fall within the potential "gray zone" between exempt and non-exempt, including the tasks required for each position, and the amount of time realistically expected to be spent on each task.
- If changes are made to any classification, make sure the job description is changed as well. Otherwise, the change may well be viewed by a court as an admission by the company that a job was non-exempt all along. *Sav-On* made this mistake, and the Supreme Court made note of it several times.
- Revamp your performance evaluations as appropriate to reflect the true nature of each job.

If you have further questions about this decision or would like to discuss conducting an audit of your Company's classifications, please contact:

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