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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *August 2017*

Tom Ingrassia Recognized by the Best Lawyers in America

Pettit Kohn Ingrassia Lutz & Dolin is proud to announce the recognition of Shareholder and CFO, Thomas Ingrassia, as part of the 2018 *Best Lawyers in America*© for his work in Employment Law – Management. This is Tom's sixth consecutive year of recognition in this practice area.

Among his other accolades, Tom has been named as a San Diego Super Lawyer since the year 2008, San Diego Super Lawyer Top 50 in 2016 and 2017, and has achieved Martindale-Hubbell's AV-Preeminent rating.

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Mortgage Underwriters Deemed Non-Exempt by Ninth Circuit

In *McKeen-Chaplin v. Provident Savings Bank*, the Ninth Circuit Court of Appeals ("Nint Circuit") held that a group of mortgage underwriters were improperly classified as exempt. Gina McKeen-Chaplin ("McKeen-Chaplin") was employed by Provident Savings Bank ("Provident") as a mortgage underwriter, responsible for analyzing the viability of mortgage loan applications. While Provident's mortgage underwriters were generally required to abide by a set of guidelines regarding loan worthiness, they exercised some leeway in applying those guidelines and, occasionally, were permitted to make suggestions outside of their bounds. Ultimate decisions regarding loan-worthiness, however, were ultimately made by higher ranking employees.

While McKeen-Chaplin and her fellow mortgage underwriters often worked in excess of 40 hours per workweek, they were classified as exempt employees[1] by Provident and therefore did not receive overtime compensation. Both California and federal law permit a number of exemptions under which employees need not receive overtime compensation. Pertinent to this matter, the "administrative exemption" exempts an employee from *federal* overtime requirements when that employee engages in primary duties that involve the exercise of discretion and independent judgement in matters which are of significance to the employer's business management or general operations.

McKeen-Chaplin filed a lawsuit on behalf of herself and her fellow underwriters (collectively, "Plaintiffs"), claiming that the nature of their work did not properly fall under the administrative (or any other) federal exemption. Provident filed a motion for summary, which was granted in its favor. Plaintiffs appealed.

The Ninth Circuit examined the district court's basis for ruling in Provident's favor. The trial court had held that Plaintiffs' roles warranted exempt classification as Plaintiffs performed "quality control" tasks that necessitated the

[1] Unlike California law, which mandates overtime compensation for non-exempt employees working in excess of eight hours in a workday or 40 hours in a workweek, federal law only requires overtime compensation for employees working in excess of 40 hours in a workweek.

independent use of discretion and were directly related to Provident's business operations. The appellate court disagreed, instead holding that Plaintiffs' required conduct was less akin to exercising independent judgment and more like performing rote production. Finding that Plaintiffs exercised insufficient independent judgment to qualify for either the administrative exemption or the similar "white-collar exemption," the district court's grant of summary judgment was overturned

The Ninth Circuit is generally considered to be the most liberal of the federal circuits. It is therefore unsurprising that the Court issued a ruling in favor of employees. Nonetheless, the split among the circuits means that this decision may be ripe for review by the United States Supreme Court. In the meantime, California employers should heed this ruling and continue to look critically at exemption decisions, particularly noting that state and federal courts reviewing borderline classification decisions may be more likely err on the side of finding the position(s) to be non-exempt.

Court of Appeal Clarifies Requirement for Class Certification in Misclassification Case

In *Kizer v. Tristar Risk Management*, plaintiffs Valerie Kizer and Sharal Williams ("the plaintiffs") filed a class action lawsuit against their former employer, Tristar Risk Management ("Tristar"), alleging that they, along with other claims examiners, were misclassified as exempt from California's overtime laws. Tristar asserted that the proposed class members were properly classified as exempt administrative employees. The plaintiffs moved for certification of the proposed class, but their motion was denied. The Court of Appeal affirmed.

To obtain class certification, the plaintiffs had to demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined "community of interest," and substantial benefits from certification that render proceeding as a class superior to the alternatives. To satisfy the "community of interest" requirement, the plaintiffs had to establish that: (1) common questions of law or fact predominated over individualized inquiries; (2) the class representatives had claims or defenses typical of the class; and (3) the class representatives could adequately represent the class.

The trial court found that based on Tristar's generally applicable policies and procedures, the plaintiffs could arguably defeat at least one element of the administrative exemption. However, misclassification alone does not result in automatic liability; a plaintiff must also establish that misclassified employees actually performed overtime work for which they were not properly paid. The trial court found that the plaintiffs failed to submit any evidence that Tristar had a uniform policy of requiring claims examiners to work overtime and that claims examiners in fact worked overtime. Therefore, the plaintiffs failed to establish that their claims were subject to proof common to all class members. Accordingly, the trial court denied the class certification motion.

The Court of Appeal agreed with the trial court, reasoning that the evidence the plaintiffs submitted did not show that overtime liability could be established by common proof. The plaintiffs presented no evidence of a written or de facto policy

requiring claims examiners to work overtime. Moreover, even though the plaintiffs submitted declarations stating that they worked overtime, nothing in the declarations suggested that the plaintiffs' experiences were typical of the class. Further, the court refused to infer from the evidence that claims examiners who managed a case load of 150 to 180 cases necessarily had to work overtime. In light of the foregoing, the appellate court determined that the plaintiffs failed to show that class certification was warranted.

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This is Pettit Kohn Ingrassia Lutz & Dolin PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Ryan Nell, Lauren Bates, Jennifer Suberlak, Shannon Finley, or Cameron Flynn at (858) 755-8500; or Jennifer Weidinger, or Tristan Mullis at (310) 649-5772.