Ninth Circuit Reaffirms Service Advisors Eligible for Overtime, Setting Up Second Potential Trip to Supreme Court

By Jeffrey W. Brecher

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The U.S. Supreme Court in 2016 granted *certiorari* in *Encino Motorcars, LLC v. Navarro* to resolve a circuit split regarding whether "service advisors" at automobile dealerships are exempt from receiving overtime under the Fair Labor Standard Act pursuant to an exemption for any "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." The federal appeals court in San Francisco, deferring to a 2011 Department of Labor regulation, had held service advisors are not covered by the exemption and, therefore, are entitled to overtime.

The Supreme Court did not resolve the circuit split. Instead, it held the Ninth Circuit erred in *how* it resolved the case. The Supreme Court held that because the DOL's position on the exempt status of service advisors vacillated over time and the 2011 regulation (changing DOL's position) provided no reasoned explanation for the change, the Ninth Circuit erred in deferring to DOL's position under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117 (2016). The Supreme Court noted that, in 1970, for example, DOL issued a regulation stating service advisors were eligible for overtime, but in 1978 and 1987, DOL issued guidance stating they were ineligible. In 2008 (during the Bush Administration), DOL issued proposed regulations confirming that position, but in 2011 (during the Obama Administration), DOL scrapped the proposed changes and stated service advisors were eligible for overtime.

The Supreme Court remanded the case to the Ninth Circuit to determine whether the exemption applied by interpreting the statute independently "in the first instance," without giving deference to the DOL's position. Justice Clarence Thomas and Justice Samuel Alito dissented, however, criticizing the Court for "punt[ing]" on the question presented (the exempt status of service advisors). In their view, service advisors were indeed covered by the exemption and not eligible for overtime.

Ninth Circuit Decision: Same Result

On remand, the Ninth Circuit reached the same result as before: service advisors are eligible for overtime and not covered by the exemption. The Ninth Circuit based its decision this time on a detailed examination of the statutory text and legislative history. *Navarro v. Encino Motorcars, LLC*, No. 13-55323 (9th Cir. Jan. 9, 2017).

The exemption applies to only three job titles: salesman, partsman, and mechanics. If Congress intended to apply the exemption to service advisors (a title that existed at the time the exemption was enacted) "it could have included 'service advisors' in the statutory list," the Ninth Circuit held. While the Court acknowledged the term "salesman" might be broad enough to include "service advisors" who sell service repairs, they are not a "salesman" *primarily engaged in selling or servicing automobiles.* "Servicing" an automobile "encompasses only those who are actually occupied in the repair and maintenance of cars," a function service advisors do not perform, the Court held. But the Court struggled with explaining the exemption's inclusion of "partsman," individuals also not directly engaged in performing mechanical repairs. The Court found partsman were still engaged in "servicing" automobiles because they provided, tested, and repaired parts.

Ninth Circuit Acknowledges Circuit Split

The decision places the Ninth Circuit at odds with Justices Thomas and Alito and the decisions of the Fourth and Fifth Circuits and the Supreme Court of Montana. The Ninth Circuit acknowledged as

Meet the Author

Jeffrey W. Brecher

Principal
New York Metro
Long Island 631-247-4652
Email

much, stating it was aware of the conflict, but was “unpersuaded by the analysis of those decisions.”

The continued circuit court split (and disagreement with two Justices of the Supreme Court) likely means the case may return to the Supreme Court.

“Narrow Construction” Principle Could be Ripe for Review

Setting up another basis for the Supreme Court to grant certiorari, the Ninth Circuit doubled down on its reliance on the “narrow construction” principle. It found the defendant’s expansive interpretation inapplicable “in light of the longstanding rule that the exemptions in §213 of the FLSA are to be narrowly construed against employers seeking to assert them” (quoting earlier Supreme Court precedent). In the 2016 decision remanding the case to the Ninth Circuit, however, Justices Thomas and Alito criticized the Ninth Circuit for relying on this “made up canon” of construction (noting the Supreme Court had declined to apply it in two recent FLSA cases). They instructed the Ninth Circuit “not to do so again on remand.” The Ninth Circuit did so anyway, citing its obligation to apply existing binding precedent. The decision, therefore, may present an excellent case for the Supreme Court to address the validity and scope of the “narrow construction” principle.

Trump Administration Could Resolve Issue

A Donald Trump administration could affect this decision. The DOL could issue new regulations providing service advisors are covered by the exemption (so long as the reasons are clearly articulated and explained). Further, a new Congress also could take care of the issue by amending the exemption at issue (§213(b)(10)) to add, by name, service advisors to the list of exempt positions.

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We will continue to monitor developments in this case. Please contact a Jackson Lewis attorney if you have questions about this case or other workplace developments.

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