Nos. 05-35080; 05-35082; 05-35145; 05-35146; 05-355101; and 05-35509

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: FARMERS INSURANCE EXCHANGE,
CLAIMS REPRESENTATIVES' OVERTIME PAY LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE IMPACT FUND, THE LEGAL AID SOCIETY–EMPLOYMENT LAW CENTER, AND THE NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES JESSE CORRALEZ, ET AL., AND DAVID MILLER, ET AL.

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I. INTRODUCTION

The National Employment Lawyers Association (NELA) is a professional membership organization comprised of lawyers who represent employees in labor, employment, and civil rights disputes, and who are committed to representing the interests of American workers. The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country, including cases involving wage and hour violations. The Legal Aid Society - Employment Law Center ("LAS-ELC"), founded in 1916, provides free legal services to those who cannot afford private counsel in employment litigation and through its Workers' Rights Clinics, and its Unemployment and Wage Claims Project. The National Employment Law Project ("NELP") is a non-profit legal organization with over 30 years of experience advocating for the employment and labor rights of low-wage and unemployed workers, including many cases addressing the rights of immigrant workers under the Fair Labor Standards Act. NELA, the Impact Fund, the LAS-ELC, and NELP respectfully request that the Court consider their views in support of Plaintiffs/Appellants/Cross-Appellees. The district court erred in three respects in this case: first, by refusing to apply the administration/production dichotomy in the broad service sector of the economy; second, by relying on an aberrant U.S. Department of Labor ("DOL") opinion

letter; and third, by inventing a "grace period" that allows employers that are willfully violating the Fair Labor Standards Act ("FLSA") to continue doing so.

II. THE DISTRICT COURT ERRED IN FAILING TO APPLY THE ADMINISTRATION/PRODUCTION DICHOTOMY

The district court erred when it refused to apply the administration/ production dichotomy solely because the insurance Claims Representatives ("CRs") are "service providers." *In re Farmers Ins. Exchange Claims Representatives' Overtime Pay Lit.*, 336 F. Supp. 2d 1077, 1088 (D. Or. 2004) (hereinafter "*In re Farmers*"). Both DOL and controlling case law have rejected this approach. The district court's error was dispositive: when the California state court applied the dichotomy to the same job descriptions the district court considered, it found that the CRs were non-exempt production workers. *Bell v. Farmers Insurance Exchange*, 87 Cal. App. 4th 805, 826 (2001) ("Our review of the undisputed evidence places the work of the claims representatives squarely on the production side of the administrative/production worker dichotomy.").

The administration/production dichotomy is one prong of the test to determine whether an employee is employed in an exempt administrative capacity. The regulations implementing the FLSA's administrative exemption provide that to "qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business

operations of the employer or the employer's customers." 29 C.F.R. § 541.201(a). The regulations distinguish administrative work, which is "directly related to assisting with the running or servicing of the business," from production work, such as "working on a manufacturing production line or selling a product in a retail or service establishment." *Id.*

The administration/production dichotomy is "a relevant and useful tool" for determining whether the administrative exemption applies to given workers – including service employees. 69 Fed. Reg. 22122, 22141 (April 23, 2004) (codified at 29 C.F.R. § 541, effective Aug. 23, 2004). In fact, DOL recently applied the dichotomy to determine the non-exempt status of paralegals (another service sector job category). DOL Wage & Hour Div. Op. Ltr., 2005 WL 3638473 (Dec. 16, 2005).

DOL rejects the opinion that the administration/production dichotomy "has little value in today's service-oriented economy … because the decline in manufacturing and the rise in the service and information industries has rendered the production dichotomy an artifact of a different age." 69 Fed. Reg. at 22140-41. Courts have also continued to hold that the administration/production dichotomy is a useful tool for evaluating whether service workers qualify for the administrative exemption. *See, e.g.*, *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990) (production workers are those "whose primary duty is producing the commodity or

commodities, *whether goods or services*, that the enterprise exists to produce and market") (emphasis added). The First Circuit has expressly mandated application of the dichotomy in the insurance sector, specifically as to insurance salespeople. *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 8-9 (1st Cir. 1997). The district court's contrary ruling thus has been soundly repudiated.

This Circuit, like DOL, has endorsed the administration/production dichotomy "as a tool toward answering the ultimate question, whether work is directly related to management policies or general business operations." *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) (internal citations omitted). The Ninth Circuit has productively applied the administration/ production dichotomy in evaluating service-sector administrative exemption claims. *See, e.g.*, *Bothell*, 299 F.3d at 1126-27; *Webster v. Public School Employees of Washington, Inc.*, 247 F.3d 910, 916 (9th Cir. 2001) (finding that field representative for public school employees' labor union performs work that "is administrative, allowing [others] to produce services for the school districts."); *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1069-70 (9th Cir. 1990) (applying dichotomy to probation officers).

DOL and the courts, including this Court, agree that the administration/production dichotomy is useful in applying the FLSA's administrative exemption to service sector jobs. The district court's holding to the

contrary was error, and it was dispositive: if the court had applied the dichotomy, it would have found, as in *Bell*, that none of Farmers Insurance Exchange's ("FIE") CRs qualify for an administrative exemption.

III. DOL'S RECENT INSURANCE ADJUSTER OPINION LETTERS ARE NOT ENTITLED TO DEFERENCE

The district court erred when it deferred to the faulty legal interpretation in DOL's November 19, 2002, opinion letter (DOL Wage & Hour Div. Op. Ltr., WL 32406601) ("November 2002 letter"). *In re Farmers*, 336 F. Supp.2d at 1090 (calling the November 2002 letter "an accurate interpretation of the regulations at issue in this MDL; thus, it is entitled to deference, at least with respect to the interpretation of the regulations themselves"). Opinion letters are not entitled to mandatory deference from this Court because they do not result from formal rule-making procedures. *Christensen v. Harris County*, 529 U.S. 576, 587-88, 120 S.Ct. 1655, 1662-63 (2000). The weight a court chooses to give to an opinion letter "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. …" *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944). The November 2002 letter on which FIE relies fails each of these factors.

Before the November 2002 letter, DOL opinion letters regularly found that certain insurance claims adjusters are not exempt administrative employees. *See*,

e.g., DOL Wage & Hour Div. Op. Ltr. (Oct. 24, 1957); DOL Wage & Hour Div. Op. Ltr. (Feb. 18, 1963). The November 2002 letter is an aberration from which even DOL itself has retreated. In January 2005, it issued an Opinion Letter that returned to its long history of finding that certain insurance claims adjusters are nonexempt. DOL Wage & Hour Div. Op. Ltr., 2005 WL 330610 (Jan. 7, 2005). This Court should not rely on the November 2002 letter because it conflicts with DOL's previous and subsequent opinion letters finding some claims adjusters nonexempt. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n.30, 107 S.Ct. 1207, 1221 (1987); *see also Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 n.9 (9th Cir. 2003), *aff'd sub nom IBP v. Alvarez*, __ U.S. __, 126 S.Ct. 514 (2005) (same).

In another conflict with previous DOL opinion letters, the November 2002 letter simply ignores the dispositive administration/production dichotomy. In previous opinion letters, DOL applied the dichotomy. DOL Wage & Hour Div. Op. Ltr. (Apr. 12, 1988); DOL Wage & Hour Div. Op. Ltr. 1988 WL 614197 (May 9, 1988); DOL Wage & Hour Div. Op. Ltr. (Feb. 16, 1988). The nature or function of the employer's business is important to the administrative exemption analysis because the "basic tasks of the employer's business," i.e. the "employer's day-to-

day affairs," are non-exempt "'production' work," as distinguished from exempt administrative work that is "directly related to management policies or general business operations." DOL Wage & Hour Div. Op. Ltr., 1998 WL 852791 (May 28, 1998); DOL Wage & Hour Div. Op. Ltr., 1998 WL 852752 (Jan. 23, 1998); DOL Wage & Hour Div. Op. Ltr., 1999 WL 1002401 (May 17, 1999); DOL Wage & Hour Div. Op. Ltr., 1998 WL 852743 (Jan. 8, 1998); DOL Wage & Hour Div. Op. Ltr., 1992 WL 845086 (Mar. 16, 1992); DOL Wage & Hour Div. Op. Ltr., 1996 WL 1031785 (June 28, 1996); DOL Wage & Hour Div. Op. Ltr. (Apr. 12, 1998); DOL Wage & Hour Div. Op. Ltr., 1997 WL 971811 (Sep. 12, 1997). Previous DOL opinion letters have found that employees were not exempt administrative employees because the employer could not satisfy the administration/production dichotomy. DOL Wage & Hour Div. Op. Ltr., 1999 WL 1002368 (Feb. 18, 1999); DOL Wage & Hour Div. Op. Ltr., 1998 WL 852783 (Apr. 17, 1998); DOL Wage & Hour Div. Op. Ltr., 1998 WL 852785 (Apr. 7, 1998); DOL Wage & Hour Div. Op. Ltr., 1998 WL 852743 (Jan. 28, 1998); DOL Wage & Hour Div. Op. Ltr., 1995 WL 1032484 (Apr. 13, 1995); DOL Wage & Hour Div. Op. Ltr., 1994 WL 1004874 (Oct. 13, 1994); DOL Wage & Hour Div. Op. Ltr., 1992 WL 845086 (Mar. 16, 1992); DOL Wage & Hour Div. Op. Ltr., 1988 WL 614197 (May 9, 1988).

The impoverished analysis in the November 2002 letter may also be seen in its confusion of exempt in-house claims agents who service their employers' business with non-exempt insurance claims adjusters who provide the service their employers exist to sell. While running or servicing a business may traditionally include managing a business's self-insurance, i.e. its plan for compensating those harmed by its own conduct, employees who manage this kind of insurance have very different roles and responsibilities from the CRs in this case. Such employees (exempt) adjust claims for damage inflicted by their employer; CRs however (non-exempt) adjust claims on policies written, administered, or adjusted by their employer.

An example of the traditionally exempt in-house claims adjuster is the Consumer Service Coordinator in *Haywood v. North American Van Lines, Inc.* 121 F.3d 1066 (7th Cir. 1997). Her employer was in the business of moving goods for customers, and the plaintiff adjusted claims that customers filed against her employer for damaging their goods. At North American Van Lines, the production workers were those who produced the company's product: the movers, drivers, and others who moved customers' goods. In this context, the Consumer Service Coordinator was not a production worker. *See also* 29 C.F.R. § 541.205(c)(5) (*superseded by revised regulation*, 69 Fed. Reg. 22122-01 (Apr. 23, 2004)) (codified at 29 C.F.R. § 541, effective Aug. 23, 2004). This is consistent with

DOL's long-standing analysis dating back to its *"Executive, Administrative, Professional ... Outside Salesman" Redefined* (Oct. 10, 1940) ("The Stein Report") (FIE Addendum) ("a claim agent for a large oil company who is given authority to settle claims" for damage caused by the oil company may be an exempt administrative employee).

The CRs in this case, in contrast, fall squarely within one of DOL's classic examples of the non-exempt type of claims adjuster.

> An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations."

29 C.F.R. § 541.205(c)(2) (*superseded by rev'd reg.*, 69 Fed. Reg. 22122-01 (Apr. 23, 2004) (codified at 29 C.F.R. § 541, effective Aug. 23, 2004).

In an attempt to appear consistent with DOL's earlier interpretations, the November 2002 letter asserts that DOL "has long recognized that claims adjusters typically perform work that is administrative in nature." But this argument conflates the two types of claims adjusters. Only by ignoring the distinction between the two can the November 2002 letter conclude that claims adjusters who provide the *product* their employer sells – insurance indemnification – are actually *servicing* their employer when they adjust policyholders' claims.

Finally, in addition to conflicting with DOL's own prior analysis, the November 2002 letter also conflicts with the Court's well-established rule that exemptions to FLSA overtime requirements must be construed narrowly. *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1045 (9th Cir. 2005). "The FLSA is construed liberally in favor of employees," *Cleveland v. City of Los Angeles*, 420 F.3d 981, 988 (9th Cir. 2005), and the administrative exemption cannot be used to justify an employer's failure to pay overtime "except [in contexts] plainly and unmistakably within the[] [exemption's] terms and spirit," *Alvarez*, 339 F.3d at 905 (quotation marks and citation omitted).

For all these reasons, the district court erred in deferring to the aberrational November 2002 letter because it is inconsistent with prior and subsequent DOL opinion letters and DOL's historical analysis, and wrongfully attempts to carve out an industry-specific exemption for insurance adjusters.

IV. THE DISTRICT COURT CREATED DANGEROUS AND UNSUPPORTED PRECEDENT IN ALLOWING EMPLOYERS A "GRACE PERIOD" TO COME INTO COMPLIANCE WITH THE FLSA

The district court correctly concluded that FIE acted "willfully" by "knowingly or recklessly disregard[ing]" federal wage and hour law in continuing to classify its CRs as exempt. *In re Farmers*, 336 F.Supp.2d at 1109. But in determining when FIE's violation became willful, the district court granted FIE a long and unprecedented period after it had notice of its violation before it had to

begin complying with the law. This "grace period" denied the class members of up to a year's worth of overtime wages.

An employer's violation of FLSA is willful when it is "on notice" of the FLSA's requirements but fails to take "affirmative action to assure compliance" with the law. *Alvarez* at 909. Congress explicitly decreed that employers whose violations are willful are liable for three years of backpay rather than two. *See* 29 U.S.C. § 255(a).

The filing of a complaint in federal court is enough to put an employer on notice – the standards for "notice pleading" are designed to guarantee just that. *See In re Marino,* 37 F.3d 1354, 1357 (9th Cir. 1994) ("The purpose of notice pleading is to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."); *Bull v. United States*, 68 Fed. Cl. 212 (2005) (employer was put on notice of its FLSA violations when plaintiff filed a complaint in federal court).

The district court here correctly found that FIE's violations were willful, but failed to extend the liability period to three years as the FLSA requires. Instead, the district court held that the "critical date" by which FIE became liable was after the company had time to "digest the impact" of the state court decision notifying it of its misclassification of the CR position and non-compliance with overtime laws, *Bell.*, 87 Cal. App. 4th 805, and to "formulate a … response." *In re Farmers*, 336

F. Supp. 2d at 1109. With this holding, the district court created an unprecedented, extended "grace period" during which an employer that is on notice of FLSA violations has impunity to continue breaking the law, while its underpaid employees foot the bill.

For many years, FIE willfully failed to pay its CR employees overtime. FIE learned that the DOL found its misclassification of the CR position in violation of the FLSA in February 1994. *In re Farmers*, 336 F.Supp.2d at 1107. The plaintiffs in *Bell* filed their complaint on October 1996, alleging that the same category of employees with the same job duties in the same industry with the same employer as the plaintiffs in this case were not exempt. Relying heavily on federal FLSA precedent, the *Bell* trial court granted summary adjudication on liability against FIE in April 1999. *See Bell*, 87 Cal. App. 4th at 812-819 (applying federal law interpreting the FLSA's administrative exemption). The California Court of Appeal affirmed the lower court's decision in March 2001. But when the court below had to determine when FIE first had notice that it had misclassified its CRs, it did not choose the date of the 1994 DOL letter, or the date of the federal complaint in *Bell* in 1996, or the date of the first ruling in *Bell* in 1999, or the date of the appellate affirmation of the *Bell* ruling in March 2001: instead, it chose a much later date, September 2001.

This Court should overturn the "grace period" the district court invented in this case for several reasons. First, because the statutory language explicitly and unambiguously provides a three-year statute of limitations for willful violations with no grace period or window for correction, the district court's invention of a grace period circumvents Congress's clear intent. Second, the district court's grace period thwarts the FLSA's broad remedial purpose of protecting employees. Third, there is no support in federal jurisprudence for a grace period. Fourth, the grace period creates a dangerous new defense for employers: that even when they have clear evidence that they are violating the FLSA, they may continue violating it.

For these reasons, the Court should reverse the district court's creation of a grace period that delays FIE's liability.

V. CONCLUSION

For the reasons discussed above, the employee-advocate amici respectfully request that this Court reverse (1) the district court's dispositive finding that the administration/production dichotomy does not apply to service providers; (2) the district court's deference to the aberrant November 2002 DOL opinion letter; and (3) the district court's creation of a grace period during which employers that are on notice of FLSA violations may continue violating the law with impunity and without compensating their underpaid employees.

Dated: March 20, 2006 Respectfully submitted,

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BRIEF FORMAT CERTIFICATION PURSUANT TO
RULE 29(c)(5) AND RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 29(c)(5) and Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the Brief Of The National Employment Lawyers Association, The Impact Fund, The Legal Aid Society–Employment Law Center, And The National Employment Law Project As *Amici Curiae* is proportionately spaced, has a type face of 14 point and contains 3,896 words.

Dated: March 20, 2006

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