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No. 65372-5-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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MARK LITCHFIELD, on behalf of himself and all  
others similarly situated,

Petitioners/Cross-Respondents/Plaintiffs,

v.

KPMG LLP,

Respondent/Cross-Petitioner/Defendant.

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**BRIEF OF THE ASSOCIATION OF  
WASHINGTON BUSINESS,  
*AMICUS CURIAE***

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Kristopher I. Tefft, WSBA No. 29366  
ASSOCIATION OF  
WASHINGTON BUSINESS  
1414 Cherry Street SE  
Olympia, WA 98507  
Telephone: (360) 943-1600

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## I. INTRODUCTION

In determining whether an employee may qualify for the professional exemption under Washington's Minimum Wage Act ("MWA"), employers must be able to rely on the rules and regulatory guidance promulgated by the Director of the Department of Labor & Industries ("L&I"). The MWA *expressly directs* L&I to define when someone is employed as a bona fide professional. Its regulations and administrative interpretations are therefore the definitive criteria for classifying an employee as exempt. Critically, neither the regulations nor the administrative interpretations require any accountant to possess a professional license nor refer in any way to professional licensure requirements. To impute some or all of the licensure requirements set by professional licensing and disciplinary boards to the classification of exempt professionals, as Litchfield urges, would be at odds with the comprehensive regulatory scheme under the MWA and, accordingly, would upset many well-established exempt professional employment classifications.

The trial court, in its March 1, 2010 Order, correctly rejected Litchfield's argument that KPMG Audit Associates cannot qualify for the professional exemption under the MWA until they obtain a license as a

Certified Public Accountant. CP 2089. AWB agrees with that holding and urges this Court to uphold it. But in its April 22 Order, the trial court incorrectly held that unlicensed KPMG Audit Associates cannot qualify for the professional exemption under the MWA until they have (a) received “the bachelor’s degree specified in WAC 4-25-[710]”<sup>1</sup> and (b) completed “on-the-job audit work-training experience for a minimum of 2,000 hours over a 12-month period [as] specified by WAC 4-25-730.” CP 2349. That ruling improperly imports wholly new requirements that appear nowhere in the statutorily mandated regulations defining the professional exemption. Because the ruling – if permitted to stand – would upset the settled expectations of many Washington employers (which are appropriately based on L&I’s regulations and administrative interpretations), and not just those employing accountants, AWB urges the Court to reject it.

## **II. IDENTITY AND INTEREST OF *AMICUS CURIAE***

Founded in 1904, AWB is this state’s oldest and largest general business trade association and acts as the state’s chamber of commerce. It represents more than 7,400 member businesses, which employ

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<sup>1</sup> *See also* CP 2351-53 (correcting prior reference to WAC 4-25-730). Also, this brief cites to the current versions of the relevant WAC provisions, which are now codified at WAC 4-30.

approximately 650,000 individuals in Washington. As an umbrella organization, AWB also represents over 100 local and regional chambers of commerce and state and local professional associations.

On behalf of its member-employers, AWB has an abiding interest in the rules of law governing the employer-employee relationship. In particular, AWB is concerned that the MWA be correctly and consistently applied to businesses subject to that statute and its implementing regulations. To that end, AWB has participated as an amicus curiae before this and other Washington courts on numerous occasions.

### **III. ISSUES OF CONCERN TO *AMICUS CURIAE***

AWB addresses the following issues:

(1) Whether the trial court correctly applied RCW 49.46.130(2)(a), RCW 49.46.010(5)(c), and WAC 296-128-530 by basing exempt “professional” status under the MWA on the attainment of some of the requirements for licensure under a different regulatory regime.

(2) Whether the trial court’s ruling is inconsistent with the Administrative Procedures Act and the Regulatory Reform Act of 1995 because it improperly disregards L&I’s Administrative Policies.

(3) Whether the trial court’s reasoning – if permitted to stand – would disrupt and interfere with a wide variety of routinely accepted

employment practices (both in the field of accounting and otherwise) throughout the state of Washington.

#### IV. STATEMENT OF THE CASE

AWB accepts the Statement of the Case in the Brief of Respondent/Cross-Petitioner KPMG LLP (“KPMG Brief”) at pages 4-13.

#### V. ARGUMENT

**A. Litchfield’s Arguments And The Trial Court’s April 22 Order, If Accepted, Would Completely Rewrite Washington’s Regulatory Scheme Regarding Exempt Professionals.**

In its April 22 Order, the trial court concluded that to be treated as exempt professionals under the MWA, KPMG Audit Associates must satisfy some – but not all – of the requirements to be licensed as a CPA in Washington. This section of AWB’s amicus brief establishes that the April 22 Order is erroneous. Section V.B. below, in turn, shows that Litchfield’s analysis would have profound consequences for Washington employers, including AWB’s members. Both the April 22 Order and Litchfield’s arguments should therefore be rejected.

Contrary to the trial court’s analysis and Litchfield’s arguments, the plain language of the MWA directs AWB members and other employers in this state to one standard, and only one standard, to determine if an employee is an exempt professional. That standard is

WAC 296-128-530, which as a binding and duly enacted legislative regulation has the force of law.<sup>2</sup> The MWA could not be more clear in adopting that regulatory standard, because it expressly provides that the overtime provision does not apply to “[a]ny individual employed in a bona fide . . . professional capacity . . . *as those terms are defined and delimited by rules of the director.*” RCW 49.46.010(5)(c) (emphasis added). As the italicized text shows, the statute expressly directs L&I to determine who is – and who is not – employed in a bona fide professional capacity. *See* RCW 49.46.010(1) (“As used in this chapter . . . ‘Director’ means the director of labor and industries[.]”).

L&I has fulfilled the obligation placed upon it by the MWA by promulgating substantive regulations to define and delimit the relevant statutory terms. Promulgated in 1976, and not changed since that time, WAC 296-128-530 has long since been ratified by the legislature, which has repeatedly amended the relevant statute (RCW ch. 49.46) without revising in any way L&I’s determination of the requirements for professional exemption.<sup>3</sup> That regulation states that to qualify for the

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<sup>2</sup> *See Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 80, 178 P.2d 936 (2008) (“agency regulations carry the force of law”).

<sup>3</sup> *See, e.g.,* Laws of 1993, ch. 281, § 56. The legislature’s acquiescence to the Director’s definition and delimitation is all the more compelling when the legislature has amended

(continued . . .)

professional exemption, among other things, the work being performed must require “knowledge of an advanced type in a field of science or learning.” WAC 296-128-530(1)(a), (5). Under one of the two alternative tests set forth in the regulation, this advanced knowledge is “customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship.” WAC 296-128-530(1)(a). That regulation does not refer to any licensure requirements.

Equally important, L&I is further empowered by Washington law to provide additional guidance regarding the professional exemption in the form of an Administrative Policy. Under the Regulatory Reform Act, a state agency is “encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements.” RCW 34.05.230(1). L&I has done so by issuing its Administrative Policies. L&I’s introduction to the intended use of those policies is straightforward: “The following administrative policies are the

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(. . . continued)

the underlying statute in other respects without repudiating the regulation. *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445 n.2, 932 P.2d 628 (1997).

current opinions of the Department of Labor & Industries about how the major labor laws under its jurisdiction should be applied.”<sup>4</sup>

One such Administrative Policy is particularly relevant here: ES.A.9.5 (hereafter, the “Policy”).<sup>5</sup> The Policy makes clear that accounting is one of the fields of advanced knowledge to which the professional exemption adheres. Policy § 8, at 4. Critically, the Policy also squarely refutes any argument that an accountant must be licensed in order to be exempt. Addressing that issue, the Policy states:

[A]ccountants who are not certified public accountants may also be exempt as professional employees if they actually perform work that requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed *in the definition* of professional employee.

*Id.* at 5 (emphasis added). The Policy thus confirms what the plain terms of WAC 296-128-530 already show: that KPMG Audit Associates can be exempt professionals under the MWA regardless of whether they are licensed.

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<sup>4</sup> Washington State Department of Labor & Industries, Administrative Policies, <http://www.lni.wa.gov/WorkplaceRights/Rules/Policies/default.asp> (last visited Mar. 13, 2011).

<sup>5</sup> Department of Labor and Industries Employment Standards, “Exemption from Minimum Wage and Overtime Requirements for Professional Positions,” ES.A.9.5 (June 24, 2005), <http://www.lni.wa.gov/WorkplaceRights/files/policies/esa95.pdf>.

The same is true with regard to the education and experience requirements for a CPA license, which the trial court adopted as requirements for exempt professional status without statutory or regulatory support in the MWA. CP 2349. The trial court's ruling that "the minimum educational requirement for unlicensed individuals performing audit work to be exempt from overtime as professional employees is at least the bachelor's degree specified in WAC 4-25-[710]" (CP 2349) is precisely *contrary* to the controlling regulation, which makes clear that knowledge of an advanced type is "customarily" acquired by a prolonged course of study. WAC 296-128-530(1)(a). The trial court's ruling superimposing the Accountancy Act's requirement of "on-the-job audit work-training experience for a minimum of 2,000 hours over a 12-month period" (CP 2349) is likewise contrary to WAC 296-128-530(5), which provides no basis whatsoever to import an experience requirement into the MWA. In this respect as well, the trial court's analysis threatens to rewrite the MWA.

Finally, it is equally clear that Litchfield was an exempt professional, and the same is true of the class of KPMG Audit Associates he would represent. The record before this Court shows that their primary duty was in the field of accounting and that performance of this duty

required knowledge of an advanced type. It is also clear that their work involved the consistent exercise of discretion and judgment. The question, then, is whether these employees can be plucked out of the professional exemption by some sort of arbitrary litmus test as the trial court's April 22 Order holds. As set forth above (and in greater detail in the KPMG Brief), such a result is directly contrary to the comprehensive regulatory scheme under the MWA. As set forth below, such a holding will yield unpredictable and costly results for Washington employers (including members of AWB) that have appropriately relied on the professional exemption as expressly defined and delimited by L&I.

**B. If The Court Were To Accept Litchfield's Arguments, Its Holding Would Have Profound Consequences For Washington Employers, Including AWB's Members.**

**1. Washington Businesses Must Be Able To Rely On L&I's Guidance Concerning Regulations Promulgated And Enforced By L&I.**

Under the Regulatory Reform Act, discussed briefly above, the entire point of collecting interpretive and policy statements – such as L&I's Administrative Policies – is “to advise the public.” RCW 34.05.230(1). Agencies must notify the code reviser and publish notice in the State Register of new or revised interpretive or policy statements. RCW 34.05.230(4). Agencies are to make interpretive and policy

information available through electronic distribution so as to “provide the greatest possible access to agency documents to the most people.” RCW 34.05.260(1). Clearly, this function – advising the public – allows businesses such as AWB’s members to structure their business practices to comport with the requirements of law.

This case presents a classic instance of when the relevant agency has appropriately provided such guidance. In an effort to better advise the public (including AWB and its members), L&I has promulgated ES.A.9.5. Litchfield’s implicit advocacy is that the Policy can simply be disregarded. That is not Washington law, nor should it be. To the contrary, Washington courts have repeatedly held that an agency’s interpretation of a rule it promulgated and enforces is entitled to deference from the reviewing courts. *See, e.g., State Liquor Control Bd. v. State Personnel Bd.*, 88 Wn.2d 368, 379, 561 P.2d 195 (1977) (“The construction of a rule by the agency which promulgated it is entitled to great weight.”).

Indeed, in *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 244 P.3d 32 (2010), this Court confirmed this fundamental tenet of administrative law with regard to L&I and the MWA as follows:

DLI [L&I] is the state agency charged with interpreting and carrying out Washington’s minimum wage laws. We give great weight to an agency’s interpretation of a statute absent a

compelling indication that its interpretation conflicts with the legislative intent.

159 Wn. App. at 54 (footnote omitted). The deference due L&I is particularly called for in instances such as this when the agency is interpreting a legislative regulation it has promulgated. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000).

This body of law exists for important reasons. First, these legal principles appropriately recognize that administrative agencies have the expertise needed to properly interpret and apply a given statutory scheme. *Overlake Hosp. v. Dep't of Health*, 170 Wn.2d 43, 56, 239 P.3d 1095 (2010) (courts accord “great deference” to agency’s interpretation of regulatory language “as the agency has expertise and insight gained from administering the regulation that the reviewing court does not possess”). As such, the agency’s directives should be afforded substantial deference. Second, the same body of law also provides needed certainty to Washington businesses so that they can structure their business practices to comport with the requirements of law.

AWB’s members must rely on regulations issued by L&I, as well as its Administrative Policies interpreting those regulations, to properly classify and compensate their employees. Given this state’s wage laws, including statutes providing for double damages and attorney fees in

certain circumstances (*e.g.*, RCW 49.52.070), it is particularly important that Washington businesses be able to rely on L&I's guidance and directives. If Washington businesses were stripped of their ability to do so – as Litchfield effectively argues – the resulting uncertainty could significantly upset business practices, generate substantial litigation, and cause employers to think twice about establishing or expanding operations in, or even consider leaving, Washington. For this reason too, AWB urges the Court to reject the trial court's April 22 Order and Litchfield's arguments.

**2. The Trial Court's April 22 Order, If Affirmed, Would Disrupt A Large Number Of Routinely Accepted And Lawful Employment Relationships.**

In addition to the obvious error in this case, AWB is greatly concerned about the effect of Litchfield's analysis, which if adopted would usurp L&I's statutory authority to determine who is and who is not employed in a bona fide professional capacity. The very premise of Litchfield's argument, after all, is that whether an employee is an exempt professional is governed by separate provisions that regulate the qualifications and professional practice of that professional – such as the regulations implemented by the Accountancy Board to regulate

accountants. Professions in Washington are licensed by a host of different state agencies.<sup>6</sup> Such agencies include the following:

- The Accountancy Board, which initially qualifies and monitors the professional performance and ethical behavior of CPAs.<sup>7</sup>
- The Department of Health, which maintains standards for quality health care delivery in Washington and establishes the licensure requirements for, among others, physicians, nurses, and other health care providers.<sup>8</sup>
- The Department of Licensing, which regulates numerous professions including real estate brokers, some engineers, geologists, private investigators, and others.<sup>9</sup>
- The Department of Financial Institutions, which regulates and licenses a number of professions, including investment advisors, mortgage brokers, and securities brokers.<sup>10</sup>

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<sup>6</sup> See Washington State Department of Licensing, List of Licenses, <http://www.dol.wa.gov/listoflicenses.html#j> (last visited Mar. 13, 2011).

<sup>7</sup> See Board of Accountancy, Washington State (2009), <http://www.cpaboard.wa.gov/>.

<sup>8</sup> See Washington State Department of Health (last modified May 28, 2010), <http://www.doh.wa.gov/about.htm>.

<sup>9</sup> See Washington State Department of Licensing (2011), <http://www.dol.wa.gov/about/whatwedo.html>.

<sup>10</sup> See Washington State Department of Financial Institutions (last modified Mar. 23, 2011), <http://www.dfi.wa.gov/>.

- The Office of the Insurance Commissioner, which oversees the insurance industry and licenses insurance brokers, agents, and adjusters.<sup>11</sup>
- The Washington State Bar Association, which administers the admissions, licensing, and discipline functions for lawyers.<sup>12</sup>
- The Administrative Office of the Courts, which oversees the Certified Professional Guardian Board, which in turn licenses those professionals.<sup>13</sup>

Professional status, under Litchfield's approach, would depend upon the determinations of these and other state agencies. Such a result is contrary to the express terms of the MWA, which delegated the determination of the requirements for professional exemption *solely* to L&I.

Equally troubling, Litchfield's approach would upset any number of established employment relationships in Washington. That is because there is nothing in Litchfield's approach that limits its application to KPMG Audit Associates, or even to accountants more generally.

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<sup>11</sup> See Washington State Office of the Insurance Commissioner, <http://www.insurance.wa.gov/about/about.shtml> (last visited Mar. 24, 2011).

<sup>12</sup> See Washington State Bar Association (last modified Dec. 18, 2010), <http://wsba.org/info/about/default.htm>.

<sup>13</sup> See Washington Courts, [http://www.courts.wa.gov/appellate\\_trial\\_courts/aocwho/?fa=atc\\_aocwho.display&fileID=adinin](http://www.courts.wa.gov/appellate_trial_courts/aocwho/?fa=atc_aocwho.display&fileID=adinin) (last visited Mar. 24, 2011).

Accountants are not a unique profession under WAC 296-128-530, and there are many other professions governed by the regulation. As a result, an argument (like Litchfield's) that would have courts go beyond the plain terms of the MWA and its regulations to impose additional requirements for exempt status (such as licensure, education, or experience) could have far-reaching effects on numerous businesses in numerous fields of work. Accountancy is not the only profession that requires licensure under Washington law, and it is not even the only profession requiring licensure that also imposes education or experience requirements. *See, e.g.*, WAC 308-12-115 (education and experience requirements for licensure as architect); WAC 196-12-010 (education and experience requirements for licensure as engineer); RCW 18.71.070 (education and experience requirements for licensure as physician). Litchfield's analysis offers no express stopping point that would necessarily preclude its application to new architects, engineers, or medical residents. The Washington Supreme Court has rejected "such result-oriented jurisprudence, particularly in an area of the law so vitally enmeshed in our economy and dependent on settled expectations ...." *Stuart v. Coldwell Banker*, 109 Wn.2d 406, 422, 745 P.2d 1284 (1987) (negligent construction of condominium claim).

By looking beyond the MWA and its regulations, Litchfield's approach would threaten to upset a significant cross-section of professions that impose (through separate statutes and regulations) their own criteria for licensure or qualification. For instance, it is a matter of public record that a person seeking to become a lawyer in Washington faces a delay of two to four months between taking the bar exam and being administered the oath of an attorney.<sup>14</sup> It is traditional for new lawyers to commence employment and earn a salary prior to learning the results of the bar exam, much less having been formally admitted to practice. Under Litchfield's analysis, all of those yet-unlicensed attorneys are not exempt professionals and would therefore be entitled to overtime pay.

The effect of Litchfield's analysis is even more bizarre with regard to resident physicians. Even though not fully licensed to independently practice medicine, residents are licensed to practice medicine under the supervision of a licensed physician. RCW 18.71.095(3). But if Litchfield's analysis were accepted, a pre-licensed physician would not be an exempt professional – even though the resident physician is applying the quintessential knowledge of an advanced type in

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<sup>14</sup> See Washington State Bar Association, Post Exam and Admission Requirements (last modified Feb. 9, 2011), <http://www.wsba.org/barexampost.htm>.

a field of science or learning and is exercising independent judgment, making literally life and death decisions. Moreover, the supervising physician need not be personally present while the resident practices medicine. RCW 18.71.095(3). Such a resident is an exempt professional under both WAC 296-128-530 and ES.A.9.5.5, and the contrary result mandated by Litchfield's analysis is absurd.

Similarly, in order to qualify for licensure, a new engineer must obtain experience that requires the engineer to make "independent judgments and decisions" in the various areas of engineering. WAC 196-12-020(1). Thus, Litchfield would likewise argue that the pre-licensed engineer is not an exempt professional – even though the engineer is using knowledge of an advanced type in a field of science or learning and, by definition, exercising discretion and judgment. That is all that is required by the controlling regulation, WAC 296-128-530(5). Only Litchfield claims that it is not enough. In this respect as well, Litchfield's argument – if accepted – would potentially exclude from the reach of the professional exemption thousands of employees traditionally considered exempt professionals.

Finally, not only is Litchfield's approach contrary to law, it also injects into the MWA a troubling source of inconsistency and confusion.

How, for example, are employers to know which state agency directives affect exempt professional status and which do not? On top of that, if the directives of any or all of these state agencies were relevant in determining exempt professional status under the MWA, that status could change without any action by L&I. If the Accountancy Board revises its experience requirement for CPAs to only 100 hours, would that many more accountants be exempt professionals? And in instances like this where there are several licensure requirements, how are employers to know which requirements might be selected by a reviewing court to classify exempt professionals? To ask these questions is to illustrate the fallacy of Litchfield's analysis and the profound consequences of adopting that analysis. The Court should summarily reject Litchfield's attempt to rewrite the MWA.

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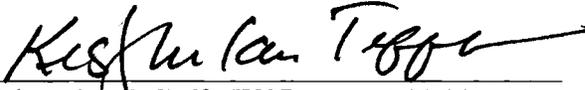
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**VI. CONCLUSION**

For the reasons stated above, AWB urges this Court to affirm the trial court's March 1 Order and reject the trial court's April 22 Order.

DATED this 22<sup>nd</sup> day of April, 2011.

ASSOCIATION OF WASHINGTON BUSINESS

By   
Kristopher I. Tefft, WSBA No. 29366  
1414 Cherry Street SE  
Olympia, WA 98507  
(360) 943-1600