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New Jersey's Appellate Division holds that centralized control over menus, prices and control procedures does not deprive managers of discretion and make them eligible for overtime pay.

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## Hospitality Edition

A Littler Mendelson Newsletter specifically for the Hospitality Industry

### New Jersey Confirms That General Managers of Chain Restaurants Are Executive Employees Who Are Exempt From Overtime

By Eric A. Savage

In a case with major significance for multi-unit restaurants and, in all likelihood, for retailers generally, the New Jersey Appellate Division, in its August 31, 2005, decision in *Marx v. Friendly Ice Cream Corp.*, No. A-6105-03TI (N.J. App. Div. 2005), held that general managers of individual restaurants in a chain of stores can be treated as executive employees and are not entitled to overtime pay. The ruling, which upheld the trial court's dismissal of the complaint, is a case of first impression in New Jersey and joins a limited number of federal and state court decisions which have upheld employers' rights to treat such employees as exempt.

**Friendly's Operations and Expectations for General Managers** Friendly's operates a number of family-style restaurants in the eastern United States. Like most multi-restaurant companies, Friendly's strives for uniformity in its offerings and service from one facility to another. As a result, menus, prices, promotional materials and store procedures are determined at company headquarters. The central office also provides various mechanisms to ensure that the restaurants meet company standards, including detailed checklists that the individual facilities are expected to use throughout the day. In this regard, the company is no different than most chain retailers and service providers, whether engaged in the food service industry or some other service line.

Overall responsibility for each store resides in a general manager, who is paid an annual salary. The restaurants also have assistant managers and lower-level managers known as guest service supervisors, all of whom are hourly employees and are entitled to overtime pay when they work more than forty hours in a week. In addition, the restaurants have cooks, servers, and other types of employees typically seen in the food service industry, all of whom are paid on an hourly basis.

Although the general managers receive extensive training in company operations,

either at the time of hire or at their promotion, and cannot take charge of a restaurant without demonstrating proficiency in company systems and operational guidelines, Friendly's expects them to exercise discretion in a number of areas. Employee relations is one such field. Each general manager hires, trains, supervises, disciplines and evaluates the members of his or her staff and retains the power to fire employees, including assistant managers with the approval of a district manager. Each general manager is responsible for ordering his or her facility's food and supplies, taking into account anticipated demand, and must also determine daily food preparation needs, and schedule employee shifts each week. In addition, Friendly's general managers bear responsibility for certain financial duties such as paying bills, banking for their restaurants, and analyzing profit and loss statements. From a customer service standpoint, they have ultimate responsibility to ensure the quality of food and service. Within the company, each general manager is considered to have overall responsibility for the management, customer service, and financial well-being of his or her store, although all general managers are required to consult with district managers who visit the stores with varying degrees of frequency.

**Plaintiffs' Claim for Overtime** In *Marx*, four New Jersey-based general managers contended that the company's mandatory menu offerings, control over prices, detailed operating procedures, ultimate control over promotional activities and the like effectively stripped them of any meaningful discretion in the operation of their restaurants. They claimed that on a regular basis they engaged in work more typically associated with staff employees, such as cleaning bathrooms, clearing tables, vacuuming, unloading food supplies, cooking and serving food. At trial, they contended that they spent no more than 20% of their time on managerial functions. Based on the type of work they claimed to be performing and the amount of

time they spent on non-managerial functions, they asserted an entitlement to overtime pay under New Jersey law.

#### **The Court's Ruling and Lessons for Employers**

Under New Jersey's wage and hour law, like the federal Fair Labor Standards Act on which it is modeled, Friendly's bore the burden of proof to show that its general managers were in fact executives who were not entitled to overtime. The court's decision upholding Friendly's position sheds light on the practical aspects of the case and offers certain guidelines for employers.

First, the company's training manuals, videos and written procedures not only made clear the range of matters over which the general managers have responsibility, but also left no doubt that the general manager has "the buck stops here"-level of responsibility in his or her store. Under this criterion, an employer that wants to preserve the exemption for managers is well advised to have in place policies and documentation, supported by appropriate training material, to demonstrate what authority it expects its general managers to possess and exercise. Friendly's was able to prevail in this case because its training and operation materials made explicit that general managers were fully responsible for actually "managing" their stores. To benefit from this rule, restaurants, or retailers with multiple outlets, should review their own materials and update them as necessary to confirm such expectations for their managers.

Second, although Friendly's general managers report to a district manager, the company was able to demonstrate that these senior managers had no day-to-day management responsibilities for each restaurant. District managers periodically checked in on restaurants within their territories and reviewed financial statements and proposed employee schedules, but did not involve themselves in the restaurants' daily activities. Accordingly, employers must be careful to ensure that persons entrusted with managing the stores are in fact allowed to carry out that responsibility. The court was not troubled by the fact that general managers had supervisors, and did not find that the mere existence of a hierarchy precluded the general managers from being considered executives. Nonetheless, companies are well advised to make sure that supervision does not evolve into actual operational control of the individual facility or divest line managers of their responsibility.

Third, a key component in the court's finding that the "primary" duty of the general manager was the actual management of the restaurant was the overall significance of these duties to the organization, particularly when compared to the "pitching in" functions that they also performed. The court recognized that managers must sometimes perform functions

usually allocated to non-exempt employees, but it emphasized that the amount of time that the general managers devoted to non-managerial work was neither determinative of their role nor inconsistent with their management duties, as long as the employer could demonstrate that the manager's main function at all times was management. The lesson for employers from this aspect of the case is that their written materials, practices, coaching and operations must stress the primacy of the management function over any other work that the manager might have to do on a temporary or occasional basis. The court did not accept the plaintiffs' contention that the manager of a restaurant should be someone who sits in a back office and is never required to come onto the floor and help out when needed.

Finally, the court addressed the New Jersey statute's requirement that service establishment employers must demonstrate that the managers spend less than 40% of his or her time on "non-exempt work." The court interpreted this term, which is not defined in the statute, as meaning work which is not "directly and closely" related to managerial duties. As one example, the court distinguished between a supervisor who regularly works alongside the other employees, and one who does so to teach, manage and supervise. For another example, the court referred to the difference between general record keeping and records kept for performance evaluations.

In an important and new explanation of New Jersey law, the court ruled that Friendly's did not need to engage in a moment-by-moment analysis of the managers' workweek, noting that such a requirement would entail the maintenance of detailed work records not required by the Department of Labor. Indeed, such a requirement would be very problematic, because the persons filling out the records would probably be the same managers who have an incentive to emphasize the time spent on non-managerial duties. Instead, the court accepted Friendly's contention that the general manager is engaged in supervision and stewardship of the restaurant at all times that he or she is in the store, even if at a given moment the manager is flipping a burger or mopping the floor.

The ruling avoids the specter of companies having to engage in quantifying the time spent on individual tasks or retaining time and motion study personnel to observe general managers at work in order to defend against future challenges. Instead, the court focused its analysis on the work being performed, how that work relates to typical management functions of a food service operation, and whether the work is consistent with the employer's reasonable expectations. In *Marx*, the court accepted Friendly's argument that the company's expressed intentions controlled, and that if the managers were in fact spending only 20%

of their time engaged in management functions, as the plaintiffs contended, then they had unilaterally changed the nature of their job, a decision for which Friendly's could not be held liable. Thus, employers can set forth and rely on their expectations to defeat arguments such as those presented in this case.

However, the court did leave open one possible escape route for employees. The plaintiffs argued that Friendly's set their labor budget so low that they could not hire sufficient staff and that the managers had no choice but to work like crew members. The court accepted Friendly's argument that it did not arbitrarily restrict staffing levels or do so in a bad faith attempt to require general managers to perform line duties for substandard pay. Specifically, the company was able to demonstrate that the labor budget was only a guideline and not a cap, and that no manager had ever been disciplined or terminated for exceeding his or her budget. Despite these findings, the court left the door open for such an allegation if the employees could prove misuse of the labor budget.

**Conclusion** Employers that run restaurant concepts or multi-unit retail stores can take substantial comfort from this ruling and should be able to rely on the decision to refute claims that the uniformity they try to achieve in their operations undercuts their right to treat store managers as exempt. However, to preserve that exemption, employers must make clear — in words, deeds and articulated expectations — that managers are in charge of their facilities and are invested with discretionary powers, of which the human resources function is an essential component. Their expectation should be made clear throughout managerial training and confirmed in all aspects of the managers' employment. In addition, employers need to be sure that managers have latitude to make important decisions regarding the operations of their stores, whether that relates to inventory, financial controls, customer satisfaction or any other aspect of the operation. Finally, they need to verify that the activities of the general managers' supervisors do not cross the line from consultation and approval for decisions consistent with company guidelines into direct management of the individual store. The more responsibility the general manager has, the less likely he or she will be to prevail on a claim for overtime pay.

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*Eric Savage is a shareholder in Littler Mendelson's Newark office. If you would like further information, please contact your Littler attorney at 1.888.littler, littler@info.com, or Mr. Savage at esavage@littler.com.*

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