

Labor & Employment

Strategic Issues Related to Employee Exemption Review

Wage & Hour

Apalla U. Chopra and Adam P. KohSweeney of O'Melveny & Myers LLP discuss the challenges employers face when determining whether to classify certain employees as exempt from the Fair Labor Standards Act's minimum wage and overtime requirements. In the authors' view, the attorney-client privilege can shield employers from some of the risks associated with exemption determinations but may also entail substantial costs. In addition, the authors address strategies for handling exemption issues in a manner calculated to avoid litigation and prevent class certification in the event litigation does ensue. Ultimately, any reasonable approach will involve consulting with sophisticated counsel early in the process of deciding whether to classify employees as exempt. Apalla U. Chopra and Adam P. KohSweeney, O'Melveny & Myers LLP [p3](#)

Computer & Internet Use Policies

Tim St. Clair of Turner Padgett Graham and Laney, P.A. discusses the steps employers can take to prevent against employee theft of patents, copyrights, trademarks, and trade secrets. In particular, corporate policies and procedures, including confidentiality and non-compete agreements, may be effective in creating an internal business climate that protects intellectual property. Contributed by Tim St. Clair, Turner Padgett Graham & Laney, P.A. [p7](#)

Employee Benefits

Non-grandfathered group health plans will be required to provide coverage for contraceptives, well-woman visits, and other preventive services for women at no cost in accordance with new guidelines issued by the Department of Health & Human Services. [p10](#)

Health & Welfare Benefits

The Eighth Circuit held that an employee's untimely allegations of sexual harassment were not so similar in nature, frequency, and severity to her timely allegations as to warrant application of the continuing violation doctrine. The court also found the timely allegations were not sufficiently severe or pervasive to create a hostile work environment. [p23](#)

Immigration & Naturalization

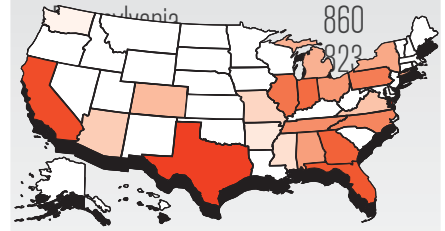
David Leopold of AILA comments on recent DHS issued guidance clarifying how entrepreneurs may obtain an employment-based second preference (EB-2) immigrant visa and also qualify for a National Interest Waiver under the EB-2 immigrant visa category. [p29](#)

Discrimination

Last year, employment discrimination charges reached a record high, and early indications suggest 2011 could be a new record-setter. The states with the highest number of discrimination charges resulting in EEOC merit resolutions were Texas, California, Florida, Georgia, and Indiana. Although a state's population size plays a role in the volume of discrimination charges, there are many other relevant factors. [p18](#)

States with the highest incidence of workplace discrimination based on the number of merit resolutions reported by the EEOC

Texas	1780
California	1600
Florida	1409
Georgia	1288
Indiana	1063
Illinois	1001
Virginia	860
Missouri	822



Source: EEOC

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Subscription Price:

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Print ISSN: 1947-7414
Online ISSN: 2152-9523

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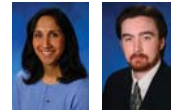


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Strategic Issues Related to Employee Exemption Review



O'MELVENY & MYERS LLP

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Introduction: Why Conduct a Review?

Wage-and-hour litigation – in particular exempt/non-exempt misclassification cases – continue to clog court dockets throughout the country, and new cases seem to be filed every day. This ongoing focus has prompted many employers, large and small, to revisit their classification practices. Such review and reclassification has its pros and cons. On the one hand, reclassifying employees from exempt to non-exempt and paying them overtime on a going forward basis cuts off any potential liability should an action be brought for misclassification. On the other hand, whenever there is a change in the employment relationship – particularly when that change impacts an employee's schedule or paycheck – there is a greater risk that the employee will begin to question the change. Given the vast gray area in the exemption law, a change will often signal that the employer was doing something wrong before, even though the reality is far less clear. For that reason, reclassifying employees may actually increase litigation risk instead of decreasing it. Despite this, little has been said regarding best practices when it comes to reviewing and potentially changing classification without increasing litigation risk. A complete discussion of such issues and best practices could fill a short book, but in this article we focus on three of the issues that are frequently encountered: (1) maintaining the attorney-client privilege; (2) creating commonality where none had existed previously; and (3) limiting exposure to fraud and misrepresentation claims.

Maintaining the Privilege

To limit the risk of – and best prepare for – potential litigation over an exempt classification review,

employers should carefully plan the entire review process from start to finish. This approach will reap benefits beyond privilege issues, but is particularly important in that vein. First and foremost, an employer should decide how important it is for the review to be privileged in the first instance, as there may come a time during subsequent litigation that the employer must defend its decision to classify or reclassify employees. If, for example, it turns out that the decision was wrong (*i.e.*, that the employees were actually non-exempt instead of exempt), an employer defending a lawsuit under the federal Fair Labor Standards Act (the FLSA) may want to use the review process to prove that its classification decisions were made in good faith in order to avoid liquidated damages. Thus, deciding whether or not a review should be privileged is an important question in its own right that does not always admit to an easy answer. That said, if the decision is made to keep the review privileged, at least as an initial matter, the next question is how to do so effectively.

If the decision is made to keep the review privileged, at least as an initial matter, then the review should be structured as a fact gathering endeavor for the purpose of providing legal advice. As with any privileged communication, the employer should ensure that communications are accomplished on a need-to-know basis and are kept between as few personnel overall as feasible. Once the fact-gathering and review of the facts has been completed by lawyers and/or their agents, the facts and advice should be provided to a non-lawyer decision maker. This decision maker should not have been part of the privileged fact-gathering and review, and should be brought into the picture at the end for the purpose of listening to the advice and making a decision based on the advice. This structure should be planned in advance in order to be most effective.

A key item to remember is that to maintain the privilege over communications made during a review, the company should maintain the division between legal advice and business decisions. To the extent that in-house counsel has both a legal and business role to play in review, plaintiffs' counsel may argue that an attorney's communications are not privileged because their "dominant purpose" was not to secure or render legal advice. Even where communications involve strategy decisions that have some legal significance, that does not mean the dominant purpose of those communications will be found to be the provision or securing of legal advice. Thus, to steer clear of any thorny dominant purpose analysis, in-house counsel and their agents should exclusively provide legal recommendations and advice, and should not participate in any business decisions.

Of course, depending on the size and scope of the review, this fact-gathering exercise may be too voluminous for lawyers – whether in-house or outside – to handle themselves. The law in some jurisdictions recognizes that lawyers may utilize non-lawyers for the purpose of gathering information and making recommendations to aid them in providing advice to the employer. More specifically, communications with and between the attorney's agents, and their notes, reports, and memoranda, qualify for attorney-client protection if they are generated in furtherance of the lawyer's provision of advice and the agent was retained by counsel for such purposes.¹ As a California Court of Appeal explained: "It follows that in order to implement the advice of lawyers, the advice must be communicated to others within the corporation. It is neither practical nor efficient to require that every corporate employee charged with implementing legal advice given by counsel for the corporation must directly meet with counsel or see verbatim excerpts of the legal advice given."² This principle recognizes that, practically speaking, requiring a lawyer to be present for every conversation necessary to gather and propagate legal advice would eviscerate the privilege – particularly in the in-house context.³ This principle extends to both hired consultants and internal personnel (such as Human Resources employees) who assist lawyers in the review. Documenting this relationship is an important step in order to prove the privilege later on, and may slip between the cracks to the extent the non-lawyers are company employees. Thus, if the employer company is performing the review solely in-house, it is a good idea to formalize the relationship with internal personnel through a document that sets out scope, responsibilities, and the like – an internal retention letter, so to speak.

That said, the employer must of course bear in mind that the attorney-client privilege protects only communications and not the underlying facts.⁴ As a result of this distinction between discoverable facts and privileged communications, employers may be required to expend an extensive amount of time and money reviewing – and in some cases partially redacting – documents to ensure that privileged information is withheld, but facts are not. On the other hand, some courts, such as the California Supreme Court, have been reluctant to carve out exceptions to the attorney-client privilege, holding that, because the privilege protects the transmission of information, a confidential opinion letter from outside counsel regarding an exemption audit does not become unprivileged simply because it contains material that could be discovered by other means.⁵ Employers who are defending the privileged nature of an internal review would be well-advised to argue that none of the facts gathered during a review are "secret" or "hidden" – things like job duties and hours

worked are facts that can easily be uncovered through standard discovery tools without the need to infringe upon the sanctity of privileged communications.

Implications For Class Certification

It is probably no secret that an employment decision that affects one employee creates substantially less liability than an employment decision that affects hundreds, or thousands, of employees. Thus, when planning an internal review, it is important to structure and conduct it in ways that do not create or establish commonality for future class certification purposes among groups of employees where no commonality had existed before. Employers should expect that employees affected by the audit may argue that, for example, the employer's reclassification of many distinct job titles creates commonality in favor of class certification. "An internal policy that treats all employees alike for exemption purposes," plaintiffs would reason, "suggests that the employer believes some degree of homogeneity exists among the employees. This undercuts later arguments that the employees are too diverse for uniform treatment."⁶

Thus, when planning an internal review, it is important to structure and conduct it in ways that do not create or establish commonality for future class certification purposes among groups of employees where no commonality had existed before.

As an initial matter, an old saying applies here – "an ounce of prevention is worth a pound of cure." To that end, when planning the review in advance, thought should be given to a seriatim review that divides the work to be done into different stages, perhaps even with different decision makers or other unique criteria. Even laying aside the issue of certification, this may make sense simply because breaking a large review into constituent parts is necessary to adequately manage a process and review the data to the required level of particularity. Note, however, that any mass review or mass reclassification – no matter how well structured – is likely to invite the types of arguments set out above. In response, employers have at least

four counterarguments: (1) the decision to reclassify was a business decision, not the final word on legal rights or questions; (2) the employer's statements in connection with the reclassification cannot function as a legal admission; (3) the doctrine of subsequent remedial measures will bar introduction of audit-related evidence at trial; and (4) treating employees the same for purposes of reclassification does not overcome other evidence of a lack of commonality.

First, it is undeniably the case that employers may treat employees as non-exempt even though they may qualify as exempt.⁷ While there is always a risk in classifying employees as exempt (since a court may disagree with the employer's determination), there is no risk in classifying employees as non-exempt. Indeed, an employer may make a business decision to reclassify everyone in certain job titles as non-exempt as a way to manage risk. Such decisions often occur in connection with job titles that are likely to be the ones in which there was a significant overlap between non-exempt and exempt duties. The fact that an employee who likely or definitely qualifies for exempt status is reclassified as non-exempt for purposes of risk management or convenience does not entitle him or her to back overtime – and hence, the reclassification itself does not obviate the need, should litigation arise, for the court to conduct an individualized analysis of the relevant facts. Further, even if the employer decided that every single reclassified employee did not meet the test for exemption, that determination should still not have any legal effect – any more than a determination by the employer that they were exempt would have any binding effect.

Second, and relatedly, the employer may respond that its statements to employees regarding their reclassification should not constitute an admission that the employees were legally non-exempt from wage and hour regulations – at most, such statements are only probative of what the employer knew or believed at the time. Under California law, for example, a party cannot admit a legal conclusion.⁸ As a matter of law, the "exception to the hearsay rule which permits declarations or admissions by a party to be shown applies only to declarations or admissions of fact and not to the interpretation, legal or otherwise of the facts."⁹ A party's own thoughts and interpretations "are inadmissible as his opinion or conclusion, where the [facts] on which the action is based [are] equally available and known to the parties and [their] interpretation is a matter for the court."¹⁰ As a general matter, whether an employee qualifies as exempt is a mixed question of law and fact, one that requires interpretation of facts and application of law.¹¹ As a result, deciding to treat exempt-qualifying personnel as non-exempt – or, deciding to treat one or

more individuals as non-exempt because their status is uncertain – should not be deemed an admission of misclassification.

Third, the employer may argue that the plaintiffs, as a matter of law and public policy, should be precluded from relying upon the employer's voluntary reclassification to argue that a class-wide determination of the exemption status of each of the job titles at issue is appropriate. After all, employers should be encouraged, not punished, for undertaking reviews with the aim of ensuring compliance with the law of the land. Under this theory, the employer's audit and actions should constitute subsequent remedial measures – even if one were to assume *arguendo* that the jobs were wrongly classified. Some jurisdictions also recognize a “self-critical review” privilege for similar reasons. To the extent that a court is convinced of these policy rationales and/or privilege claims, evidence of an internal review or reclassification should not be admitted to show liability or, arguably, for the purpose of establishing commonality at the class certification stage. When “remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.”¹²

Fourth, the employer may argue that treating employees the same for purposes of reclassification does not overcome other evidence of a lack of commonality. In a decision overturning the certification of a class of current and former California employees challenging their treatment as exempt employees, the Ninth Circuit recently held in *In re Wells Fargo Home Mortgage* that “[w]hile such uniform exemption policies are relevant to the [class certification] analysis, . . . it is an abuse of discretion to rely on such policies to the near exclusion of other relevant factors touching on predominance.”¹³ The Ninth Circuit found error in the district court's “presumption that class certification is proper when an employer's internal exemption policies are applied uniformly to the employees,” in the face of contrary evidence of the necessity for individual inquiries.¹⁴ In theory, evidence of a common review or common reclassification should be treated as any other evidence of a common exemption policy and should not trump affirmative evidence showing a lack of commonality or predominance.

Fraud and Misrepresentation Claims

After completing a review and making the decision to reclassify employees, it is critical for employers to be careful with any communications they share with

the affected employees about the review process and reclassification decision. Of course, it goes without saying that the employer should always tell the truth and provide accurate information to employees. Even the most candid employer, however, can run into trouble in this area if adequate care is not taken. This is because exempt/non-exempt law is a complex subject, and it is quite easy to inadvertently misstate something or make a statement that actually conveys a different meaning than intended. This is compounded by the information asymmetry that exists between, for example, a computer programmer and a human resources professional. For these reasons, if statements are not closely scrutinized before they are communicated to employees, these statements could possibly give rise to claims, such as fraud or misrepresentation, where none had existed before. In other words, employees may claim that not only were they previously misclassified as exempt, but the employer also lied to them about the reasons they were reclassified which caused them damage.¹⁵

An employer is generally not under any legal obligation to communicate anything about the audit or reclassification decision to the affected employees. But once any communication is made, it should be truthful in terms of both providing accurate information and not omitting any material information. While in theory the reclassification decision can be implemented without making any statement to the employees, in practice an employer may inevitably find itself having – or wanting – to explain its reclassification and/or backpay decision to the affected employees. This may occur, for example, in the context of explaining to these employees the new time keeping and overtime procedures they now have to follow as non-exempt employees. In the absence of “official” communications, employees may also seek out information from unofficial channels, and then be provided incorrect information by well-meaning but uninformed or misinformed personnel. Accordingly, even if employers do not wish to communicate anything to the affected employees about the reclassification decision, employers would be wise to plan for contingencies and perhaps preempt issues by providing employees with a carefully worded and attorney-scrutinized statement, and providing official channels through individuals that have the correct facts and are able to communicate to employees without being misconstrued or disseminating incorrect or partial information.

This, of course, does not mean that it is necessary for an employer to provide specific details about the review and why certain employees have been reclassified. What is necessary is that the communications are thought of and vetted in advance, and are not generated on the fly after employees have already started to ask questions. For example, in

many circumstances the law pertaining to whether an employee qualifies for an overtime exemption is murky and uncertain, as there remain a good number of open questions not yet answered by the courts and other questions with inconsistent and conflicting answers in different jurisdictions. If an employer makes the business decision to reclassify borderline employees from exempt to non-exempt out of an abundance of caution where the law is unclear, it would be perfectly honest for the employer to state this to the affected employees. Conversely, if the law is clear and there can be no legitimate dispute that the employees were in fact misclassified, the employer should not represent to the employees that their exemption status was unclear. All of these cautions apply equally to both written and oral communications.

Several best practices emerge from the above discussion. One lesson is that communications about the internal review and/or reclassification decision should be channeled through authorized personnel, to minimize the risk of uninformed individuals disseminating incorrect information. Another lesson is that it is helpful to involve lay people in the drafting of any written communications. The reality is that an affected employee may very well read a document in a different way than was intended by the lawyers and the human resource professionals who drafted it. Lastly, keeping the wrong people from talking is just as important – perhaps more so – as making sure that the right people do talk. This means that management and non-involved human resources and corporate communications personnel need to be instructed not to address questions and to direct inquiries to the proper individuals.

Conclusion

Although internal reviews and reclassifications are complex affairs which abound with traps for the unwary, they are still worthwhile endeavors and far preferable to finding out about a potential problem by being served with a lawsuit. Considering and implementing the analysis above should allow employers to start the process with the right frame of mind and with some appropriate signposts for the road ahead.

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¹ See, e.g., *National Steel Products Co. v. Superior Court*, 164 Cal. App. 3d 476 (1985); *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 141 (N.D.N.Y. 2007).

² *Zurich American Insurance Co. v. Superior Court*, 155 Cal. App. 4th 1485, 1498 (2007).

³ See, e.g., *Scripps Health v. Superior Court*, 109 Cal. App. 4th 529 (2003); *National Steel Products Co. v. Superior Court*, 164 Cal. App. 3d 476 (1985); *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 723-38 (1964); *Scholtisek v. Eldre Corp.*, 441 F.Supp.2d 459, 463-64 (W.D.N.Y. 2006) (collecting cases).

⁴ See *Upjohn Co. v. U.S.*, 449 U.S. 383, 396 (1981).

⁵ See *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725 (2009).

⁶ *In re Wells Fargo Home Mortgage*, 571 F.3d 953, 957 (9th Cir. July 7, 2009). See also *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 330 n.4 (2004).

⁷ *Eicher v. Advanced Business Integrators, Inc.*, 151 Cal. App. 4th 1363, 1370 (2007) (stating that exempt status is a defense to otherwise applicable provisions of the wage orders).

⁸ See *Pacific Indemnity Co. v. Fireman's Fund Insurance Co.*, 175 Cal. App. 3d 1191, 1203 (1985); *Quan v. Truck Insurance Exchange*, 67 Cal. App. 4th 583, 602 (1998) (recognizing that memoranda advising whether to afford a defense are not "admissions" of a defense duty"). See also *Meyer v. Berkshire Life Insurance Co.*, 372 F.3d 261, 265 n.2 (4th Cir. 2004) (noting the "unsurprising proposition" that "the court is not bound by a party's conception of the legal effect of certain facts").

⁹ *Fireman's Fund*, 175 Cal. App. 3d at 1203.

¹⁰ *Id.*; see also *Quan*, 67 Cal. App. 4th at 602.

¹¹ *Eicher*, 151 Cal. App. 4th at 1369.

¹² Cal. Evid. Code § 1151; see also *Pastor v. State Farm Mutual Auto. Insurance Co.*, 487 F.3d 1042, 1045 (7th Cir. 2007); *Dennis v. Fairfax*, 55 F.3d 151, 154 (4th Cir. 1995); *Los Angeles v. Superior Court*, 33 Cal. App. 3d 778, 783 (1973) (recognizing "the settled rule prohibiting the use of remedial measures undertaken after an event to prove negligence or culpability in connection with the event itself").

¹³ *In re Wells Fargo Home Mortgage*, 571 F.3d 953, 955 (9th Cir. July 7, 2009).

¹⁴ *Id.* at 958.

¹⁵ For example, an employee who is obviously misclassified might argue that she forwent legal action because her employer told her that her position was borderline and that her correct classification was very unclear.

Computer & Internet Use Policies

Minding the Store: Addressing IP Theft in the Workplace

Contributed by Tim St.Clair, Turner Padgett Graham & Laney, P.A.

"Thieves respect property. They merely wish the property to become their property that they may more perfectly respect it." – G. K. Chesterton

Locking the CEO's office door and chaining the front gate at night may once have been effective to protect business assets. Those days are gone.

Only a few decades ago, the majority of business assets were tangible property – buildings, equipment, tools, etc. Mechanical security was enough to insure that they remained the assets of the business. Within the span of our own careers, however, that accounting has