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Opposing Class Certification Requires Careful Preparation

By Arthur F. Silbergeld and Robert H. Horn

Since the decision in *Bell v. Farmers Insurance Exchange*, 87 Cal.App.4th 805 (2001) (*Bell I*), hundreds of class actions have flooded state trial courts, each asserting that an employer mistakenly has classified various categories of employees as exempt from the daily and weekly overtime provisions of state law. Such claims have been costly. Indeed, Farmers recently paid $210 million following lengthy litigation to settle the case.

The evolution of California case law that has led to this explosion of often-complex litigation, and recent court pronouncements regarding techniques for effectively defending employers, has raised concerns about compliance and the management of challenges to job classifications.

Many employers and their attorneys did, and others might have, correctly read the tea leaves derived from *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785 (1999), regarding how to address the risks associated with the unique demands of state wage-and-hour laws. But not every company acted quickly enough to review its exempt classifications and alter them when necessary to avoid the onslaught of subsequent litigation.

In *Ramirez*, a sales representative brought an action for unpaid overtime against his former employer. The employer argued that the employee fell within the "outside salesperson" exception found in the federal Fair Labor Standards Act, Sections 201 et seq.

Finding no state decisional law on point, the Court of Appeal in *Ramirez* looked to federal law to explain the meaning of "outside salesperson." Under the Fair Labor Standards Act and U.S. Department of Labor regulations, an employee is an outside salesperson if his or her "primary function" is the making of sales or the taking of orders. The Court of Appeal applied the federal standard to the evidence and found that the plaintiff was exempt from the overtime laws.

The Supreme Court in *Ramirez*, however, rejected the "primary function" standard, instead deciding Ramirez' status with reference to the overtime laws set forth in Labor Code Section 1171, as implemented by the state Industrial Welfare Commission's Wage Order 7-80, (2) (I).

Section 1171, found in the chapter pertaining to overtime laws, establishes an exemption for an individual employed as an "outside salesperson." Wage Order 7-80, (2) (I), defines "outside salesperson" as a person "who customarily and regularly works more than half the working time away form the employer's place of business."

In reversing the lower court, the *Ramirez* court contrasted the federal "primary function" test with the wage order's "quantitative approach, focusing exclusively on whether the individual 'works more than half the working time ... selling ... or obtaining orders or contracts.'"

The *Ramirez* court adopted the simple standard of the Industrial Welfare Commission order: To be properly classified as exempt, the salesperson must spend more than 50 percent of the time performing in exempt activities.

Although *Ramirez* was not a class action, it set the cornerstone for subsequent class actions by firmly establishing that courts in California will apply a simple, quantitative approach to evaluating exempt status.

The court cautioned trial courts not to place excessive reliance on an employer's job description or on the actual average hours spent on sales activity. Instead, the panel said, "the court should consider ... how the employee actually spends his or her time" and "whether the employee's practice diverges from the employer's realistic expectations."

This language, however, often has made it difficult for an employer to determine whether it can defeat a challenge to how it has classified one or more categories.

The *Ramirez* standard heralded a virtual tsunami of wage-and-hour claims leading to *Bell I* and the explosion of class actions that followed. The "50 percent plus" requirement quickly found its way into the administrative-exemption test, which also requires the employee to exercise independent judgment and discretion in implementing management policies.

Given the dramatic upsurge in wage-and-hour class claims in the last three years and potential for significant damages, management attorneys are expected to explain early in the litigation how they intend to achieve a quick and favorable settlement or to defeat a motion for class certification."

As a first line of defense, management attorneys commonly send out teams of lawyers to survey a reasonable sampling of employees in the challenged job classifications and to obtain their declarations as evidence of their exempt status. Such data may be useful to plaintiffs and the defendant in analyzing the allegations, understanding

the facts and, as in many cases, settling the matter in mediation.

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Attorneys start by reviewing job descriptions and categorizing each known duty associated with a job as either managerial (exempt) or nonmanagerial (nonexempt) in accordance with standards found in state labor law and, where consistent, the Fair Labor Standards Act.

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Using those benchmarks, attorneys develop written questionnaires regarding job duties and responsibilities for supervising nonmanagerial employees. The attorneys go into the field and interview managers to obtain evidence describing their work, including the amount of time per week spent on each particular exempt and nonexempt task.

Those declarations are developed with the expectation of concluding that such managers spend more than 50 percent of their time on exempt tasks, a result essential to meeting the exempt-status standard.

Despite its common use, in the view of both federal and California courts, this technique for obtaining and preserving evidence may no longer serve as a viable mechanism for an employer's counsel in opposing a motion to certify a class. In *Dukes v. Wal-Mart*, 222 F.R.D. 189 (N.D. Cal. 2004), pending on appeal, the defendant conducted a pre-certification survey consisting of declarations from store managers randomly selected by the defendant. The survey was developed and administered during the litigation, the witnesses knew they were being interviewed for purposes of the litigation, and the survey suggested a list of factors rather than asking open-ended questions. The court rejected the surveys as unreliable.

The *Dukes* court cited *Pittsburg Press Club v. United States*, 579 F.2d 751 (3rd Cir. 1978), which involved a dispute over the government's use of its zoning power to impose age restrictions on the residential use of real property, where the court identified standards for assessing whether a survey had been carried out "in accordance with generally accepted principles."

The court stated, "A proper universe must be examined and a *representative* sample must be chosen, the persons conducting the survey must be experts, the data must be properly gathered and accurately reported. It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques.

"Just as important, the survey must be conducted independently of the attorneys involved in the litigation. The interviewers or sample designers should, of course, be trained, and ideally should be unaware of the purposes of the survey or the litigation. A *fortiori*, the respondents should be similarly unaware.

Surveys are not, however, to be avoided in opposing an effort to certify a class. In *Bell v. Farmers Insurance Exchange*, 115 Cal.App.4th 715 (2004) (*Bell II*), the court noted well-grounded state law on the subject. Citing to *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462 (1981), *Bell II* stated that discovery of a marginal element of nonclaimants should not result in denying a class certification.

The *Richmond* court determined that survey results showing that not more than 6 percent of a class of 4,000 people were antagonistic to the class-action claims were insufficient to defeat the motion for certification. What percentage of respondents disclaiming the purported class allegations is appropriate to defeat the motion, however, will be determined by the trial court case by case.

In *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004), the state Supreme Court also indicated that more will be needed to defeat class certification. The court noted that certification is a procedural question and that a trial court does not have authority to make a determination on the merits in deciding that issue. Thus, in a contest of competing declarations, a trial court need find only that the plaintiff has presented substantial evidence that common issues of fact and law will predominate over individual issues.

Moreover, the *Sav-On* Court noted that, besides disagreeing on the time spent on various tasks, "the parties disagree on whether certain identical work tasks are 'managerial' or 'nonmanagerial.'" The court found that the plaintiff had provided "substantial" evidence on this issue. As a result, the trial court was within its discretion to credit the plaintiffs' evidence on "how the various tasks in which [employees] actually engaged should be classified – as exempt or nonexempt," without deciding the merits of the case.

These decisions require attorneys for employers to consider alternative strategies. Still, there is no reason to abandon the survey strategy altogether. To avoid the result in *Dukes*, attorneys should consider retaining a qualified independent expert to design *and* administer a survey. To parry the inevitable challenges to the methodology and reliability of the survey, questions should be open-ended and nonsuggestive.

For instance, the *Dukes* court noted that the survey provided the managers with a list of 100 "suggestive" factors, rather than asking the managers "what factors do you rely on in setting individual pay rates?"

Attorneys involved in the litigation and their employees should not craft the survey or conduct the interviews. The interviewers and managers should not be informed of the purpose for taking the statements.

Statistical information on how managers spend their time is not sufficient to defeat a class-certification motion. Based on *Sav-On*, an employer must marshal evidence to establish that it has placed a task properly in either the exempt or nonexempt category.

For example, the court noted the plaintiff's argument that the defendant listed tasks such as "supervising the unloading of trucks," "checking the quality of warehouse and vendor shipments," "safeguarding company assets," "opening and closing the store," "making the store safe for employees and customers" and "ordering emergency repairs."

The defendant contended that those tasks were exempt, whereas the plaintiff asserted the tasks were nonexempt. Thus, a proper survey will include detailed evidence of what a manager does when "supervising the unloading of trucks."

Counsel for the defense must follow closely these recent developments in order to present evidence that is adequate in weight and collected using appropriate methods in order to effectively oppose a motion to certify a class.

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