



LEGAL BRIEFING

White-collar Exemptions Still 'Mis'-tifying to Employers Misclassification of Exempt Employees Could Result in Large Awards

By Thomas H. Reilly & Allison Martin Nelson

On August 23, 2004, the U.S. Department of Labor enacted new regulations governing white collar exemptions to overtime requirements under the Fair Labor Standards Act ("FLSA").

While the new FLSA regulations have been widely publicized, their impact in California is largely limited to public agencies, since California's own wage-and-hour laws are more restrictive than the FLSA and California employers must follow the regulations that are most beneficial to their employees. As a result, the FLSA is trumped by California's more-restrictive wage-and-hour laws and regulations.

Although the new FLSA regulations have not dramatically changed the wage-and-hour landscape in California, **misclassification of employees continues to be a problem for California employers.** It has also resulted in large class-action verdicts against a number of California employers and even greater payouts through settlements of such claims. When employers misclassify employees, there typically are no payroll records with sufficient detail to disprove claimed overtime hours.

Moreover, employers set "salaries" at rates intended to include compensation for overtime work, but courts and the California Labor Commissioner use these "premium rate" salaries to establish the employee's hourly rate for the initial eight hours of work in a day or 40 hours of work in a week. To the extent that the misclassified employee can establish additional overtime hours, the base rate is multiplied by the applicable overtime premium (e.g., time and one-half) to calculate the damage award, resulting in a windfall to the misclassified employee.

To avoid the most common pitfalls of misclassifying employees, employers should keep the following points in mind when determining whether an employee is exempt or non-exempt under California law.

First, for the executive exemption to apply, an employee's duties and responsibilities must involve management of a recognized department of the enterprise, the employee must supervise the work of at least two other employees, the employee must have the authority to hire, fire and/or promote (or to effectively recommend such actions), the employee must customarily exercise discretion and independent judgment, and the employee must spend more than fifty percent of his or her time performing supervisory work.

Second, for the administrative exemption to apply, an employee's duties and responsibilities must include non-manual work that requires specialized training or knowledge, the employee must spend more than fifty percent of his or her time involved in the actual running of the business as opposed to creating or delivering the goods or services produced by the business, and the employee must exercise discretion and independent judgment with respect to matters of significance.

Third, the professional exemption only applies in California if the employee is licensed and working in one of eight recognized professions. For example, a CPA is exempt, but a bookkeeper is not. Although California recognizes a "learned" exemption for employees working in complex fields that require long and specialized education, the Department of Labor Standards Enforcement has limited the learned exemption to employees who have earned post-graduate degrees.

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Contract Consistency of Arbitration Provisions Helps Avoid Court

By Mark S. Himmelstein & Shane E. Coons

It is generally accepted in the construction industry that arbitration is preferable to uncertain and more costly jury trials, and we have worked with a number of clients to draft enforceable arbitration provisions.

Yet despite having achieved such a provision, an owner/developer ("owner") must also ensure that all potential litigants are bound by matching contractual provisions, or face losing the ability to litigate solely in arbitration.

While legislatures at both the federal and state levels have approved arbitration as an alternative means of adjudicating dis-

putes and courts routinely enforce agreements between parties requiring disputes to be decided by arbitration, a litigant who is not bound by an arbitration provision may still force the owner to go to court in addition to the arbitration. This can result in losing the ability to arbitrate some or all of the claims, and incurring the additional expense of litigating in multiple forums.

For example, suppose an owner and a contractor agree in the prime construction contract to arbitrate disputes. The contractor then enters into agreements with subcontractors, sub-subcontractors, suppliers, etc. If one or more of these agreements does not contain an arbitration provision, California law provides the court with discretion — where "there is a possibility of conflicting rulings on a common issue of law or fact" — to refuse to compel the arbitration, stay the arbitration, or order all parties and/or certain issues joined in the court litigation. The U.S. Supreme Court has viewed this California law favorably, and the California Supreme Court is likely to do the same in a matter presently before it. Thus,

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Corfield Rejoins Firm as Partner, Also Named to Charitable Foundation

Over the last few months, the firm has made several significant moves, including the return of **Michael A. Corfield** as a partner in the Newport Beach office. He was with **Newmeyer & Dillion** from 1992 to 1996 and was most recently a partner in Corfield and Rovell in Carlsbad.

Corfield's return further enhances our premier litigation practice as well as our rapidly growing business and real estate transactional practices.

In addition to rejoining the firm, Corfield has been named a director of the Rabbit Kekai Foundation of Manhattan Beach, started by surfing legend Kekai to promote surfing, ocean education and the spirit of "Aloha" to underprivileged children in Hawaii, California and elsewhere. Newmeyer & Dillion has also been retained as the Foundation's counsel.

Real Estate Practice Group Adds Experienced Attorneys as Of Counsel; Associates Added to Litigation Group in N.B., S.M.

The firm is pleased to welcome as of counsel **Jennifer J. Tice**, practicing in the areas of real estate transactions, subdivision law and business transactions, and **Charles S. Krolkowski**, who specializes in real estate litigation, including land use, eminent domain and inverse condemnation. Both are officed in Newport Beach. Jennifer was previously associated with Allen & Kimbell in Santa Barbara and taught corporations law at the Santa Barbara College of Law. Chuck Krolkowski comes over from Palmieri, Tyler, Wiener, Wilhelm & Waldron, LLP, where he tried several notable cases, including obtaining a substantial jury verdict in a case concerning the construction of portions of the I-5 Freeway in Anaheim.

Joshua Vinograd joins the firm as a litigation associate in Newport Beach; he was previously an associate with Paul, Hastings, Janofsky and Walker and served as a law clerk to the Hon. Virginia A. Phillips in the United States District Court for the Central District of California.

Jon-Michael Marconi has been hired as an associate in the Santa Monica office, concentrating on construction, real estate and business litigation. A participant in the Thematic Option honors undergraduate program, he received his undergraduate and law degrees from USC.



(Arbitration continued from page 1)

a party expecting to arbitrate disputes may nevertheless find itself in court.

In order to avoid this possibility, the owner must make certain that matching arbitration provisions are contained in all project-related contracts. Every contract must: 1) contain the arbitration provision; 2) require the contracting party to place this identical arbitration provision in each subcontract and purchase order; and 3) require that all subcontracts and purchase orders be submitted to the owner for approval. The owner also must establish a procedure for reviewing these documents (similar to that for additional insurance endorsements).

It takes careful drafting and efficient contract administration to make certain that all potential parties are subject to the desired alternative dispute-resolution provision. However, avoiding the extra time and expense involved with litigating in multiple forums is worth the effort.

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About Newmeyer & Dillion LLP

Newmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

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 - Lender Liability
 - General Business Disputes
- *Real Estate*
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 - Environmental Warranty
 - Title
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 - Wrongful Termination
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- Business Transition Planning
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Trusts & Estates Administration & Litigation

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- Acquisition, Development, Option, Sale and Lease of Real Property (Residential, Retail, Multifamily, Office, Industrial, Agricultural)
- 1031 Like-Kind Exchanges
- Master Planned Community Developments and Community Associations
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- Construction Related Matters
- Military Base Reuse

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- Mitigation Agreements
- Subdivision Map Act
- Clean Air Act
- CEQA and NEPA
- Initiatives and Referendums
- Municipal Incorporations and Annexations
- Inverse Condemnation and Eminent Domain