



# Tackling Depositions in Wage and Hour Misclassification Suits

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# Tackling Depositions in Wage and Hour Misclassification Suits

Written by KAMRAN MIRRAFATI AND ARCHANA A. MANWANI 5/10/18

This article discusses how to prepare for and take a plaintiff's deposition in wage and hour exemption misclassification cases. It also discusses how to defend the deposition of a Federal Rule of Civil Procedure 30(b)(6) witness in such cases.

This article addresses the following steps and strategies:

- Step 1: Identify the Objectives of the Plaintiff's Deposition;
- Step 2: Address Preliminary Issues before Taking the Plaintiff's Deposition;
- Step 3: Gather Relevant Documents and Compile the Exhibits;
- Step 4: Interview Individuals Who Worked with the Plaintiff;
- Step 5: Take the Plaintiff's Deposition;
- Step 6: Prepare the Employer's 30(b)(6) Witness for Deposition; and
- Step 7: Object during the Deposition of the Employer's 30(b)(6) Witness.

In an exemption misclassification case, the plaintiff alleges that the employer misclassified him or her as being exempt from minimum wage or overtime laws pursuant to one or more state or federal wage and hour exemptions. For detailed information on wage and hour exemptions, see "[Understanding the Executive Employee Exemption](#);" "[Navigating the Administrative Employee Exemption](#);" "[Applying the Professional Employee Exemption](#);" "[Examining the Outside Sales Employee Exemption](#);" "[Applying the Computer Professional Employee Exemption](#);" "[Satisfying the Highly Compensated Employee Exemption](#);" "[Utilizing the Combination Exemption](#);" "[Navigating the Section 7\(i\) Exemption for Commissioned Employees in Retail Service Establishments](#);" "[Navigating the Motor Carrier Exemption and Other Exemptions to Overtime Requirements](#);" and "[Understanding Non-White-Collar Exemptions to Minimum Wage and Overtime Requirements](#)."

For detailed information on state exemption requirements, see the "Exempt vs. Non-Exempt" column in the [Wage and Hour State Practice Notes Chart](#).

For more information on taking and defending depositions generally, see "[Deposing Plaintiffs in Employment Litigation](#);" "[Defending Depositions of Employer Witnesses in an Employment Litigation](#);" "[Rule 30\(b\)\(6\) Deposition Strategies for Employer-Defendants in Employment Cases](#);" and "[Discovery Strategies for Employers in Wage and Hour Class and Collective Actions — Taking and Defending Depositions](#)."

## **Step 1: Identify the Objectives of the Plaintiff's Deposition**

The plaintiff's deposition is often the most crucial deposition in wage and hour exemption misclassification cases. The deposition is usually your first chance to hear — directly from the plaintiff and not counsel — the bases for allegations and claims in the lawsuit and get additional details. This is your opportunity to gather evidence to contradict the plaintiff's allegations, put the plaintiff's credibility into question and lock down admissions that will help with a summary judgment motion or cross-examination at trial.

In exemption misclassification cases, the plaintiff-employees claim they have been performing the duties of nonexempt employees but that the employer misclassified them as exempt employees who are not subject to minimum wage and overtime requirements. Thus, the employer's goal is to get details regarding the plaintiff's daily duties and tasks to determine whether those duties in fact fall within any applicable exemptions.

In class or collective action exemption misclassification cases, a secondary goal is to highlight that the day-to-day actions that the plaintiff and the putative class members performed are not common or uniform but rather require individualized inquiry and assessment, such that class or collective certification is improper.

For more information on identifying the objectives of plaintiffs depositions generally, see ["Deposing Plaintiffs in Employment Litigation — Goals of Plaintiff's Deposition."](#)

## **Step 2: Address Preliminary Issues before Taking the Plaintiff's Deposition**

In exemption misclassification cases, it is important to complete the following tasks before deposing the plaintiff:

- Assess when to take the deposition (see section below titled "Determine When to Conduct the Deposition");
- Conduct a background search on the plaintiff (see section below titled "Conduct a Background Search on Plaintiff"); and
- Identify the federal and state exemptions in your forum that could apply to the plaintiff and their requirements (see section below titled "Identify the Exemption Requirements").

### **Determine When to Conduct the Plaintiff's Deposition**

Determining when to conduct the plaintiff's deposition is a critical strategy decision in exemption misclassification cases. You are advised to take the following steps:

- Take the plaintiff's deposition before serving interrogatories but after receiving the plaintiff's document production. While attorneys' practices differ on whether to obtain written interrogatory responses before or after the plaintiff's deposition, it is generally a best practice to depose the plaintiff first to avoid providing opposing counsel with topics, questions and facts on which to prepare the plaintiff before deposition. Additionally, you are more likely to obtain forthright and helpful testimony about the

plaintiff's job duties in a deposition than through interrogatories, which can be more readily influenced by the plaintiff's counsel.

- Take the plaintiff's deposition before the depositions of the employer's witnesses. It is also important that you try to take the plaintiff's deposition before opposing counsel deposes the employer's 30(b)(6) witness (i.e., the person the employer designates to testify on its behalf). This allows you to lock down the plaintiff's testimony before any other witnesses testify. It also prevents the plaintiff's counsel from preparing the plaintiff to testify in response to the employer witness' testimony. In some jurisdictions, like New York, the defendant has a limited period of time to notice the plaintiff's deposition to preserve its right to depose the plaintiff first. (See N.Y. C.P.L.R. § 3106(a).) As such, to get deposition priority, be sure to serve the deposition notice on the plaintiff immediately once discovery opens, before opposing counsel has a chance to notice any depositions of the employer's witnesses. Taking the plaintiff's deposition early also ensures that you have time to serve additional discovery concerning items you learned about during the deposition and, if necessary, to file a motion to compel additional documents. For a sample deposition notice, see "Deposition Notice (Plaintiff), [LexisNexis\(R\) Forms FORM 629-14.16.1](#)." For more information on the timing of plaintiff's depositions, see "[Deposing Plaintiffs in Employment Litigation — Timing of Plaintiff's Deposition](#)."

### **Conduct a Background Search on Plaintiff**

Before any plaintiff's deposition, conduct a background search on the plaintiff, including his or her criminal history, past lawsuits and bankruptcy filings. The information discovered in the background search may help to attack the plaintiff's credibility.

It is also helpful to conduct a social media search on the plaintiff. The plaintiff's [LinkedIn](#), [Facebook](#), [Instagram](#), [Twitter](#) or other social media feeds may include posts that contradict the plaintiff's allegations that he or she performed nonexempt job duties or, at the very least, put the plaintiff's credibility into question.

Be sure to comply with federal and state laws on conducting background checks. See "[Step-by-Step Guidance for Complying with the FCRA and State Mini-FCRAs](#);" "[Understanding Consumer Reports \(Including Credit History Checks\) under the Fair Credit Reporting Act](#);" "[Criminal Background Checks: Key Analyses and Considerations](#);" "[Obtaining Information Regarding Job Applicants and Employees from Social Media Websites, Interviewing and Screening Job Applicants](#);" and "[Checklist for Pre-employment Screening and Obtaining/Using Consumer Reports](#)."

For additional information concerning background check issues governed by state and local law, see the "[Step-by-Step Guidance for Complying with the FCRA and State Mini-FCRAs](#)." For federal and state background check forms, see the [Screening and Hiring State Expert Forms Chart](#).

### **Identify the Exemption Requirements**

Another important aspect to consider in a misclassification case is under which exemption the employer classified the plaintiff. The U.S. Department of Labor has identified certain exemptions. State and federal law may vary on the specific exemptions and factors. It is important to check the exemption applicable to the plaintiff. Incorporate the list of factors into your deposition outline so that you can question the plaintiff about each factor.

### **Step 3: Gather Relevant Documents and Compile the Exhibits**

Soon after becoming counsel in the case, obtain all relevant documents from the employer. At a minimum, you should request the company's written policies and/or employee handbook; the plaintiff's personnel file, payroll records and timesheets; documents concerning any company audit or investigation into employee exemption statuses; and the emails or other communications between the plaintiff and other relevant parties. Make sure to also serve document requests and review the plaintiff's production for documents that have a bearing on the plaintiff's allegations. For sample document requests in exemption misclassification cases, see "Document Requests (Defendant to Plaintiff) (FLSA Administrative Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action)" and "Document Requests (Defendant to Plaintiff) (FLSA Executive Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action)."

You should be prepared to confront the plaintiff with any documents that show that the plaintiff performed exempt duties, such as documents showing the plaintiff had managerial duties, advised on personnel decisions such as hirings or firings, or otherwise exercised discretion and independent judgment on a regular basis.

Most employers maintain a written job description for each employment position or, at the very least, an informal summary of the job duties and responsibilities expected of the position. As the crux of the case likely centers on the plaintiff's job duties, make sure you have all applicable job descriptions for the time period at issue, preferably signed by the plaintiff. Other documents relevant to the plaintiff's job duties that you should consider using as exhibits in a plaintiff's deposition generally include the plaintiff's:

- Résumé;
- Employment application;
- LinkedIn profile; and
- Written communications (e.g., emails) concerning the plaintiff's job duties.

Be sure to get the plaintiff's testimony on any documents that he or she produces that contradict the employer's documents concerning the plaintiff's job duties (e.g., a personal journal or diary that conflicts with the actual job description).

You should also obtain documents that show the plaintiff's hours and compensation, which are relevant to the plaintiff's potential damages and would influence negotiations over settlement amounts. These documents include:

- Pay stubs and wage statements;
- Work schedule and timesheets; and
- Acknowledgment of the company's employee handbook and/or written policies concerning plaintiff's hours or pay.

Finally, if you're preparing to take a plaintiff's deposition in a misclassification class or collective action, you'll want to obtain the aforementioned documents for members of the putative class. Keep in mind that during the plaintiff's deposition, you will need to question him or her about any documents relevant to whether the plaintiff and putative class members are similarly situated or appropriate for class certification. Be sure to include as exhibits any documents or communications showing that the plaintiff's job duties were unique to the plaintiff and would require an individualized assessment of whether the plaintiff was properly classified as exempt. For more information on conducting discovery in wage and hour class and collective actions, see "[Discovery Strategies for Employers in Wage and Hour Class and Collective Actions.](#)"

Organizing the relevant documents into exhibits is very important, as it will help you maintain the flow of your deposition. As you prepare your deposition outline, make sure to highlight (with a color or bold font) when you plan to introduce each specific exhibit. Organize the exhibits in a redweld in the order in which you intend to introduce them. For more information on the nuts and bolts of preparing for plaintiffs depositions generally, see "[Deposing Plaintiffs in Employment Litigation — Preparing for Plaintiff's Deposition.](#)"

#### **Step 4: Interview Individuals Who Worked with the Plaintiff**

Another key task to complete when preparing to take the plaintiff's deposition in exemption misclassification cases is to interview the plaintiff's supervisors and coworkers to gather information regarding what exactly the plaintiff did on a daily basis. Ask your client for the names of the individuals who worked closely with the plaintiff. It is always helpful to interview one or two supervisory individuals and one or two individuals who either worked with the plaintiff or performed the same duties. Details are important. For each person you interview, try to get as much information as you can about what the plaintiff did on a day-to-day basis. You can then use these facts as ammunition to obtain admissions from the plaintiff that he or she primarily performed exempt tasks.

If the case is a class or collective action, these interviews are an excellent opportunity to get declarations from the plaintiff's supervisors about the lack of commonality among the putative class members. The interviews are also excellent opportunities to get declarations from putative class members themselves about how the details of their everyday work differed. For more information on gathering declarations to oppose collective actions, see "Step 4: Develop Evidence in Support of an Opposition" in "[Opposing Motions for Conditional Collective Action Certification and Making Decertification Motions under FLSA Section 216\(b\) — Steps and Strategies for Responding to Motions for Conditional Certification.](#)"

## Questions to Ask Interviewees

Some facts to gather from your interviewees include:

- Their dates of employment;
- The number of individuals they supervise, if any;
- The number of individuals the plaintiff supervised, if any;
- The tasks and duties that the plaintiff was expected to perform;
- The tasks and duties that the plaintiff actually performed based on what they saw the plaintiff doing;
- Try to get details about the duties performed on a daily basis as well as those duties performed on an irregular basis.
- The amount/percentage of time the plaintiff spent performing each of his or her duties;
- Whether the plaintiff could hire or fire other employees or make recommendations to do so;
- Whether the plaintiff managed any departments or divisions;
- Whether the plaintiff had any job duties that required him or her to exercise discretion or independent judgment;
- The number of hours the plaintiff worked;
- The number of different locations in which they have worked while employed by the employer (particularly if the case involves chain restaurants or retailers);
- The amount of time (months/years) they worked with the plaintiff; and
- Any details that call the plaintiff's credibility into question.

Modify the questions above to address the exemption(s) at issue in your case. For instance, if the employer is claiming the plaintiff was exempt pursuant to the outside sales exemption, be sure to ask about where the plaintiff made sales and how much time he or she spent outside the office.

## Class and Collective Actions

If the case is a class or collective action, you should also gather information about the tasks and duties that those who share the plaintiff's job title are expected to and actually perform. Find out what differences there are among those who form the putative class. Be sure to obtain a declaration with these details. Try to have the interviewee break down by percentage the amount of time they spent on each task (both managerial and nonmanagerial) in any given workweek. It may be helpful to use a job description as a reference.

By gathering this evidence, you should be able to demonstrate the lack of commonality between class members. For example, if the plaintiff and the putative class consisted of

exempt assistant store managers alleging they performed primarily nonmanagement duties, some variances to highlight could be:

- The general manager in one store delegated more authority to a specific assistant store manager because the general manager had worked with him or her previously.
- Smaller stores required more nonmanagement duties for coverage purposes so the assistant store manager's duties in those stores would drastically differ from the duties performed in larger stores.
- The staff in one store was more inexperienced so the assistant store manager could not delegate any management duties there.

## **Step 5: Take the Plaintiff's Deposition**

### **General Topics**

When taking the plaintiff's deposition in an exemption misclassification case, most of the topics you'll want to cover are going to overlap with the standard topics covered in any deposition of a plaintiff in an employment lawsuit. Key topics for exemption misclassification depositions include:

- Admonitions;
- Criminal/bankruptcy history;
- Employment history;
- Overview of employment with the company;
- Specific duties performed while employed with the company (discussed below);
- Allegations in the complaint;
- The plaintiff's responses to written discovery, if any;
- Documents the plaintiff produced, if not already addressed;
- Any useful information gathered from social media or job sites; and
- Damages and emotional distress.

For more information on taking plaintiffs depositions in employment litigation generally, see "[Deposing Plaintiffs in Employment Litigation — Taking Plaintiff's Deposition.](#)"

### **Testimony About Job Duties**

Use your witness interview notes to question the plaintiff's allegations and lock down testimony concerning his or her job duties. For each task — whether managerial or nonmanagerial — ask the plaintiff to estimate the percentage of time he or she spent each workweek performing those duties. The goal is to have the plaintiff admit that although he or she may have performed nonmanagerial duties over the course of any given workweek, the majority of the time was spent performing managerial (i.e., exempt) duties.

Because the plaintiff's attorney will likely coach the plaintiff on responding to questions about primary job duties, ask questions that do not signal to the plaintiff that you are probing into this critical subject matter. For instance, rather than asking "What was your primary job duty?" ask instead "Tell me about how you spend a typical day." If you are defending against a class or collective action and the plaintiff responds that no day was typical, use this admission in support of your opposition to class or collective certification.

Be sure to utilize the key documents you've obtained during this portion of the deposition. For instance, go through the plaintiff's job description with a fine-toothed comb. Obtain testimony on whether plaintiff actually performed the duties that the job description contains. If you learn that the plaintiff deviated from his or her job description, you may be able to claim that the plaintiff's case requires an individualized assessment that is not suitable for class or collective certification.

Specifically, consider including the following types of questions concerning job duties in your deposition outline to ask during the deposition. Depending on the exemption(s) at issue in your case, you should ask questions related to:

- The tasks and duties that the plaintiff was expected to perform;
- The tasks and duties that the plaintiff actually performed;
- The amount/percentage of time the plaintiff spent performing each of his or her duties;
- The number of individuals the plaintiff supervised, if any;
- Whether the plaintiff could hire or fire other employees or make recommendations to do so;
- Whether the plaintiff managed any departments or divisions;
- Whether the plaintiff had the ability to make managerial decisions regarding the employer's business (e.g., staff schedules, training of other employees, store layout, whether to provide customers with discounts, etc.);
- Whether the plaintiff had any job duties that required him or her to exercise discretion or independent judgment;
- The number of different locations in which the plaintiff worked and how his or her job duties varied at different locations; and
- Whether there were any other individuals who performed the same exempt or nonexempt duties as plaintiff.

In addition, be sure to ask about the hours the plaintiff worked. The plaintiff's testimony will be important evidence concerning the number of overtime hours the plaintiff worked and, in turn, how much liability the employer may face.

### **Step 6: Prepare the Employer's 30(b)(6) Witness for Deposition**

Under Federal Rule of Civil Procedure 30(b)(6), the plaintiff may notice the deposition of a company on particular matters the plaintiff sets out in the deposition notice. The employer must then designate one or more individuals to testify about those matters on its behalf.

(See Fed. R. Civ. P. 30(b)(6).) Just as the plaintiff's deposition is the most important deposition for the defense, the deposition of the employer's 30(b)(6) witness is the most important deposition for the plaintiff. For comprehensive coverage of preparing for and defending a 30(b)(6) deposition, see "[Rule 30\(b\)\(6\) Deposition Strategies for Employer-Defendants in Employment Cases.](#)"

## **Review the Deposition Notice**

A large part of preparing the 30(b)(6) witness — and figuring out who is best suited to be the 30(b)(6) witness — will depend on the areas of inquiry that accompany the Rule 30(b)(6) deposition notice. The specific areas of inquiry will vary depending on the plaintiff's counsel and whether the case is a single-plaintiff or class or collective action. However, topics in an exemption misclassification case generally include:

- Corporate hierarchy of the company;
- Relevant company policies and procedures;
- Creation of the plaintiff's job description;
- Implementation of the plaintiff's job description;
- The plaintiff's on-the-job training (if any);
- The plaintiff's job duties;
- The plaintiff's work schedules; and
- Methods used to track the performance of the plaintiff's job duties.

If the case is a class or collective action, the plaintiff is likely to also focus on uniformly enforced company policies and procedures in hopes of establishing that the putative class and collective action members are similarly situated and face common questions of fact and law.

Begin by reviewing the deposition notice and determining whether it is deficient and whether it is necessary to seek a protective order. See "[Rule 30\(b\)\(6\) Deposition Strategies for Employer-Defendants in Employment Cases — Evaluating the 30\(b\)\(6\) Notice of Deposition.](#)" The deposition notice must identify topics with "reasonable particularity." You should object and seek greater specificity if the deposition topics are too vague to adequately prepare the witness to testify on a particular set of issues.

Also be sure to consider whether the deposition notice would require the employer's witness to disclose privileged information. For example, if the employer received legal advice concerning the employee's exempt classification, you should exclude that privileged information from the scope of the deposition and instruct the witness not to answer any questions on the topic during the deposition itself. Prep the witness on how to answer questions regarding the employer's process for classifying positions, reviewing exempt versus nonexempt status, and staying up to date on the law, which all are likely to implicate privileged information. Note, however, that if you use as a defense that the

employer made the exempt classification in good faith, some courts will deem that as putting the employer's mental state at issue and waiving the attorney-client privilege that protects the legal advice. See, e.g., *Edwards v. KB Home*, 2015 U.S. Dist. LEXIS 93584, at \*9–10 (S.D. Tex. July 18, 2015).

### **Identify and Prepare the 30(b)(6) Witness**

Next, you must decide who will represent the employer at the deposition. While most employers prefer to select one individual to act as the company's 30(b)(6) designee, depending on the variety of topics, it may be necessary to have more than one designee. Confer with your client about who at the company has knowledge about the deposition topics. Common designees in exemption misclassification cases include human resources representatives or high-level managers who are familiar with the creation of the company's policies and procedures and their application to the plaintiff's role. In smaller companies, the designee may be an executive. For tips on identifying the 30(b)(6) witness(es) generally, see "[Rule 30\(b\)\(6\) Deposition Strategies for Employer- Defendants in Employment Cases — How to Select the Designee.](#)"

After identifying the 30(b)(6) witness, meet with him or her in advance of the deposition to review every area of inquiry in the deposition notice and any documents that may be relevant to the topic, such as the plaintiff's job description, employer policies and nonprivileged memos relating to exempt classifications and pay practices, emails concerning the plaintiff's job duties, and communications about the employer's classification process.

If the case is a class or collective action, be sure to also go over deposition topics and documents concerning similarities or differences between the job duties of the plaintiff and the putative class. It is critical that the witness be comfortable and confident to provide testimony on anything related to each area of inquiry.

In addition to covering the specific areas of inquiry set forth in the deposition notice, remember to cover the basics of a deposition as well. Even though the 30(b)(6) witness might be a high-level employee in the corporation, it might be his or her first deposition, and going over the ground rules is always helpful. For more information on preparing a 30(b)(6) witness generally, see "[Rule 30\(b\)\(6\) Deposition Strategies for Employer- Defendants in Employment Cases — Preparing the Designee.](#)"

### **Step 7: Object During the Deposition of the Employer's 30(b)(6) Witness**

Attorneys differ on whether to heavily object during depositions or limit their objections to only crucial moments. Generally, the most common objections in a 30(b)(6) deposition include:

Outside the scope of the 30(b)(6) deposition topics;

- Misstates testimony;

- Calls for speculation;
- Asked and answered;
- Vague and ambiguous;
- Lacks foundation;
- Incomplete hypothetical;
- Compound; and
- Privileged.

If you are not familiar with objecting during depositions, it might be helpful to keep a list of the possible objections with you so that you can use them as a guide during the deposition.

One key benefit of having particular areas of inquiry in a 30(b)(6) deposition notice for the defendant is that plaintiff's counsel is limited to questions related to those areas during the deposition. Regardless of whether you are a heavy or light objector, it is important to pay attention to the deposition questions and object to any questions that go beyond the scope of the areas of inquiry.

Additionally, as discussed above, object and instruct the witness not to answer any questions that would elicit information about legal advice that the employer received concerning the plaintiff's exempt classification. Allowing the witness to answer such questions can waive the privilege with respect to those communications.

For more information on defending 30(b)(6) depositions generally, see "[Rule 30\(b\)\(6\) Deposition Strategies for Employer-Defendants in Employment Cases — Defending the Deposition.](#)"

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