

Measuring the plaintiff's unmeasured work in wage and hour lawsuits



Many wage and hour employment lawsuits are built on personnel information that simply does not exist. Unlike other employment disputes that often revolve around the interpretation of a measurable statistical disparity between employees, allegations in wage and hour cases are centered around employee work effort that is generally unmeasured by the employer.

The issues in these types of cases frequently involve work that was allegedly performed 'off-the-clock' or while the plaintiff was presumed to be performing the duties of a non-FLSA covered employee.

Employee testimony alone can produce misleading estimates of overtime and non-FLSA covered work hours.

Since few employers would not maintain such a personnel database, employee declaration statements, employee testimony often takes the place of employer maintained data in wage and hour violation cases.

In essence, employee testimony, in the form of depositions and self-reported work calendars, is used to measure the plaintiffs' disputed work effort a wage and hour lawsuit.

Employee testimony *alone* can produce misleading estimates of overtime and non-FLSA covered work hours. The problem many employment attorneys face is that like any survey, the employee's responses, when not viewed in the proper context, can produce inferences regarding the alleged wage and hour violation that are misleading, and in some instances, simply wrong.

In some instances, such as the landmark \$90 million Farmer's Insurance case, there may be serious conflicts in the employee reported accounts of uncompensated overtime.

In other instances, such as the California SAVON drugstore case, companywide inferences based on employee testimony can be misleading because of scheduling policies, geographical location, sales volume and other factors that could reasonably affect the number of hours worked by an employee.



Although the information obtained from employee declaration statements and deposition testimony is not analytically perfect, courts have tended to rely heavily on employee testimony in wage and hour cases.

It is not uncommon for courts to grant a plaintiff's motion to notify potential collective action members based on the testimony of only a handful of representative employees. Perhaps most significantly, self-reported descriptions of the employee's work duties often form the basis for the damage award in wage and hour collective actions.

Even with the inherent problems, employee testimony is often a critical factor in wage and hour cases. Minimizing data problems in wage and hour employment lawsuits. It is not uncommon for courts to grant a plaintiff's motion to notify potential collective action members based on the testimony of only a handful of representative employees.

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There are a number of steps an employment attorney can take to help minimize the problems with using employee testimony to measure the plaintiff's invisible work in wage and hour employment cases.

THE BOTTOM LINE

Invest early.

Spending the time at the beginning of a case will help to ensure that information received during discovery will be useful.

Ask good questions.

Deposition questions and employee declarations should be as detailed as possible, like a good survey.

Get all the information.

Employer information such as scheduling and job descriptions are often quite informative and help put the employee testimony in the correct context.

Questions or comments

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*Courts tend to
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