

Using surveys and declarations in wage and hour cases



Can declaration statements and surveys provide useful insights in an wage and hour case?

Attorneys can create employee declaration statements and surveys that can be used to effectively assess allegations of off-the-clock in wage and hour violation cases. Using a real-world case study, we will explore how surveys of potential class members should be constructed. We also provide a discussion of the core principles behind designing insightful surveys and declaration statement documents in wage and hour cases.

Case study of an off-the-clock-work wage and hour class action. In a recent wage and hour class action, the pharmacists at a major west coast grocery store chain filed a class action lawsuit in state court that alleged that they were denied the opportunity to take uninterrupted, duty-free meal breaks. The pharmacists allege that they were routinely required to answer customer's questions and fill prescriptions during their meal break period.

In the state in which the collective action was filed, the pharmacists were as of January 1, 2001 classified as non-exempt employees. As non-exempt employees they are entitled to one or two 30-minute duty-free meal breaks depending on the amount of time worked. Across the state, there are about 700 employees spread over about 325 store locations in the potential class.

In the lawsuit both the extent and commonality of the off-the-clock wage and hour violation allegations are at issue. The defendant's attorneys are looking to the use of declaration statements administered to the stores pharmacists to determine what percentage of the time pharmacists believe their meal breaks were interrupted by work duties. They are also looking to determine how representative the named plaintiffs are of the proposed class of pharmacists, and learn to what degree the allegations of missed meal breaks vary across the proposed class.

A survey or declaration statement document used to analyze wage and hour violation allegations needs to have several main characteristics.

Declaration statement design principle #1: Use a sampling routine to construct the data.

In many wage and hour class actions, asking only a portion of individuals to fill out declaration statements or surveys is preferable to obtaining surveys from every member in the potential class. In many instances, the potential class members are too geographically dispersed to make a total census count feasible. For instance, in the grocery store case study the 700 potential members of the class action worked in over 325 geographically dispersed locations throughout the state. Most stores had at least one pharmacist on duty 24 hours a day. A total census count of active

pharmacists who would be potential class members would involve administering a survey over a short period of time to employees spread over 2,800 different work shifts (700 members x 4 shifts).

Additional effort would have to be expended to administer the survey to pharmacists that no longer worked at the company. Total census counts, even if they are feasible, may not be desirable because responses may become contaminated as the declaration statements are collected from potential class members. It is possible that once word of survey or lawsuit gets out to all the potential class members, later responses may vary from earlier responses in non-desirable ways.

The bottom line: even if it were possible to survey every person in a potential class, you may not want to do so.

Individuals who complete a declaration statement (after they learn of the lawsuit may review pay-stubs or other documents and arrive at the estimate of off-the-clock work in a different manner from individuals who completed statements earlier. In this instance, the declaration statements of the later potential class members may be contaminated and should potentially analyzed in a different manner.

A well designed sample will help ameliorate many of the problems associated with attempting to take a complete census count of the entire potential class. In this case study, declaration statements were taken from a random sample of 125 pharmacists across the store's locations within the state. The pharmacist sample, which used a technique that is called stratified random sampling, appropriately reflected the stores located in the northern and southern part of the state and different shifts that the pharmacist worked.

*Declaration statement design principle #2:
Ask minimal questions.*

Once the random sample of individuals is selected, the declaration statement or survey questions must

be carefully designed. As a general rule the declaration statement or survey form, and questions asked of the potential class members, should be as parsimonious as possible. Shorter forms and questions will tend to increase the amount of effort and thought that each potential class member puts into completing the survey.

Questions that ask about information that can be directly obtained from other sources, such as human resource or time card records, should be avoided. The additional work to match the respondent's information to the survey is generally outweighed by the benefits of a shorter form.

*Declaration statement design principle #3:
Ask the right questions in the right way.*

Once the general focus of the survey or declaration statement is determined, it is important to make sure that the correct, focused questions are asked of the respondent. The questions should not be leading, but be closed-end in nature, which yield a choice based response and allow the results of the declaration statement to be analyzed in a more quantitative manner.

Furthermore, important issues concerning the wage and hour case should be probed more than one way to ensure that all angles of the issue are covered appropriately. Differently worded questions may yield different responses by potential class members. When appropriate, the declaration statement document should include follow-up or 'check' questions that help monitor the validity of the initial response. In sum, wage and hour cases are complex to analyze. However, using the results generated from a carefully constructed declaration statement or survey of potential class members can be extremely insightful.

Questions or comments

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