

Volume 22
Number 1
October 2015

ISSN# 1054-3023

American Academy of
Economic and Financial
Experts

JLE

Journal of Legal Economics

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Printed by Allen Press, Lawrence, Kansas

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http://aaefe.org/Documents/AAEFE_Ethical_Principles.pdf

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While all forensic economists have the discretionary right to accept retention for any case or proceeding within their expertise, they should decline involvement in any litigation when asked to take or support a predetermined position, when having ethical concerns about the nature of the requested assignment, or when compensation is contingent upon the outcome.

Honesty and Candor

Forensic economists shall be honest, thorough and open in their analyses and shall not provide the retaining or opposing attorney or the court, any information, through commission or omission that they know to be false or misleading. They shall exert due diligence, and at all times strive to use competent judgment to avoid the use of invalid or unreliable information.

Disclosure

Forensic economists shall clearly state the sources of information and material assumptions leading to their opinions. Such disclosure should be in sufficient detail to allow identification of specific sources relied upon, and replication of the analytical conclusions by a competent economist with reasonable effort.

Neutrality

Forensic economists shall at all times attempt to operate from a position of neutrality with respect to their calculations and analyses. Whether retained by the plaintiff or the defense, the approach, methodology and conclusions should be essentially the same.

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Forensic economists shall at all times attempt to maintain a current knowledge base of the discipline and shall provide the retaining attorney with the full benefit of this knowledge regardless of how it may affect the outcome of the case.

Responsibility

Forensic economists shall at all times strive to practice within the boundaries of professional and disciplinary honesty and fairness. To this end, they must assume the responsibility of holding their colleagues in the profession accountable to the ethical principles promulgated herein.

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Jeffrey S. Petersen, Phillip H. Allman, and William C. Lee. 2015. Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Respondents. *Journal of Legal Economics* 22(1): pp. 25–38.

Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Respondents

Jeffrey S. Petersen, Phillip H. Allman, and William C. Lee

Abstract: *Forensic economists face a choice when retained to project damages in a class action wage and hour case and need to survey the class members – should they conduct a survey themselves or rely upon a survey professional? In either case, forensic economists will need to be involved in developing the survey questions. A wage and hour survey is unlike most other surveys conducted by researchers since respondents can potentially receive substantial financial payments based on their responses. In order to obtain accurate estimates of past work hours, twenty-four hour time accounting should be utilized within the survey. Also, the survey participants should likely be told that their responses are not anonymous and that they may be held accountable for their answers at a deposition and/or trial testimony. Survey respondents may inflate work hours if informed that they will be anonymous – a classic problem of moral hazard because the surveyed class members bear no risk associated with the inflated responses while employers have to pay for them. The decision of anonymity will not come without controversy in the courtroom because the vast majority of literature on surveys advocates anonymous survey respondents. This article describes why conventional wisdom on anonymity does not apply in wage and hour surveys.*

I. Introduction

Class action wage and hour cases cover a variety of damages that may be claimed by the plaintiffs, such as unpaid overtime, failure to provide meal and rest breaks, or unreimbursed work expenses. This article will largely be devoted to unpaid overtime but the issues discussed can be applied to other categories of damages.

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In a class action wage and hour case, time records may not be available due to the company classifying the class members as salaried and therefore not needing to track their work hours. In this situation, a survey of the class members must be taken to project the number of hours the class members worked during the class period. The amount of compensation due to the class is then projected from the survey responses.

When forensic economists (FEs) are retained to project damages in a class action wage and hour case where a survey is needed they face a crucial decision – whether to conduct the survey themselves or have a survey expert conduct the survey. This decision should be guided by the expert’s educational background, experience with wage and hour cases, and knowledge of important publications regarding surveys in the context of litigation. If an FE decides to consult with a survey expert, the two experts will need to work together to develop the survey instrument. A key factor that needs to be discussed is whether the respondents will be anonymous or if their names will be attached to their responses.

The decision about surveying anonymously can be perplexing to FEs and survey experts because wage and hour surveys are a unique experience for survey participants. These surveys are likely to be the only time survey participants can receive payments ranging from hundreds of dollars to thousands of dollars to possibly hundreds of thousands of dollars based upon their survey responses. Thus, potential bias due to financial gain must be addressed by FEs and survey experts. There are methods for controlling this bias, but use of anonymous responses is not one of them. This is the perplexing part of the decision for FEs and survey experts – sources are abundant that espouse the importance of anonymity in surveys that will meet “generally accepted” guidelines for Daubert and federal rules of evidence (*Daubert* 1993), but following the generally accepted guideline of anonymity is likely to lead to biased data. Specifically, systematic bias may occur where the measurement error shifts the entire sample distribution of overtime hours to the right. This systematic shift can have little or no effect on the margin of error.

Due to the unique nature of a wage and hour survey, standard anonymity protocol should likely not be followed. Moreover, survey participants should be subjected 24-hour time accounting to enhance the accuracy of their work hour answers.

II. Choosing Whether to Consult a Survey Expert

The first step in determining whether consultation with a survey expert is necessary is dependent upon the FE’s educational

background. A graduate level education in economics is likely to include coursework in statistics that covered survey research methods on how to design and implement a survey. Therefore, if an FE has completed a graduate level economics program, he or she should possess the educational background necessary to qualify him or her with sufficient expertise to conduct a survey. The defense attorney will not be able to argue that educational background is an issue that should disqualify the FE from conducting a survey in a class action wage and hour case.

The second step is to review three key publications on the subjects of wage and hour cases and conducting surveys in litigation. Crandall (2012) describes the role of a damages expert in wage and hour cases. Diamond (2011) and Lavrakas and Stec (2015) detail the scientific methods necessary for designing and conducting surveys in litigation. If an FE can comprehend the material in these publications dealing with survey design and implementation with relative ease, he or she should be well qualified to conduct a survey in a wage and hour case.

The third step in determining if FEs should conduct the survey is whether they have experience with wage and hour cases. Many FEs have performed damages computations in individual wage and hour cases. If time records were not available to determine the damages due, the FE would have to interview the plaintiff to determine the amount of hours worked. Conducting this type of interview gives the FE a unique perspective on wage and hour cases. During the interview process, the FE may notice that the plaintiff is possibly exaggerating his or her claims of hours worked. For example, plaintiffs may claim they worked 70 hours per week, on average, over a five-year period. While this type of work schedule is possible, it is not probable and the FE will need to ask follow up questions to determine if the plaintiff could realistically have worked this number of hours. During this interaction with the plaintiff, the FE will gain insight on how to solicit accurate work hour estimates. For example, the FE may ask, “you told me you usually worked fourteen hours per day, can you please describe how you spent the other ten hours of your usual day?” As plaintiffs account for the time outside of work, they often realize they did not work as many hours as they first stated. The FE has essentially engaged in the type of cross examination a defense attorney might use to assist the plaintiff to arrive at a more accurate work hour estimate.

If an FE does not have the educational background described above, cannot read the aforementioned publications with relative ease and does not have sufficient experience with individual wage and hour cases, he or she should consult with a survey expert to design and implement the survey for the class action wage and hour case. The FE will assist the survey expert with developing the survey instrument and

the survey expert will then carry out the data collection and send the FE the raw data to be used in the determination of damages. Thus, even if a survey expert is utilized, the FE will still need to participate in writing the survey questions, as there are several issues that are unique to wage and hour surveys that need to be addressed in the survey.

The remainder of this article will be devoted to issues that are unique to wage and hour surveys in class action cases that are not covered in the aforementioned publications. The issues that will be addressed are as follows: (1) which survey method to utilize and how to draw a sample; (2) how to obtain accurate work hour estimates; and (3) whether the survey respondents should be anonymous.

III. Survey Method and Sample

Telephone surveys are preferable to mailed surveys in a wage and hour case. A telephone survey allows the FE or survey expert to maintain control over the contact with the survey participants with as many follow up calls as needed to attain an adequate response rate.

Prior to conducting the telephone survey, the FE should have the attorney representing the class contact all the class members in advance. The communication should be carefully scripted to avoid bias. The FE should develop a script that details what the attorney should say to the class members. The script should explain that a representative of the FE's firm, or the survey expert's firm, will be calling to ask them questions. The script should not inform the class members of the subject matter of the survey in advance.

After the attorney representing the class has attempted to contact all of the class members, he or she should provide the FE with a categorized list of the contact attempts. The categories should be: (1) phone number is accurate and contact was made with class member; (2) undetermined if phone number is accurate and no contact made with class member; and (3) phone number is disconnected. If class members were contacted and stated that they did not want to participate in the survey, these members should be placed in category one to avoid response bias. If a survey is going to be conducted on a sample of the class members, the sample should be drawn from category one. The reason for drawing the sample only from category one is that these class members can be contacted with certainty in order to obtain an adequate response rate. Moreover, whether or not someone has a working telephone number is not likely a source of bias. There is no reason to believe that class members who recently changed their phone numbers are any different than any of the other class members.

IV. Obtaining Accurate Work Hour Estimates

Research has shown that individuals are able to accurately recall their work hours depending on the questions asked and the survey context. Frazis and Stewart (2014) addressed an ongoing issue of whether work hour estimates in the Current Population Survey (CPS) are biased. Their conclusion is that there is not substantial bias in work hour estimates in the CPS. However, the authors note in their concluding paragraph: “The wide range of over and underestimates of work hours corresponding to the different survey questions implies that the answers to the question ‘Is the Workweek Overestimated?’ depend on the specific questions and survey context.” The conclusions reached in the Frazis and Stewart article are important for damage experts in class action wage and hour cases in regard to the fact that persons are able to accurately estimate their hours of work depending on how the questions are formed and asked.

The preferred method of obtaining work hour estimates in a class action wage and hour survey is to ask: “During time period X, how many hours per week did you work on average?” The time frame “X” may need to be varied depending on whether survey participants worked multiple years during the class period and their hours varied during the different years. This is an open-ended question that allows the survey participants to answer in their own words. A closed-ended question such as “Did you work more than 40 hours per week on average?” should not be used because it can bias the survey respondents due to 40 hours being threshold for damages being computed. If survey participants respond to the open-ended question that their typical workweek was 40 hours or less, then no further questioning is needed. These people are not making a claim against the company for unpaid wages. Any follow up questioning to these survey respondents could give the appearance that the researcher is guiding them into making a higher estimate of work hours.

Survey experts need to determine the point at which they will engage in follow up questioning after obtaining an estimate of work hours. If class members respond that they worked 42 hours per week on average and they were only paid for 40, they are making a claim for unpaid wages – two hours per week of overtime pay for every week worked during the class period in which they were employed by the company. However, could follow up questioning to this individual be perceived as guiding him or her toward a higher response? It could certainly be argued by the defense attorney that such is the case. Therefore, follow up questioning should only be used when a work estimate appears to become unreasonable in terms of standard hours

people tend to work. According to the American Time Use Survey (ATUS) (2014) the average workday for males is 8.52 hours or 42.6 hours per week. Therefore, a response of 42 hours per week is not a deviation from a normal work schedule and no follow up questioning is needed. A response of 50 hours per week is a significant deviation from a normal workweek and follow up questioning should be undertaken.

Follow-up questions to persons reporting unusually high numbers of work hours should be based on 24-hour time accounting. Robinson and Bostrom (1994, pp. 19-20) found that “a more detailed measurement strategy, like total time diary method, is useful for capturing the complexities of people’s daily work lives.” This article showed a substantial difference between work hour estimates between workers subjected to 24-hour time accounting and those who were not. Robinson and Bostrom (1994, p. 18) stated: “among workers claiming to work more than 55 hours per week, the gap was often more than 10 hours per week.”

Twenty-four hour time accounting can be accomplished by asking the survey participants how they spend their time outside of work in three categories – sleeping, working around the house, and leisure activities. According to the ATUS (2014), these are the major categories of activities of daily living, besides working, for persons in the United States. Upon recalling how they spend their time outside of work, this will likely cause some respondents to revise their answers to the question of hours worked. Some respondents may report more than 24 hours when estimating the time they spend working, sleeping, working around the house and in leisure. When an estimate of hours exceeds 24, it becomes apparent to the respondents that they need to think more thoroughly about how they usually spend their days. If someone changes his or her answer, this does not mean the answer is biased; it means the accuracy of the response has been improved.

Finally, the survey participants should be asked about days off work. Survey participants should be questioned about their paid holidays, sick and vacation days. These days should be subtracted when computing the number of days when damages are due.

V. Anonymous Survey Respondents in Wage and Hour Surveys

The Rationale for Anonymity in Surveys

In general, anonymity is a useful technique for eliciting accurate survey responses. Anonymity serves to put the respondents at ease so they will feel free to divulge sensitive information. An FE and/or a

survey researcher can point to textbooks on social science research that advocate anonymity as the preferred method of data collection (Colton and Covert 2007; Evans and Rooney 2014; Mitchell and Jolley 2010). Moreover, major survey research organizations such as the Council of American Survey Research Organizations (CASRO) and the American Association for Public Opinion Research (AAPOR) list anonymity as a best practice when conducting surveys. For example, the AAPOR best practices guide states, “Exemplary survey research practice requires that one literally do ‘whatever is possible’ to protect the privacy of research participants and to keep collected information they provide confidential or anonymous.” CASRO’s “Code of Standards and Ethics” specifically addresses the use of survey research in litigation:

The use of survey or other research results in a legal proceeding does not relieve the research organization of its ethical obligation to maintain the privacy and confidentiality of participant-identifiable information or lessen the importance of participant privacy and confidentiality. Consequently, research organizations confronted with a subpoena or other legal process requesting the disclosure of participant-identifiable information must take all reasonable steps to oppose such requests, including informing the court or other decision-maker involved of the factors justifying participant confidentiality and interposing all appropriate defenses to the request for disclosure.

The rationale for anonymity is very clear – in the vast majority of surveys conducted, anonymity will lead to more accurate and candid responses. Moreover, the protection of survey respondents’ identities is a crucial ethical obligation among survey research professionals. Survey participants who are being asked about their health status will likely withhold information about health problems if they know their response can be traced to their name. Survey participants who are asked about their financial status will likely withhold information about their assets and net worth if their responses can be traced to their name. Therefore, when inquiring about health status and/or finances, a survey researcher should use anonymity. Moreover, if surveying about preferences, anonymity is clearly a correct technique. Attaching a name to a response concerning a preference would not be necessary because preferences do not need to be verified. A person’s preference is just that – a personal preference.

Financial Gain is a Reason to not Utilize Anonymity in Wage and Hour Surveys

A recent research paper argues that anonymity should not be used in all circumstances when conducting a survey. In an article titled

“Complete Anonymity Compromises the Accuracy of Self-Reports,” Lelkes et al. (2012) come to the conclusion that “complete anonymity may decrease accountability, thereby decreasing motivation to answer thoughtfully and precisely.” This research conclusion was related to the concept of satisficing. For purposes here, however, it shows that anonymity should not be used in 100 percent of surveys. A damages expert in a class action wage and hour case cannot simply point to the best practices guides from the major survey research organizations as the basis for choosing anonymity as part of their survey method. Damages experts need to think thoroughly about response bias due to financial gain and methods to control it when choosing the surveying method.

Participating in a class action wage and hour survey is a unique experience for survey respondents due to potential financial gain associated with their survey responses. As noted earlier, Frazis and Stewart (2014) found that work hour estimates in the CPS were not biased and the CPS is conducted anonymously. However, participants in the CPS do not receive payments based on their responses to survey questions. When financial gain can be tied to survey responses, informing survey participants at the outset of the survey that their answers to survey questions will be anonymous and that their name will never be attached to their responses is a source of potential systematic bias. If survey respondents observe that inflating work hour estimates will lead to an increased financial payment, the bias occurs by informing them that they will be anonymous and not accountable to their responses.

Surveys in a class action wage and hour case do not occur in a vacuum. Prior to a survey being conducted, all class members will receive notice that they are a part of a class. And when a survey is conducted, the survey researcher will likely need to inform the participants of the purpose of the survey. The survey taker will not inform the survey participants how their answers affect the outcome of the class action, but they will inform the survey respondents that they are calling on behalf of the attorneys representing a group of people in a class action. Therefore, all survey participants will be conscious that a legal action is the source of the questions being asked of them.

Survey researchers should assess potential bias among surveyed class members in class action wage and hour cases through the lens of moral hazard. Moral hazard has been described as “any situation in which one person makes the decision about how much risk to take while someone else bears the cost if things go badly” (Krugman 2009, p. 63). Survey respondents who are anonymous bear no risk associated with inflating their work hours because there is no accountability. Anonymous survey respondents can be very costly to the defense

because inflated estimates of work hours lead to higher damages. Survey respondents who are not anonymous bear considerable risk when inflating a work hour estimate. They might look foolish, and possibly be subject to perjury, if they cannot substantiate their estimate of work hours during a deposition and/or trial testimony. Informing survey respondents in a class action wage and hour case at the outset of the survey that they may be questioned by the defense about the accuracy of their answers is a useful tool in limiting moral hazard.

CASRO and AAPOR list no specific guidance for a best practice when financial gain can occur as a result of survey responses. Moreover, there is no definitive study on how financial gain affects survey responses when large sums of money may accrue to the survey participants. Thus, conventional thinking on anonymity may not be useful within the context of wage and hour litigation.

The Defense Cannot Verify the Accuracy of Survey Responses if Anonymity is Utilized

When defense attorneys are confronted with anonymous survey results, they cannot cross-examine the survey respondents to verify their answers because the survey responses appear as a series of data with no names attached to them. The only persons they can cross-examine about the accuracy of the results are the survey taker and the statistician who compile and present the results of the survey. This creates a substantial problem – the accuracy of the source data cannot be verified. The defense is not allowed to ask questions of the persons who ultimately are making a claim for damages against the company being represented. The defense can only question the survey process and the statistical process and results. This is the equivalent of an individual wage and hour case where the plaintiff never has to testify against the company about which he or she is making a claim for unpaid wages. An important legal question derives from this fact – would a judge allow an individual wage and hour claim to proceed on an anonymous basis? In other words, would the judge allow the plaintiff's case to be presented to the jury without anyone knowing who the plaintiff is, never hearing testimony from the plaintiff or never allowing the defense to cross-examine the plaintiff?

In a class action wage and hour case where survey respondents are anonymous, the source of systematic bias can be the anonymity of the respondents. Individuals who participate in the survey that realize that their payouts are connected to their response, and subsequently realize they will not be held accountable to their response due to anonymity, may inflate their estimated hours of work in a systematic way. These biased responses can shift the distribution of responses to the right in a systematic way such that the distribution of the sample data will have

an acceptable margin of error. The result is that these biased survey responses push up the mean or median of estimated hours worked for the survey population such that the class-wide damages may increase by hundreds of thousands or even millions of dollars depending on the size of the class, the number of hours being claimed, and the wage rates of the class members.

The mean or median estimated hours worked will be utilized by the statistician to project the payments due the non-surveyed members of the class. Also, depending on the preference of the statistician or the legal requirement, the mean or median hours worked will be utilized to estimate all damages. Some statisticians make individual computations of payments due the surveyed class based on the individual's response. Other statisticians may use the mean or median to project damages for all class members including the surveyed individuals. Therefore, the precision of the estimated hours is the crux of damage computations in a wage and hour class-action case.

Cross-examination is utilized throughout the legal process as a method of deriving accurate responses. If the defendant is denied the opportunity to cross-examine the source of the claim being made against them, they are being denied the opportunity to possibly improve the accuracy of the survey results. Hence, they are being denied the opportunity to accurately measure the damages claimed against them.

If wage and hour surveys are not conducted anonymously this gives the defense the opportunity to challenge survey respondents whose claims they feel are inaccurate. If the defense attorney decides to depose, or cross-examine at trial, the survey participants and this decision results in individuals changing their estimates of work hours, then the new estimate should be used by the damages expert. The cross-examination process has improved the accuracy of the response. Therefore, the new estimated mean or median will be more accurate. The new computation of damages can be done in minutes by the damages expert because the programming of damage computations is already complete. Changing one or more data points and revising the damages is a very simple process in this context. Therefore, cross-examination of survey participants should ideally occur before the statistician testifies so that computations can be revised if individuals revise their estimated hours of work.

As noted previously, the CASRO "Code of Standards and Ethics" specifically addresses the importance of survey participants being anonymous in survey research being presented in legal proceedings and thus deserves specific mention. The CASRO statement is vague as to whether it applies to class members or non-class members. Most likely, the statement is in the Code to protect participants who are not involved in the class action. Persons who were told they would be

anonymous in a survey and who are not part of a class action should not be forced to testify in a legal proceeding where they have no stake in the outcome. However, because the CASRO statement does not specify whether it applies to class members or non-class members, it can be misinterpreted by attorneys and judges as a basis for keeping survey participants in a class-action wage and hour survey anonymous.

Issues Regarding Anonymity and Response Rates

A potential reason as to why it could be argued that anonymous survey responses should be utilized in class action wage and hour cases is that the survey respondents who are currently employed by the company being sued may be concerned about retaliation due to their participation. Legal protections exist to protect class members who may be retaliated against. For example, Michael Marlo was awarded \$2.2 million in wage loss and \$15.9 million in punitive damages after he was fired by United Parcel Service for organizing a wage and hour class action case against the company (*Michael Marlo v UPS* 2012). This jury verdict is a powerful reminder to companies of the possible impact of wrongdoing to persons who are members of a class action.

Class members may simply not want to participate in the survey because they can be identified. This is problematic for the response rate and may lead to bias. However, damages experts should not assume this is an issue without testing it. If a damages expert is confronting a high refusal rate because class members are concerned about being identified, then an anonymous survey may be needed. Anonymity should not be the first course of action but it may be needed as a backup method if the response rate will otherwise be too low for valid statistical results. Anonymity should only be used if class members are saying they do not want to participate. This program of action will allow the damages expert to compare the anonymous respondents with the non-anonymous respondents to see if there is any substantial difference between the two groups.

VI. Conclusion

The decision as to whether FEs should consult with a survey expert is a function of their educational background and their familiarity with important publications on surveying methods within the context of litigation listed in this article. If an FE chooses to consult with a survey expert, he or she will still need to be very involved in the development of the survey questions. The unique aspects of questioning survey respondents in wage and hour cases have been detailed in this article. In order to elicit accurate responses to work

hour estimates, 24-hour time accounting should be utilized among survey respondents who report unusually high numbers of hours worked.

The major survey research organizations need to revisit the issue of anonymity in their best practices guidelines when financial gain can occur based on respondents' answers to survey questions. These best practices guidelines that espouse the need for anonymity in surveys can be used to mislead judicial authorities that must rule consistently with the methods determined by the scientific community. The CASRO code is particularly problematic because it addresses using survey responses in litigation and needs clarification. Surveys in wage and hours cases need to address how potential financial gain can lead to systematic response bias among surveyed class members through the lens of moral hazard. Anonymous survey respondents in class action wage and hour cases present a classic moral hazard situation – the plaintiff (class members) bears no risk associated with biased responses while the defendant may be required to pay for them. This article has shown methods to control for this source of bias and dampen the incentive for some class members to inflate their estimates of work hours in an attempt to receive a higher payout from the class action. Informing class members that they will not be anonymous and they will be held accountable to their responses throughout the legal process, along with performing 24-hour time accounting, are two very useful processes to control for potential bias.

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