

SURVEY DESIGN AND ANALYSIS IN CLASS ACTION WAGE AND HOUR CASES

Jeffrey S. Petersen, Ph.D.

Allman & Petersen Economics

Oakland, CA

&

Saint Mary's College

Moraga, CA

Typical wage and hour cases where a survey is needed

- Misclassification as salaried leading to a failure to pay overtime and no time records available
- Failure to “provide” meal periods
- Failure to “authorize and permit” rest breaks
- Failure to reimburse for job-related expenses

Important Legal Decisions Regarding Survey Data

- ▶ Anderson v. Mt. Clemens Pottery (1946 – U.S. Supreme Court) – employees may provide reasonable estimates of time worked when employer time records are missing or inaccurate.
- ▶ Bell v. Farmers Insurance (2004 – California Court of Appeals) – 10 percent margin of error accepted, 34 percent margin of error rejected.
- ▶ Duran v. U.S. Bank (2014 – California Supreme Court) – Expert needed to determine manageability of survey in accord with accepted science.
- ▶ Duran v. U.S. Bank (2018 – California Court of Appeals) – Margin of error based on overtime hours not total hours.

CONTROVERSIAL TOPICS

- ▶ Pre-Notification Letter
- ▶ Self-Interest Response Bias
- ▶ Reliability and Validity of the Survey Data
- ▶ Response Rate
- ▶ Margin of Error

PRE-NOTIFICATION LETTER

- ▶ Identifying the sponsor of the survey – the law firm representing the class members

AAPOR STATEMENT ON DISCLOSURE OF SURVEY SPONSOR

- ▶ We will make no false or misleading claims as to a study's sponsorship or purpose and will provide truthful answers to participants' questions about the research. If disclosure of certain information about the research could endanger or cause harm to persons, OR BIAS RESPONSES, or does not serve research objectives, it is sufficient to indicate, in response to participants' questions about the research, that some information cannot be revealed.

Shari Diamond's Article on Survey Research in the "Reference Manual on Scientific Evidence"

- ▶ "... any potential bias is minimized by having interviewers and respondents blind to the purpose and sponsorship of the survey"
- ▶ "To ensure objectivity in the administration of the survey, it is standard interview practice in surveys conducted for litigation to do double-blind research whenever possible."

Self Interest Response Bias

- ▶ Individuals may inflate survey responses in anticipation of receiving monetary award from lawsuit.

CONFIDENTIAL OR NON-CONFIDENTIAL SURVEY RESPONDENTS

- ▶ “Your answers will be kept completely confidential and will never be connected with your name. And no one will ever be told that you participated in this survey.” – Not recommended unless class members refuse to participate in survey in high numbers.
- ▶ “This survey is part of a class action lawsuit, I need your answers to be as accurate as possible. Your answers will not be anonymous and you may be questioned by the defendants about the accuracy of your answers.” -- Recommended

Journal Article on Conducting Surveys in Class Action Wage and Hour Cases

- ▶ Petersen, Jeffrey S. and Phillip Allman, “Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Respondents,” *Journal of Legal Economics*, Volume 22, No. 1, October 2015

MARGIN OF ERROR

- ▶ Judges and attorneys usually think margin of error is the “probability you are wrong.”
- ▶ Protect the Defendant (the employer) or protect the Plaintiff (class members / the employees)?

Important Legal Decisions Regarding Margin of Error

- ▶ Bell v. Farmers Insurance (2004 – California Court of Appeals) – 10 percent margin of error accepted, 34 percent margin of error rejected.
- ▶ Duran v. U.S. Bank (2014 – California Supreme Court) –
 - ▶ 43 percent margin of error rejected.
 - ▶ Stated that Bell is “The premier case approving the use of representative testimony in an overtime class action.”
- ▶ Duran v. U.S. Bank (2018 – California Court of Appeals) – Margin of error based on overtime hours not total hours.

MARGIN OF ERROR (EXAMPLE)

- ▶ 500 class members and 50 survey responses
- ▶ In order to project how much overtime is due the class, surveyed class members were asked “how many hours did you typically work per day?” and then a follow up question of “how many days did you typically work per week?” Assume all class members stated they worked five days per week and the distribution of the hours per day question was as follows:
 - ▶ Ten respondents answered eight hours per day = 0 OT Hours Per Week
 - ▶ Twenty respondents answered nine hours per day = 5 OT Hours Per Week
 - ▶ Ten respondents answered ten hours per day = 10 OT Hours Per Week
 - ▶ Ten respondents answered eleven hours per day = 15 OT Hours Per Week
- ▶ Overall 20% of respondents have no claim for damages and 80% have a claim for damages.

MARGIN OF ERROR (EXAMPLE)

- ▶ Average survey response (the sample mean) is 7.0 hours of overtime per week.
- ▶ The 95 percent confidence interval is 5.64 hours to 8.36 hours.
- ▶ The margin of error is therefore 19.4%.

MARGIN OF ERROR (AN EXAMPLE)

- ▶ Options for the trier of fact.
 - ▶ Option 1: Cite the Bell decision and deny the class damages because the margin of error is too high. This creates a windfall to defendants. Speculative decision.
 - ▶ Option 2: Utilize the lower bound of the confidence interval to award damages. This results in a 95 percent probability that the Defense is not overpaying for damages. Redistribution of income among the class members will occur.
 - ▶ Option 3: Lower the level of confidence until the margin of error conforms to *Bell*.

MARGIN OF ERROR (AN EXAMPLE)

▶ Option 2: Redistribution

- ▶ 20 percent of the class members will be overpaid – 40 hours per week respondents
- ▶ 40 percent of the class members will be slightly overpaid – 45 hours per week respondents
- ▶ 40 percent will be underpaid – 50 and 55 hours per week respondents

MARGIN OF ERROR (AN EXAMPLE)

▶ Option 3: Lower the Confidence Level

- ▶ “Traditionally, scientists adopt the 95 percent confidence level”
 - ▶ No scientific rationale for this, only tradition and convention.
- ▶ Is 80% confidence enough to protect the welfare of the plaintiffs and defendants?
 - ▶ If yes, then the margin of error is 12% (very close to Bell).