

# THE IMPLICATIONS OF RECENT LEGAL DECISIONS FOR SURVEY METHODOLOGY IN CLASS ACTION WAGE AND HOUR CASES

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# 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

# Recent Legal Decisions Regarding Wage and Hour Surveys

- ▶ McCleery v. Allstate Insurance Company
  - ▶ California Court of Appeals, 2019
  - ▶ Issue: Anonymous survey instrument.
  - ▶ Class members: Property inspectors alleging misclassification
  
- ▶ Duran v. U.S. Bank
  - ▶ California Court of Appeals, 2018
  - ▶ Issue: Judge forced disclosure of confidential survey respondents
  - ▶ Issue: Reliability of survey results.
  - ▶ Class members: Loan officers alleging misclassification

# McCleery v. Allstate Insurance Company

- ▶ “No case of which we are aware suggests a trial may be conducted solely on the evidence of an expert witness relying on an anonymous survey.”

# Williams v. York (2014)

- ▶ Class members: Insurance examiners alleging misclassification
- ▶ Survey instrument introduction: “your answers will be kept completely confidential and will never be connected with your name. No one will ever be told that you participated in this survey.”
- ▶ Survey data being collected: estimates of hours worked

# Williams v. York

- ▶ CASRO Code of Standards and Ethics
- ▶ “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.”

# Williams v. York

## ▶ Trial Court Judge's Decision

- ▶ "The court finds that the position of Dr. Petersen that the survey respondents should not be anonymous is contrary to the view of the applicable scientific community."
- ▶ Judge awarded \$7,435,758 in damages and \$918,000 in penalties.

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

- ▶ Problems with anonymous/confidential surveys in class action wage and hour
  - ▶ The survey responses are the claim against the company and the source data cannot be verified through cross examination
  - ▶ Logical problem: 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?
- ▶ Survey Introduction: "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."



# McCleery v. Allstate Insurance Company

- ▶ Plaintiffs argue defendants need no access to the survey data, as they are free to conduct their own survey and present contrary conclusions to the jury. This misses the point. Defendants have the right to defend against plaintiffs' claims by impeaching the evidence supporting them.
  - ▶ *Goldberg v. Kelly* (1970) 397 U.S. 254, 269-270 ["due process requires an opportunity to confront and cross-examine adverse witnesses"].
- ▶ Decision posted one month after York settled

# DURAN v. U.S. Bank

- ▶ Class size: 260 plaintiffs
- ▶ Class Period: December 1997 to September 2005
- ▶ Claim for Damages: Unpaid Overtime
- ▶ Defendant's Business: Nationwide provider of financial services
- ▶ Class members: Business Banking Officers (BBO)
  - ▶ BBOs sell bank products, including loans and lines of credit, to small business customers. Their primary job is to cultivate new business. After a BBO acquires a new client, a client manager handles the portfolio and maintains the relationship

# DURAN v. U.S. Bank

- ▶ 2008 Survey of Hours Worked = 54 hours per week
- ▶ 2015 Survey of Hours Worked = 63 hours per week
- ▶ Some class members participated in both surveys and the judge forced their names to be revealed.

# DURAN v. U.S. BANK

## CALIFORNIA COURT OF APPEALS (2018)

- ▶ Decision: “In sum, the trial court did not abuse its discretion in concluding that the wide discrepancy between the 2015 and 2008 survey results demonstrated that the 2015 Survey was unreliable, and served as tangible evidence that the survey results were tainted by bias.”
- ▶ Decision: “The order denying class certification is affirmed.”
- ▶ The trial court decision in Phase II contains the reasons for the large difference in the responses whereas the appeals court decision does not.

# DURAN V. U.S. BANK

- ▶ 2008 Survey: Asked respondents to estimate,
  - ▶ “all the time you spent at U.S. Bank at any of their offices, or work you did from home, or work you did in any other location. However, please do not count any time that you spent driving from your home to somewhere or time you spent driving from somewhere to your home.”
- ▶ 2015 Survey: Asked respondents to estimate,
  - ▶ (1) hours worked at home
  - ▶ (2) hours worked at places owned by U.S. Bank
  - ▶ (3) hours worked at non-U.S. Bank locations
  - ▶ (4) driving time unrelated to commuting

# CONCLUSION

- ▶ Pilot a non-confidential survey instrument
- ▶ If refusal rate is high, split your sample into a confidential and non-confidential group to test for bias.
- ▶ Read the 2018 decision in *Duran v. U.S. Bank* before undertaking a survey in a class action wage and hour case