

# **DATA CHALLENGES IN WAGE & HOUR DAMAGES ANALYSES**

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## Introduction

In 2018, Fair Labor Standards Act (“FLSA”) lawsuits alleging wage & hour or other FLSA violations totaled 7,494 filings, the 7th highest year ever in the filing of such cases (virtually all are collective actions).<sup>1</sup> By all indications, 2019 will bring a record-breaking increase in the number of FLSA filings. This is due to the following factors: (i) minimum wage increases in 21 states taking effect in 2019 (which surface additional litigation exposures); (ii) the intense focus on independent contractor classification and joint employer status, especially in the franchisor-franchisee context; and (iii) a decrease in expected filings by the DOL in 2019, which will likely fuel filings by the private plaintiffs’ bar.<sup>2</sup>

In California, where state labor laws are known to be more generous to workers than their federal counterparts, class actions alleging violations of the state’s overtime laws and related Labor Code claims are filed every day in state courts.<sup>3</sup> In 2018, the value of the top ten wage & hour settlements was \$253.18 million, with eight of the ten involving lawsuits pending in either state or federal courts in California or New York.<sup>4</sup>

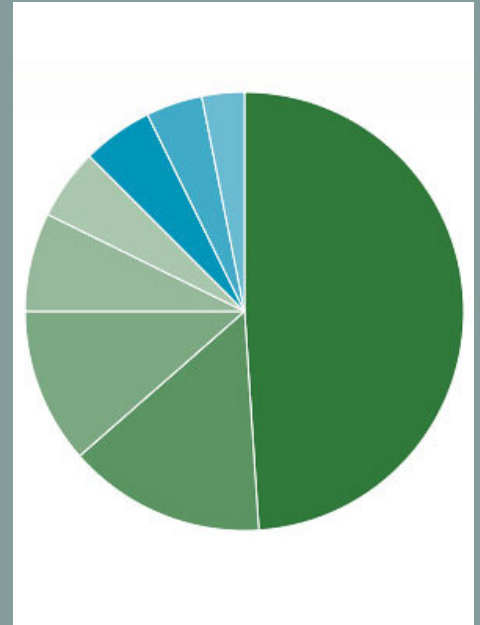
Given the anticipated rise in the number of both federal and state filings, it is important to revisit some of the evidentiary challenges confronting litigants. In this article, we use former cases to provide examples of data-related issues that emerge when analyzing wage & hour claims.

## Data and Damages

Whether a wage & hour case is a top-ten settlement contender or something more modest, potential damages are estimated by molding employee data into a robust damages model. This model reconciles the data to the applicable law (FLSA or state law) and should be flexible enough to accommodate reasonable assumptions while presented with the requisite simplicity for a settlement conference judge or mediator to quickly comprehend. The primary data sets the expert relies upon are timekeeping records and payroll records—the foundation for quantifying potential damages. To arrive at estimated unpaid wages, the formula is simple: it is the difference between wages due under applicable law minus wages actually paid. Getting the important data ready for the main analysis, however, can be quite eventful because the process is heavily influenced by how the data sets were originally prepared, maintained and produced. The case studies used in this article are assignments we have been involved in as consulting experts or testifying experts.

In our experience, a number of common data-related challenges emerge when analyzing wage & hour claims. These challenges include a variety of factors, such as the unique way the employer has maintained its records, a lack of alignment between work periods and pay periods, or the sheer volume of the data involved. Experience has shown, however, that such hurdles can be overcome by working closely with counsel early in the process and engaging in productive and frequent communication with the client, when possible.

The following case studies illustrate the importance of interpreting the employer’s timekeeping and payroll data correctly by: (i) understanding how the employer collects, maintains and reports the employee data; (ii) identifying the relevant data and periods to analyze; and (iii) utilizing suitable tools to organize the data



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so that the expert analysis can commence and estimated unpaid wages, if any, are determined in a cost-efficient manner.

### ***Case Study 1 - Inconsistent Format Issues of Source Data***

In a collective action involving Section 7(k) employees,<sup>5</sup> the plaintiffs alleged their employer calculated a regular rate of pay that was not in compliance with the FLSA.<sup>6</sup> The plaintiffs claimed that the regular rate should have included a specific type of cash compensation but did not, and the omission resulted in the underpayment of overtime wages. The timekeeping data resided in three years' worth of time cards that were filled in by hand by hundreds of different employees, and some entries were illegible. Furthermore, sporadic prior-period corrections made in a current period time sheet needed attention. The time cards also displayed total pay period hours that did not always correspond to the sum of the recorded daily hours. For strategic reasons, the client requested a preliminary damages assessment within 30 days. The time data, however, was not primed for immediate quantitative analysis, as the data file format was not maintained electronically.

It is not unusual for timekeeping information to come in less-than-desirable formats, like handwritten time cards, stamped time cards, or poorly scanned PDFs. In that case, the expert must convert the source data into an electronic file (such as Excel) via either manual data entry or by using an optical character recognition ("OCR") software. Therefore, receiving the source data for timekeeping and payroll information in electronic format creates significant cost efficiencies while eliminating inadvertent data entry or conversion errors. In our illustrative case, data from the handwritten time cards had to first be reconstructed in Excel via manual data entry before any quantitative analysis could begin. This additional but critical step was an incremental cost that the client understood to be necessary.

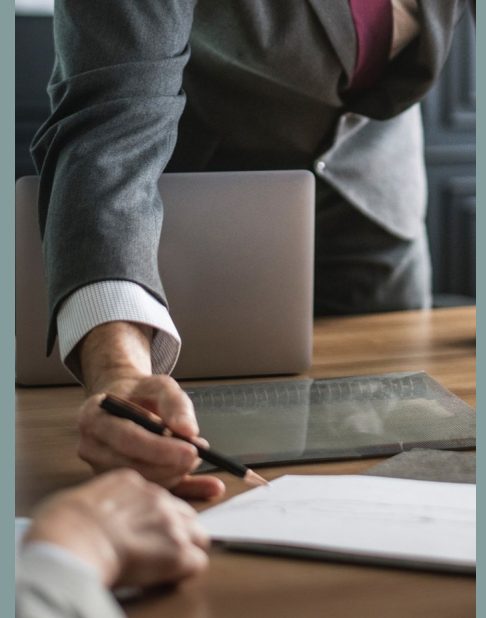
When timekeeping or payroll information is available in PDF format, using a PDF conversion or OCR software rather than manual data entry is an immediate, but not guaranteed, option. While there are various software programs that can convert PDF files into spreadsheet format, the integrity of the converted data is not a given, and sometimes the PDF data is best converted electronically via manual data entry after all.

Equally important to carefully performing and supervising the data conversion is the auditing of the converted data for accuracy and completeness. For example, the expert should perform some testing to validate the results of the converted data by corroborating those results with available source data.

The quality and natural state of the timekeeping and payroll data significantly govern the time required to prepare the raw information for analysis, naturally impacting costs. Early input from the damages expert can positively influence the project's anticipated schedule and bring clarity to the client's expectations.

### ***Case Study 2 - Incomplete Data***

In a pre-litigation project involving over 1,000 employees, the employer proactively sought to determine its potential exposure for a three-year period. Retained by the employer, the wage & hour expert had the benefit of commu-



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nicating freely with the employer’s payroll manager, who was the custodian of the payroll data, and the electronic data transfer to the expert was seemingly smooth. However, upon completing some preliminary review and testing of the data, the expert immediately recognized that certain critical pay codes were unaccounted for. After communicating with the client, it was discovered that the payroll manager had inadvertently filtered the data provided to the expert, resulting in the omission of the pay codes that were the very subject of the anticipated dispute.

Here, even when the employee data was already in electronic format, it was important that the expert had donned her “auditor hat” by performing data completeness tests for the purpose of confirming that all available timekeeping and payroll information had in fact been received—for all employees at issue and for the entire relevant period.

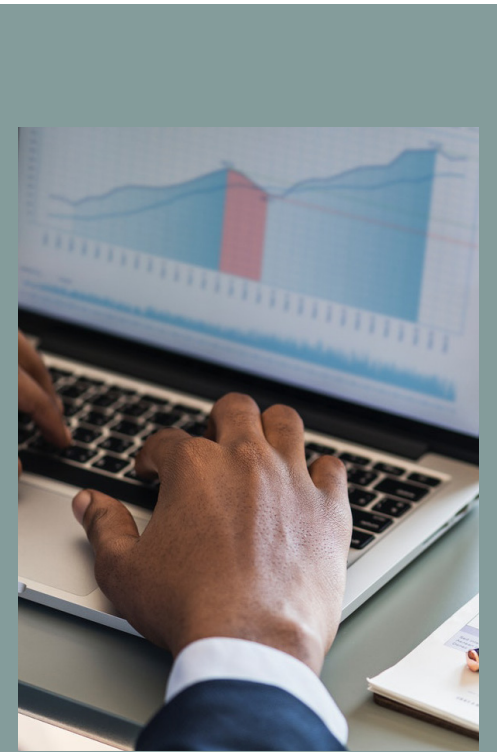
While incomplete or unclear data might be produced for a variety of reasons, the expert is in a position to correct course. For example, the expert for the employer has the benefit of direct access to the employer’s relevant personnel in human resources, payroll or information technology as she formulates detailed data requests and raises questions to obtain clarity regarding the data fields in the time and payroll records. When engaged to support the plaintiffs, the expert works with plaintiffs’ counsel to generate useful and timely discovery requests. Because the plaintiffs’ expert is naturally precluded from having direct contact with the employer, it is beneficial to get the expert involved early in the discovery phase, as the timeliness of available expertise benefits the preparation of interrogatories, deposition questions or necessary discovery motions.

### ***Case Study 3 - Large Volumes of Data***

In a putative class action involving over 8,000 employees working in over 50 locations in California, the employees claimed that their employer violated state labor laws by allegedly failing to pay correct overtime wages, failing to provide compliant meal periods and rest breaks, and failing to furnish timely and accurate wage statements, among other things. The relevant period to be analyzed spanned almost nine years. The employer’s raw time data in electronic form could easily occupy the equivalent of at least five million rows of data. Excel, however, could only hold a little over one million rows of data.

Depending on the liability period, the size of the class, and the type and number of pay codes involved, the collective size of the time and payroll data might be too large to be maintained and analyzed in otherwise dependable programs like Excel or Access. For example, in each employee pay stub, relevant data might consist of the following for each pay period: (a) a column for each type of information (e.g., employee number, employee name, pay code, hours, wages paid); and (b) a separate row for each pay code with wages or deductions. Here, a single employee pay stub could easily occupy more than a dozen rows. In the case above, the requisite data pertaining to the over 8,000 putative class members was too large to manage and analyze in Excel alone.

When a program like Excel’s maximum capacity is an issue, the expert utilizes other, specialized types of software that can house all of the time and payroll data. Pertinent subsets of the data can then be exported to Excel for targeted expert analysis or sample testing if such testing in Excel is preferable.



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## Conclusion

Because every employer has its own distinct process of recording, processing and maintaining timekeeping and payroll records (and other relevant information like pay codes), data-related challenges can be expected in connection with wage & hour damages analyses. Nevertheless, informed by a good understanding of applicable law, a responsive wage & hour damages expert utilizes the available data from every new environment by being adaptable and creative, alert and inquisitive, and self-correcting and prompt. For the expert adept at navigating these challenges, anticipating the next unplanned step is actually part of the plan.<sup>7</sup>

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## Endnotes

- 1 Seyfarth Shaw LLP, 15th Annual Workplace Class Action Litigation Report, 2019 Edition, page 24.
- 2 Seyfarth Shaw LLP, 15th Annual Workplace Class Action Litigation Report, 2019 Edition, page 24.
- 3 Seyfarth Shaw LLP, Litigating California Wage & Hour and Labor Code Class Actions, 2018 Edition, page 6.
- 4 Seyfarth Shaw LLP, 15th Annual Workplace Class Action Litigation Report, 2019 Edition, page 35.
- 5 Section 7(k) of the FLSA (29 U.S.C. § 207(k)) provides public employers the option to implement an exemption from the seven-day, 40-hour overtime threshold for public safety employees (fire protection and law enforcement personnel). The “7(k) exemption” increases the overtime limit and gives the employer the flexibility to select anywhere from a 7 to 28-day work period over which the overtime limit will be calculated. (See, e.g., 29 C.F.R. § 553.230 [“For those employees engaged in law enforcement activities ... who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28”].). That the start and end dates within corresponding work periods and pay periods do not always align is a unique analytical component of Section 7(k) wage & hour analysis.  
  
Section 7(k) also provides that “overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28.” This is an exemption to the FLSA requirement to pay employees overtime for hours in excess of 40 in a seven-consecutive day workweek. See U.S. Department of Labor Wage & hour Division, Fact Sheet #8: Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA), revised March 2011.
- 6 The regular rate of pay is the rate used in calculating overtime wages, and includes the employee’s hourly rate plus certain forms of remuneration, such as commission and incentives (if paid).
- 7 This paper was adapted from an article published by Law 360 Portfolio Media, Inc. in March 2018.

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