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CONTENTS

11.1	Relevant Laws and Regulations.....	284
11.1.1	Class Certification	285
11.2	Wage and Hour Violations.....	286
11.2.1	Misclassification (Overtime Exemptions).....	286
11.2.2	Potential Changes to Exemption Regulations	291
11.2.3	Independent Contractor Status	292
11.2.4	Allegations of Off-the-Clock Work.....	292
11.2.5	Meal and Rest Breaks.....	293
11.2.6	Special Wage and Hour Issues in California	294
11.3	Methodologies	294
11.3.1	Job Analysis Questionnaires.....	296
11.3.2	Observations.....	297
11.3.3	Live Observations	298
11.3.4	Video Observation	301
11.3.5	Structured Interviews	301
11.3.6	Analysis of Legal Documents.....	302
11.3.7	Analysis of Existing Company Materials.....	304
11.4	Sampling.....	304
11.5	Level of Specificity	305
11.6	Types of Analyses Performed.....	306
11.7	Case Study 1: Executive Exemption Observation Study	307
11.8	Case Study 2: Meal and Rest Break Survey.....	309
11.9	Case Study 3: Off-the-Clock Work Observation Study.....	311
	Legal Commentary.....	313
	Overtime Exemptions.....	314
	Class Actions	315
	Meal and Rest Breaks	316
	Recommended References	316
	Glossary	317
	References.....	318
	Laws and Regulations	319
	Court Cases	319

We prepared this chapter with three primary goals in mind. In particular, we hope that readers of this chapter will gain knowledge in the following areas:

1. **Legal Context.** Understand a range of wage and hour issues that are relevant to HR practitioners. In the chapter, we highlight the areas within the broad realm of wage and hour where Industrial/Organizational (I/O) methods are useful for resolving allegations and evaluating compliance.
2. **Methodology.** Understand the methods available to study wage and hour issues. Many wage and hour issues require a detailed knowledge of what work is actually performed by individuals and many job analysis methodologies exist to address this need. In the chapter, we identify and explain the job analysis methods that are best suited to address these unique issues.
3. **Application.** Understand how job analysis methods can be applied to evaluate wage and hour compliance. Our experience has taught us that simply having knowledge of job analysis methods is rarely sufficient to do quality work in this area. In this chapter, we address the application of job analysis methods in the wage and hour context.

11.1 Relevant Laws and Regulations

Compliance with wage and hour regulations requires an understanding of both federal and state laws and regulations. At the federal level, laws involving wage and hour issues are contained within the Fair Labor Standards Act (FLSA; U.S.C. §§ 201 et seq.). The FLSA, enacted in 1938 (and amended in May 2011), covers a variety of em-

ployee protections such as minimum wage, child labor, hours worked, working conditions, and overtime pay. The Department of Labor (DOL) estimates that over 103 million workers are covered by the FLSA (US Department of Labor 2009). Within the DOL, the Wage and Hour Division (WHD) is responsible for enforcing the provisions of the FLSA and, as such, has promulgated a number of regulations organizations must follow to be in compliance (29 C.F.R. § 541 et seq.). Together with the FLSA, DOL regulations establish employers' legal obligations at the federal level.

Each state within the USA has its own wage and hour laws which may be the same as, or broader in scope than the FLSA. Companies doing business in more than one state must be compliant with the laws of each state in which business is conducted. When federal and state regulations differ, the more restrictive regulation controls (29 U.S.C. § 218(a)). Because state laws incorporate the provisions of federal law, companies must be in compliance with both federal and state law. In states like California where state laws are considerably broader and more restrictive than federal law, companies need to review their practices to ensure that it is compliant with the more strict state standards. Because California has earned the distinction of having the highest frequency of wage and hour lawsuits and the largest awards, we discuss California law specifically in addition to federal law as companies operating in multiple states most likely have California employees.

California's wage and hour laws are contained in two sets of regulations: the California Labor Code (Cal. Lab. Code §§ 200 et seq.) and the Industrial Welfare Commission (IWC) Wage Orders (Cal. Code Regs. tit. 8, § 11000). The Division of Labor Standards Enforcement (DLSE) is the enforcement agency for California's wage and hour laws. The DLSE interprets laws enacted and creates guidelines for companies to follow to ensure compliance with the law. For example, the DLSE published the *Enforcement Policies and Interpretations Manual* (Division of Labor Standards Enforcement 2010) which summarizes the agency's policies and interpretations of wage and hour laws and regulations. The DLSE also

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conducts employer audits and investigates claims of wage and hour violations.

Like California, most of the 50 states have a state-level wage and hour laws (e.g., US Department of Labor 2014d, e) that may differ from the FLSA. Employers should therefore be aware of the relevant laws in all states in which they have employees as the frequency of wage and hour cases has recently begun to surge in many states including Florida, Massachusetts, New Jersey, New York, and Pennsylvania (Seyfarth Shaw 2014).

11.1.1 Class Certification

Many wage and hour lawsuits are brought as class actions and typically include three stages: class certification, merits, and damages. The cost to all parties to litigate single-plaintiff wage and hour cases is quite high. As a result, plaintiffs' attorneys file cases as class actions even if they can only identify a small number of plaintiffs (e.g., two or three). The named plaintiffs seek to represent the putative class of individuals who have common claims in order to make a case financially beneficial given the size of damage awards or settlements they may be able to secure. In contrast, employers want to defeat the creation of a class of plaintiffs because a class action increases the cost of the litigation substantially and increases liability exposure significantly.

Before a case can proceed as a class action¹, the class must be "certified." That is, a judge must decide whether the claims of all class members are similar enough that they can be resolved on a class-wide basis. Wage and hour classes can be certified under two legal processes: Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") and 29 US Code (USC.) § 216(b) ("Section 216(b)"). The certification standards differ so each will be discussed separately².

¹ Officially, actions certified under section 216(b) are "collective actions" but for the purposes of this chapter, the term "class action" will be used.

² There are other differences between class action and collective action cases such as the requirement for putative class members to "opt-in" to a collective action versus the requirement to "opt-out" of a class action.

Multi-plaintiff FLSA cases can be certified under Section 216(b). The certification standard for these classes is that the members of the putative class are "similarly situated." Section 216(b) cases are frequently certified using a two-stage process (see, for example, *Lewis v. Wells Fargo Co.* 2009) in which the class is first "conditionally certified" based on a lenient standard for the purpose of sending notice of the action to potential class members. In a second stage, after all evidence has been presented, the court determines whether the case should proceed to trial as a class action. A more stringent standard is applied at the second stage and is where evidence from experts is considered.

Class actions in federal court can also be certified under Rule 23. Under Rule 23, a certified class must meet four criteria: (1) numerosity, (2) typicality, (3) commonality, and (4) adequacy of representation. The "commonality" criterion is generally where I/O methods are most directly applicable because it requires plaintiffs to show that "there are questions of law or fact common to the class." For example, "commonality" can be shown when a uniformly implemented company policy resulted in employees working off the clock, or all employees within a job title have the same duties and responsibilities and they all spend the majority of their work time performing nonexempt work.

I/O methods are useful here because relevant to certification under both processes is the degree of variability between putative class members on factors such as the tasks employees perform and time spent on certain tasks. The challenge for employers is to show that the members of the putative class do in fact vary person to person with respect to the issues in the case making treatment as a class inappropriate because their claims cannot be resolved on a class-wide basis.

The outcome of a wage and hour case is dramatically impacted by whether the class is certified. Most wage and hour class actions settle before trial (Levine and Lewin 2006) and even before plaintiffs' motion for class certification is heard by the judge because of the risk of having a certified class and the huge potential liability for defendants (employers) should they lose the case

(Banks and Cohen 2005). Settlements usually involve agreements by employers to pay plaintiffs' attorney fees, a small financial award to named plaintiffs, and an agreement that there is no admission of liability by the employer. If the case advances to a class certification hearing and the judge rules against plaintiffs, then the case can proceed as individual cases; however, the monetary value of such cases becomes much lower and plaintiff attorneys often are not inclined to pursue these cases further.

It is worth noting that although a well-known US Supreme Court case, *Dukes v. Wal-Mart Stores, Inc.* (2011), was a discrimination case, the ramifications of the decision have impacted wage and hour cases. The court ruling specifically addressed the criteria for establishing "commonality" in a class action when it considered whether a class can be certified if there is widespread evidence of discrimination but there is nothing specifically one can identify that is responsible for that outcome. The class could be certified if Wal-Mart had a uniform policy of discriminating against women, but could the class be certified if there was no such policy? Testimony from a plaintiffs' expert regarding implicit bias against women was not sufficient to establish a common factor which led to gender discrimination. Finding no explicit and provable factor, the court did not certify the class and thus, significantly raised the bar for plaintiffs to prove they are a class in employment and wage and hour cases. Since the *Wal-Mart* decision, motions for class certification, including wage and hour cases, have been easier to defeat (e.g., *Aburto v. Verizon California, Inc.*, 2012).

It should also be noted that once a class is certified, *all* class members automatically become plaintiffs in the litigation and therefore are represented by plaintiffs' attorneys. This means that class members cannot be questioned without their attorneys present. Because the class includes all or nearly all current employees in question—the people who can typically provide the most accurate information about the issues in the case—data collection from these plaintiffs is impossible for defense experts and questionable for plaintiffs' experts. That is, defense cannot

have direct contact with class members without their attorneys present which makes their testimony potentially unreliable, and data collected by plaintiffs' experts make their testimony also potentially unreliable. For defense experts, data collection methodologies such as job analysis questionnaires and observations are typically not feasible because they require participation from current employees and cannot be done in the presence of plaintiffs' attorneys. In sum, data collection is problematic post class certification for both sides.

When data must be collected post class certification, there are a few options for obtaining reliable data which are discussed later in this chapter such as (1) choosing a methodology that does not require direct contact with current employees or (2) collecting data from employees in the job who have opted out of (or did not opt into) the class or perform the same job in a state not included in the litigation. An example of this latter strategy can be found in Case Study 3 at the end of this chapter.

11.2 Wage and Hour Violations

11.2.1 Misclassification (Overtime Exemptions)

One of the most commonly disputed wage and hour issues is the proper classification of employees as "exempt" or "nonexempt" from FLSA (or state wage and hour) protections. All employees are presumed to be nonexempt and it is the employer's burden to demonstrate that they are exempt (Division of Labor Standards Enforcement 2010, § 50.2). Employees who qualify for one or more exemption are considered "exempt" and thus not protected under FLSA protections such as overtime pay for all hours worked over 40 in a workweek. Exempt employees are paid a fixed salary regardless of the number of hours they work. Litigation arises when employees (current and/or former) allege that they are misclassified as exempt because they do not meet the exemption criteria. If successful, these employees can reclaim unpaid overtime and interest as well as

Table 11.1 Summary of exemption criteria for the “white collar” exemptions. (This table is a summary of the criteria specified in the Federal Regulations. Readers should refer to the actual regulations (29 C.F.R. § 541 et seq.) for additional explanation and guidance)

Exemption (Federal Regulation)	Criteria (must meet all)
Executive (29 C.F.R. § 541.100)	(1) Paid a salary of US\$ 455 or more per week (2) Primary duty is management of the enterprise, department, or subdivision (3) Manages two more employees (4) Has the authority to hire or fire others (or whose recommendations are given particular weight)
Administrative (29 C.F.R. § 541.200)	(1) Paid a salary of US\$ 455 or more per week (2) Primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer’s customers (3) Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
Professional (29 C.F.R. § 541.300)	(1) Paid a salary of US\$ 455 or more per week (2) Primary duty meets one of the following criteria: i. Primary duty is work requiring advanced knowledge (i.e., “learned professional”) ii. Primary duty is work requiring invention, imagination, originality, or talent in an artistic or creative field (i.e., “creative professional”)

other compensation associated with nonexempt benefits that were not given because they were misclassified. In addition to these costs, employers who lose a misclassification case will pay other costs including penalties and plaintiffs’ attorney fees (Banks and Cohen 2005). When the litigation includes large numbers of plaintiffs across several years (up to 5 years), the costs can reach into the tens of millions. Perhaps the most well-known misclassification case that advanced to trial is *Bell v. Farmers* (2001) in which plaintiffs were awarded over US\$ 90 million in damages. In 2013 alone, several large misclassification settlements were reached: *Ladore, et al. v. Ecolab Inc.* (US\$ 29 million), *Craig, et al. v. Rite Aid Corp.* (US\$ 21 million), *Luque, et al. v. AT&T Corp.* (US\$ 19 million), and *Beauperthuy, et al. v. 24 h Fitness USA, Inc.* (US\$ 18 million).

Employers can seek to qualify for one or more exemptions to the FLSA for certain groups of employees. Three of these are commonly known as the “white collar” exemptions: executive, administrative, and professional exemptions. While the specific requirements of each exemption differ, all exemptions (under the FLSA and state laws) are based on two factors: (1) the amount and method of compensation the employee receives and (2) the employee’s job duties. Table 11.1 summarizes the criteria for each exemption.

The regulations and case law make it clear that exemption status must be determined based on *actual job duties*, not job titles (see 29 C.F.R. § 541.2). An evaluation of proper classification requires an understanding of what work employees actually perform, the context in which it is performed, the nature of the work, and the time spent on that work. Job analyses are often required to collect this evidence (Banks and Aubry 2005; Banks and Cohen 2005; Ko and Kliener 2005; Honorée et al. 2005). Also, classification decisions must be made on an *individual* basis (as opposed to a group basis; 29 C.F.R. § 541.2). This means that the exemption is determined individual by individual based on what each employee actually does on the job, and is not based on the job description or what employees in the job generally or typically do. This is a critical component of the law and one that I/O psychologists and other HR practitioners should find particularly meaningful. If the exemption is focused on a single individual, then individual-level job analysis is required as opposed to a traditional job analysis which captures a generalized picture of the work performed by typical employees.

Executive Exemption

To qualify for the executive exemption, an employee must be “employed in a bona fide

executive capacity” (29 C.F.R. § 541.100) and the specific criteria required are summarized in Table 11.1. Although there are multiple aspects to the exemption, I/O methods are most commonly applied to the second criterion: whether the employee’s “primary duty” is the “management of the enterprise.” Job analysis methods can determine which tasks qualify for “management of the enterprise” and the degree to which these tasks form a “primary duty.” The FLSA differs in a critical way from California law in that California goes beyond the “primary duty” requirement and instead uses “primarily engaged” as the criterion. While “primary duty” can constitute less than half of an employee’s daily or weekly work time, “primarily engaged” has been operationalized as over 50% of an employee’s work time. In other words, an employee who spends 40% of his time on “management” duties may be considered exempt under the FLSA but not under California law. Therefore, it is more difficult to meet the exemption criteria in California compared to the FLSA or state laws that incorporate but do not extend federal law. Not surprisingly, more misclassification cases are filed in California compared to all other states (Seyfarth Shaw 2014).

An additional issue is defining which duties are considered “management of the enterprise.” Federal regulations provide guidance by specifying examples of activities that are considered management (see 29 C.F.R. § 541.102), and these are listed in Table 11.2. Despite this guidance, jobs involve many activities that are not mentioned in the regulations, creating uncertainty about whether those additional activities are considered “management.” Ultimately, the court decides which job duties are “management.” However, as a practical matter, tasks have to be classified despite this uncertainty in order to calculate the percent of time employees spend performing exempt work. Because of the potentially significant consequences of misclassifying a job, an employer may benefit from an independent review of the classification of tasks into “management” or “nonmanagement” categories by an independent party who has a great deal of experience classifying tasks and may even require input from a legal expert in wage and hour classification.

Employees who typically qualify for the executive exemption are management employees with substantial management responsibilities. First-line supervisor positions with “management-like” job titles (e.g., assistant manager, department manager, shift supervisor) sometimes cannot meet the executive exemption criteria and have been targets of misclassification lawsuits under this exemption. Employees in these positions often perform managerial duties but they may also perform some of the same nonmanagerial duties as the nonexempt employees they manage (see Banks 2004). Depending on which laws are operative (FLSA or state law), the job could meet or not meet the exemption criteria based on the amount of time spent on management tasks. Regardless of which law is operative, determination of a job’s proper classification requires knowledge of the actual job duties performed and the amount of time spent on those duties.

Administrative Exemption

To qualify for the administrative exemption, an employee must be “employed in a bona fide administrative capacity” (29 C.F.R. § 541.200) and the specific criteria are summarized in Table 11.1. I/O methods are directly applicable to determining whether an employee’s primary duty is “the performance of office or non-manual work directly related to the management or general business operations.” This evaluation requires detailed information about how the employee supports management or contributes to the company’s general business operations (as opposed to a subset of operations). The regulations define administratively exempt work as “assisting with the running or servicing of the business” which means that the function an employee serves supports the fundamentals of the business (e.g., finance, HR, administration). Administratively exempt work is distinguished from production work (e.g., manufacturing, production line work) or sales (e.g., retail or customer service work). Examples from federal regulations (see 29 C.F.R. § 541.201) of job duties that are generally considered exempt are listed in Table 11.2. One of the challenges when evaluating jobs in the con-

Table 11.2 Examples of job duties and job titles reference by Federal Regulations¹.

Generally Exempt Job Duties	Job Titles
Executive Exemption	
Interviewing, selecting, and training of employees; Setting and adjusting their rates of pay and hours of work; Directing the work of employees; Maintaining production or sales records for use in supervision or control; Appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; Handling employee complaints and grievances; Disciplining employees; Planning the work; Determining the techniques to be used; Apportioning the work among the employees; Determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; Controlling the flow and distribution of materials or merchandise and supplies; Providing for the safety and security of the employees or the property; Planning and controlling the budget; Monitoring or implementing legal compliance measures.	None specified
Administrative Exemption	
Work in functional areas such as: Tax, Finance, Accounting, Budgeting, Auditing, Insurance, Quality control, Purchasing, Procurement, Advertising, Marketing, Research, Safety and health, Personnel management, Human resources, Employee benefits, Labor relations, Public relations, Government relations, Computer network, internet and database administration, Legal and regulatory compliance	<p>Examples that generally meet the exemption: Insurance claims adjusters, Employees in the financial services industry, Employees who lead a team assigned to complete major projects, Executive assistant to a business owner or senior executive, Human Resources managers, Purchasing agents</p> <p>Examples that generally do not meet the exemption: Ordinary inspection work, Examiners or graders, Comparison shoppers, Public sector inspectors or investigators</p>
Professional Exemption (Learned)	
None specified.	<p>Examples that generally meet the exemption: Registered or certified medical technologists, Nurses, Dental hygienists, Physician assistants, Accountants, Executive chefs and sous chefs, Athletic trainers, Funeral directors or embalmers, Teachers, Physicians</p> <p>Examples that generally do not meet the exemption: Practical nurses and other similar health care employees, Accounting clerks and bookkeepers, Cooks, Paralegals and legal assistants</p>

¹ Note that these are examples from the regulations that *generally* qualify as exempt. There are many circumstances that could impact these general classifications.

text of the administrative exemption is the importance that is placed on the nature of the work. That is, not only is the actual work that employees perform important but the purpose of that work is also important in order to determine whether the job is administratively exempt. What

an employee does physically may not project the precise meaning of that work without an in-depth understanding of the context of the work. For example, it may not be obvious that an employee who designs a new computer chip to fit in a client’s new electronic device is doing something

more than programming. Instead, the employee is creating something new that enables his client to be more competitive in the marketplace by introducing a new feature. In essence, the employee is enabling his client in a material way to advance its business operations—an aspect of administratively exempt work.

To facilitate an understanding of this exemption, the regulations offer examples of jobs that generally meet and do not meet the duties requirements for the administrative exemption, which are listed in Table 11.2 (29 C.F.R. § 541.203). However, remember that simply having one of these job titles does not automatically make an employee exempt or nonexempt. As an example, there have been multiple high-profile misclassification lawsuits filed on behalf of insurance claim adjusters, which is one of the examples of an exempt job according to the regulations (see *Bell v. Farmers* 2001; *Hodge v. Aon* 2011; *Harris v. Liberty Mutual* 2011). The outcomes of these cases have been inconsistent. Some courts (*Hodge*) have found insurance adjusters to be exempt while other courts (*Bell* and *Harris*) have found insurance adjusters to be nonexempt. The inconsistent rulings illustrate the need to fully understand what work employees actually perform and the nature of that work. This is an exemption where I/O methods would be particularly valuable because of their ability to study jobs in depth using job analysis which provides the level of detail needed.

Professional Exemption

The professional exemption is broken down into two categories: “learned professional” and “creative professional” exemptions (29 C.F.R. § 541.300) and the criteria to meet each are summarized in Table 11.1. The creative professional exemption (29 C.F.R. § 541.302) applies to individuals in a recognized field of artistic or creative endeavor, including music, writing, acting, and the graphic arts. I/O methods such as job analysis have rarely been applied for evaluating a job under this exemption, and it is not clear why. An evaluation of the learned professional exemption, on the other hand, has been evaluated using I/O methods since the exemption involves

an understanding of the knowledge, skills, abilities, and other characteristics (KSAOs) required in the job and how those KSAOs are acquired (e.g., prolonged study of an advanced nature or short-term on the job training). In addition, I/O methods can tease apart those aspects of the job that cannot be learned quickly or performed by other employees who related but different work, indicating the advanced nature of the work.

When evaluating the Professional Exemption, there are three important considerations (see 29 C.F.R. § 541.301). First, the primary work must require advanced knowledge. This means that the work is primarily intellectual in nature and involves the consistent exercise of discretion and judgment. Second, the advanced knowledge must be in a “field of science or learning.” Occupations covered by the professional exemption include law, medicine, accounting, and engineering (see 29 C.F.R. § 541.301(c)) because they have a recognized professional status as opposed to mechanical arts or skilled trades. Third, the advanced knowledge must be “customarily acquired by a prolonged course of specialized intellectual instruction.” In other words, the knowledge must be academic in nature, as opposed to knowledge that is acquired through experience (e.g., on-the-job training). I/O methods can add significantly to the court’s understanding of these criteria because of their ability to derive KSAOs for jobs. Job analysis techniques can be applied to the question of whether advanced knowledge is required to perform the job successfully. This question is a common source of dispute. Even if every employee in the job has an advanced degree, it does not mean that the degree is necessary to perform the job—and this is where knowledge of the work that employees actually perform is critical to answering this question. A list of job titles that are generally considered exempt under the professional exemption are listed in Table 11.2.

The high-tech industry has become a recent target of misclassification cases under the professional exemption because the jobs of IT employees are not well understood, creating a lack of clarity as to whether IT employees meet the professional exemption criteria. Many employees in

this field have bachelor's or master's degrees in fields such as electrical engineering or computer science, but it is not obvious whether these degrees are necessary to perform the work. This determination is further complicated by the fact that much of the work performed by IT employees is mental and unobservable, and is highly technical in nature. In such cases, it is crucial to understand the technical details of the work being performed—how the work is performed, why it is performed, and what the work is connected to in the business—before one can determine what knowledge is required to perform that work and where that knowledge is customarily acquired. Even after that is determined, it is not clear what level of education meets the exemption criterion. There is no case law to direct employers as to when a graduate degree is required to meet the criterion of advanced knowledge and when a bachelor's degree or certification is sufficient. Therefore, it is up to the court to determine what "advanced knowledge" means in each case based on a detailed description of the work and the knowledge required to perform that work. I/O methods can contribute significantly to the court's ability to make an accurate determination using data from a systematic job analysis.

Other Exemptions

In addition to the "white collar" exemptions, the regulations identify a group of occupations that are considered exempt a priori. These occupations include teachers, outside salespersons, computer professionals (e.g., programmers, software engineers), public safety employees (police officers), and fire protection employees (29 C.F.R. § 541.3). Although these jobs are specifically designated as exempt in the regulations, the exemption status of employees who hold these job titles has been disputed. One reason is that exemption is based on job duties, not job titles (29 C.F.R. § 541.2), so ultimately the status of any employee is based on the actual tasks performed in the job and the amount of time spent performing exempt work. For example, an employee could hold the title of "outside sales" but not actually perform the duties of outside salespersons where the work meets the exemption criteria (see 29 C.F.R.

§ 541.500). There have been a number of recent cases challenging the outside salesperson exemption for pharmaceutical sales representatives, individuals who visit physicians' offices, educate them on the drugs they represent, provide drug samples to the physicians to use with their patients, and encourage physicians to prescribe these drugs for their patients. A key issue in such cases is whether the act of meeting with physicians and gaining nonbinding commitments to use the representatives' drugs constitutes "sales." A representative's performance is judged by how many prescriptions of the representative's drugs the physician writes and are filled by a local pharmacy—the sale occurs sometime later following the representative's visit to the physician, and no sales are directly made by the representative. Legally, are these activities sales activities? The US Supreme Court ruled in 2012 that this activity did constitute sales and that pharmaceutical sales employees are properly classified as exempt (*Christopher v. SmithKline Beecham Corp.* 2012). In sum, legal determinations of exemption status require an in-depth and thorough understanding of the work involved, an expertise for which I/O methods are particularly useful.

11.2.2 Potential Changes to Exemption Regulations

Although no official changes have been made (or even proposed) at the time of this writing, we want to alert readers to the fact that the federal regulations are currently under review by a directive President Obama issued in March 2014 (Office of the Press Secretary 2014a, b) and consequently, these exemption regulations could soon change. The Secretary of Labor has begun the process of proposing revisions to "modernize and streamline the existing overtime regulations." As with all regulatory revisions, this is likely to be a lengthy process and the nature and extent of revisions are unknown. However, early speculation indicates that the following may occur: (1) The minimum salary requirement of US\$ 455 per week for an exempt job is likely to increase, and (2) the test for "primary duties" at the federal

level may become more restrictive and may even follow the California requirement of “primarily engaged” which would move the threshold for time spent on exempt work to a 50% time threshold. Should these changes be adopted, it is likely that fewer employees will qualify for an exemption just on these criteria alone. We advise readers on this topic to pay close attention to developments in this area as they may have a significant impact on the necessary evidence appropriately determine the exemption status of a job.

11.2.3 Independent Contractor Status

In addition to the exemptions to the overtime provisions of the FLSA, workers may be retained by employers as “independent contractors” who also are exempt from various benefits provided to employees under the law because they are not employed by the company. By definition, independent contractors are self-employed rather than employees of the organization. Classification as an independent contractor has several implications for the employer including avoidance of taxes such as employment tax and tax withholding requirements (Joint Committee on Taxation 2007; Internal Revenue Service 2013), and freedom from employment laws such as overtime pay and provisions for meal and rest breaks (Division of Labor Standards Enforcement n.d.). From the worker’s point of view, classification as an independent contractor means the ability to deduct expenses incurred while performing work as an independent contractor (Joint Committee on Taxation 2007; Internal Revenue Service 2013), discretion in the time and manner in which work is performed, and ability to work for more than one company at a time. On the negative side, independent contractors have no wage security and may not receive certain benefits and protections such as family and medical leave, overtime, minimum wage, and unemployment insurance (US Department of Labor n. d.).

In order to be classified appropriately as an independent contractor, the law requires the employer to show that the worker retained meets specific criteria and can be distinguished from an employee in material ways. Multiple federal

agencies such as the Internal Revenue Service (IRS) and the DOL have published separate guidance on how to determine the proper status which is not identical. Generally, the IRS’ “20-factor test” relates to the degree of control that the organization has over the individual and the factors are grouped into three categories: behavior control, financial control, and relationship of the parties (Joint Committee on Taxation 2007). The DOL’s Fact Sheet #13 (US Department of Labor 2014a) lists six factors that should be considered including: (1) the extent to which the services rendered are an integral part of the principal’s business, (2) whether the worker’s managerial skills affect his or her opportunity for profit and loss, (3) the relative investments in facilities and equipment by the worker and the employer, (4) the worker’s skill and initiative, (5) the permanency of the worker’s relationship with the employer, and (6) the nature and degree of control by the employer. However, as the Fact Sheet points out, although these factors are *generally* considered when determining independent contractor status, the factors considered can vary (US Department of Labor 2014a). I/O methods are well suited to assist in determining the proper classification of workers as independent contractors.

In recent years, the DOL has stated that it intends to increase efforts to identify misclassified independent contractors (e.g., US Department of Labor 2010) and has entered into a memorandum of understanding (MOU) with the IRS and several other agencies to share information and coordinate enforcement efforts to identify employers who have misclassified employees as independent contractors (US Department of Labor n. d.). It is possible that this increased attention by enforcement agencies will result in independent contractor status becoming more frequently disputed in the near future.

11.2.4 Allegations of Off-the-Clock Work

Another increasingly common allegation involves off-the-clock work, in which nonexempt hourly workers claim they have not been compensated for all time worked. Because nonexempt workers

are paid by the hour and track their worked time by some method (e.g., time clock, timesheet), any time that is worked but not paid is considered “off-the-clock” work. Unpaid work can occur a variety of ways including an employee starting work before clocking in, clocking out before finishing work, working through unpaid meal periods, donning or doffing required uniforms or equipment before clocking in or after clocking out, time shaving (i.e., paying employees for fewer hours than actually worked), or improper time clock “rounding” practices. Employers can be liable for considerable sums in damages for not paying all time worked. In fact, the largest wage and hour settlement in 2013 was a case in which employees worked off the clock; the case settled for US\$ 73 million (*In Re Bank of America Wage & Hour Employment Litigation* 2013). Off-the-clock work cases are less about *what* work is performed and more about *when* work is performed. Off-the-clock allegations require a comparison of how much time an employee worked, and whether that employee was compensated for all time worked. While this is a very simple task conceptually, it is rarely a simple task in practice. The primary cause of the difficulty is that time worked off the clock is invisible. That is, it is rarely recorded separately from the work time recorded for the purpose of payroll. To obtain an independent record of time worked, an employee has to estimate retrospectively actual time worked because companies generally assume that the compensated time equals the worked time and do not systematically record two sets of data. Unfortunately, retrospective estimates are subject to a variety of biases. When an employee alleges that the compensated time is not equal to the worked time, it can be difficult to find reliable data that show the actual worked time. Some sources other than retrospective reports of time that may be available are time-punch data, point-of-sales (POS) data, phone records, e-mail records, and security videos. All of these are potentially useful but are often incomplete. For example, e-mail records may show that an employee sent a work e-mail after they were officially clocked out (suggesting that work was done off the clock), but e-mail records do not show how much of the time an employee was

actually working while they were clocked in. The same is true of the other sources listed above because they are not designed or intended to be used as a record of actual worked time. The challenge is to combine all the information available to estimate actual hours worked.

One type of off-the-clock allegation that has received increasing attention is the time employees spend “donning and doffing” (putting on and taking off) uniforms and personal protective equipment (PPE) that are “integral” to the employees’ principal work activity (see 29 C.F.R. § 785 et seq.). These allegations are concentrated in jobs that require employees to wear protective equipment to perform their work. Food processing, safety and security, hazardous waste, biomedical, manufacturing, package delivery, and telecommunications industries represent some of industries that have faced lawsuits in which employees claimed they were not compensated for time spent donning and doffing required PPE. Experts for these lawsuits often measure through a time-and-motion study the amount of time employees actually spend donning and doffing uniforms and PPE (Boedeker 2013). If the amount of time spent is 10 minutes or less per day, the courts generally regard this amount of time *de minimis*—not a significant amount of time and therefore not compensable (see *Lindow v. United States* 1984). Over 10 min per day the courts are more willing to decide in favor of plaintiffs.

11.2.5 Meal and Rest Breaks

Nonexempt (hourly) employee protections³ related to meal and rest breaks are established at the state level and therefore differ from state to state. Employees in some states are not entitled to meal or rest breaks (e.g., Florida, Texas) while employees in other states are entitled to almost an hour of break time per day. For example, employees in many states including California, New York, Connecticut, Delaware, Massachusetts, Tennessee, and Washington are entitled to

³ Meal and rest break protections apply to nonexempt employees only; exempt employees are not protected.

a 30-min unpaid meal break when they work an 8-h shift (US Department of Labor 2014b). In addition, employees in California, Washington, Oregon, Nevada, Colorado, and Kentucky are also entitled to two paid 10-min rest breaks in an 8-h shift (US Department of Labor 2014c). In other states, employees are also entitled to meal and rest breaks but the length of those breaks differs (e.g., West Virginia, Rhode Island).

Recently, California has seen a shift in the way meal and rest break requirements are interpreted. The much anticipated decision by the California Supreme Court in *Brinker v. Superior Court* (2012) clarified several aspects of California's meal and rest break requirements. Most notably, the court stated that an employer's obligation to "provide" meal and rest breaks means that they must simply make breaks *available* to employees, as opposed to *ensuring* that breaks are given and taken (Banks and Arnold 2008). The impact of this decision was that employers did not need to police their employees to ensure that everyone has taken their breaks but simply to allow them to take their breaks.

11.2.6 Special Wage and Hour Issues in California

The wage and hour laws in California are generally considered to some of the most restrictive in the country, fueling the high frequency of wage and hour allegations filed in that state. In addition to the exemption and meal and rest break regulations, California features a number of additional unique wage and hour regulations relating to topics such as vacation pay, gratuities, time records and travel time (see Division of Labor Standards Enforcement 2010), or on-the-clock meal periods when hourly employees are not free to leave the worksite (see Hanvey and Arnold 2012).

One area that has drawn particular attention in recent years is the requirement for employers to provide "suitable seating" to employees when "the nature of the work reasonably permits" (see I.W.C. Wage Order 7-001, § 14). Despite the law being in existence for nearly 100 years, only recently have plaintiffs begun to file

lawsuits alleging that employers did not provide adequate seating for hourly employees (Paul Hastings 2013). The success of some early cases in the retail industry (*Bright v. 99¢ Only Stores*, 2010; *Home Depot U.S.A., Inc. v. Superior Court* 2010) and the frequency with which additional lawsuits were being filed has been a source of significant concern for many employers because, as any shopper knows, very few retailers provide seating for employees while they are working. What appears to be a central issue in these cases is whether the tasks could be performed in a seated position and whether employee performance is impeded or facilitated by the availability of seats while on the job. However, case law around these types of lawsuits continues to evolve. In response to two suitable seating cases (*Kilby v. CVS Pharmacy Inc.*; *Henderson et al. v. JPMorgan Chase Bank*), the 9th Circuit Court of Appeals requested in March 2014 for the California Supreme Court to provide some much needed guidance on employer's obligations with regard to providing suitable seating for employees. This guidance is likely to have a significant impact on the future of this litigation. The issues involved in these cases highlight the importance of understanding what work employees actually perform.

11.3 Methodologies

The most important consideration when consulting in a wage and hour case is the selection of data collection methodology. In addition to the specific violation at issue, there are specific factors that influence which is the most appropriate methodology. Several of these factors are listed below. This is certainly not an exhaustive list but does include some of the most important considerations when deciding which methodology to use:

- Stage in litigation—A job-study-conducted pre-certification often focuses on variability between putative class members, whereas post certification, the focus is on whether there are violations. In addition, direct contact with incumbents may be prohibited post certification which eliminates some methodological options.

- Type of job—Jobs that involve high complexity or primarily mental tasks, for example, are difficult to observe.
- Size of class—The size of the class may impact the amount of data desired. Certain data collection strategies (e.g., questionnaires) are able to collect large amounts of data more quickly and cost effectively than others (e.g., observations).
- Geographic disparity of incumbents—Some data collection strategies require the job analyst to be physically present in the workplace (e.g., observation). Traveling to remote locations is time consuming and costly.
- Degree to which the job has changed over time—Methodologies such as observations can only collect data on how the job is performed now. Other methods such as questionnaires and structured interviews can ask questions about how the job used to be performed.
- Existing organizational policies and practices—Some organizations regularly conduct job analysis observations or questionnaires and employees are comfortable participating. It may make sense in these situations to use a method that is familiar to the employees.
- Language fluency of incumbents—Questionnaires and structured interviews require reading and verbal comprehension. When employees are not fluent in English, these methods are more challenging.

All research methodologies have strengths and limitations. The most appropriate method should be based on what will provide the most reliable data to properly address the legal issues, given the specifics of the job and the organization. There are instances where more than one method can provide reliable data, and in these instances practical considerations such as time, cost, required resources, and even client preference may impact the choice of methodology.

As mentioned several times in this chapter, most wage and hour issues are resolved by a detailed understanding of the actual work employees do and job analysis methods are often required to accomplish this task (Banks and Aubry 2005; Banks and Cohen 2005; Ko and Kliener 2005; Honorée et al. 2005). However, traditional

job analysis methods must be modified to study jobs for exemption misclassification cases for two reasons. First, the goal of traditional job analysis is to define the work performed by the “typical” employee, not any one employee in particular. Remember that wage and hour cases require classification decisions to be made at the *individual* level (29 C.F.R. § 541.2), creating the need for an individual differences approach to job description. It does not matter if employees in the job perform exempt tasks; it matters if *each* employee performs exempt tasks and that *each* employee performs mostly exempt tasks. Contrary to traditional job analysis, within-title variability in tasks performed is not considered error variance in this context; it is in fact valid variance that reveals the degree to which the job performed varies person to person. Variability is treated as a meaningful outcome of the job analysis because in the class certification context, variability across putative class members is a key aspect of the case: Should the group of employees be treated as a class?

The second reason for modifying traditional job analysis is that many job analyses methods are not designed to collect data at a sufficient level of detail to determine compliance with these laws. An exemption decision, for example, requires a calculation of the percent of time that an individual employee spends performing exempt tasks. A job analysis questionnaire which shows that employees in general perform many exempt tasks “frequently,” for example, does not allow this required calculation. Specifically in California, precise estimates of time spent on exempt work are required to determine whether an employee crosses the 50% time spent threshold. For other states that do not have a specific percent time requirement, a calculation of time spent performing exempt work is still needed to determine whether it is sufficient to meet the exempt duties criterion.

As a result, practitioners have been successful in adapting traditional job analysis methods for the wage and hour context. Table 11.3 summarizes seven methodologies that have been used in wage and hour cases and are described in this chapter. If applied appropriately, each of

Table 11.3 Common job analysis methodologies for wage and hour litigation

Methodology	Description	Strengths
Job analysis questionnaire (self-report)	Paper and pencil or online instrument that asks employees to self-report their work experiences including work performed, time spent on work reasons for performing work, decisions made (discretion), actual time worked, frequency of meal, and rest breaks	Data come directly from class members Can collect data about mental tasks or reasons for performing tasks Can collect data retrospectively
Observations (live)	Direct observation of job incumbents performing their job	Detailed description of work actually performed Not dependent on language ability or employee recall Observers can collect contextual information and ask probing questions
Observations (video)	Review, coding, and analysis of video footage	Can collect large amount of data with decreasing marginal cost High degree of timing precision Data can be coded by multiple observers to assess reliability
Structured interviews	Verbal question and answer that asks for detailed information about one's job or work experiences	Highly detailed information about work performed, context of work, and importance of work Can ask probing questions
Analysis of legal documents	Reviewing and analyzing existing information such as depositions, declarations	Information is based on sworn statements No additional data collection required (data already available)
Analysis of existing company materials	Review and analysis of existing materials that describe the job such as job descriptions, training manuals, operations manuals, or noncompany-specific sources such as ONET	Can provide detailed information about how work should be done or is typically done No additional data collection required (data already available)
Analysis of point-of-sale (POS) data	Analysis of POS transaction data to determine number of transactions processed by employees, time of transactions, and duration of transactions	Includes large amount of data No additional data collection required (data already available) Data are often available for all/most class members and retrospective

these methods can properly address wage and hour issues.

11.3.1 Job Analysis Questionnaires

Job analysis questionnaires are a common methodology for collecting data in wage and hour cases (see Banks and Aubry 2005). When properly designed and administered, they enable employees to accurately self-report their work experience, including what tasks they actually perform, time spent on exempt and nonexempt

groups of tasks, decision-making authority (to measure discretion and independent judgment exercised on the job), time spent working off the clock, and frequency and duration of meal and rest breaks.

There are several advantages to using such a self-report instrument. Self-report instruments can be distributed to large numbers of employees with decreasing marginal time and expense. The cost to develop a questionnaire that will be administered to one employee will be roughly the same as one that will be administered to 1000 employees, making it a cost-effective option for

collecting data from many people. Administration can be in person or online, depending on the complexity of the questionnaire. In some cases, it may even be possible to collect data from an entire class of current employees which eliminates sampling altogether.

Self-report instruments have an additional advantage of measuring nonobservable work such as mental tasks. This is particularly relevant for exemption cases because arguably all mental tasks would be considered exempt (e.g., planning, strategizing, evaluating employee performance, resolving problems). If a significant portion of the tasks performed on the job are mental (thinking) tasks, then a questionnaire will allow employees to report that they perform these tasks whereas an observational method would miss these tasks and thus underestimate the true amount of exempt work performed. Nonobservable tasks are very common in certain industries (e.g., high tech), making this an important factor to consider in when studying these types of jobs.

Self-report questionnaires can also assess the reasons certain tasks are performed. This is particularly relevant in exemption misclassification cases. For example, a task such as straightening displays in a retail store is typically considered nonexempt. However, a manager may be performing that task in order to train a new employee (i.e., demonstrate how it is done), and this context would turn a nonexempt task into an exempt one because training would be considered an exempt task. The reason, to train an employee, would be important to know in order to properly classify the task.

Finally, a self-report instrument can collect retrospective data. The relevant period of time for a class action lawsuit typically goes back 4–5 years, which makes it important to collect data across the class period whenever possible. This means that retrospective self-reports may be collected to cover periods of time on the job especially when there were significant changes to the way the job was performed early in the class period.

Job analysis questionnaires have a few limitations as well. Most fundamental to the methodology is the employee's ability to recall how he or

she performs the job. As with any self-report instrument, the data are dependent on respondents' willingness and ability to provide accurate self-reports. Research on memory decay suggests that this ability is dependent on several circumstances including the length of time since the work was performed, the degree to which the tasks are routine, the clarity of the question wording, and how the questionnaire is laid out to control survey biases and errors and to help respondents generate accurate responses⁴. Respondents also should have at least an eighth grade-level reading and writing to be able to respond to the questions competently. Non-English speakers will need the questionnaire prepared in their native language. Lastly, the time and resources required to develop a sufficiently detailed questionnaire to measure compliance with exemption criteria can be substantial.

11.3.2 Observations

There are different types of observation methodologies that are applicable to wage and hour cases (see Banks and Aubry 2005; Boedeker 2013; Eash 2013). These range from conducting "live" observations in which job analysts are physically present to observe and record all tasks performed and time spent on tasks to analyzing video recordings of employees performing work. Different types of observational methods can be matched to the types of data that need to be collected. For example, live observations are well suited for situations in which detailed information about what a specific employee does on the job is required including the sequence of tasks, the content of conversations, and the work context. Alternatively, video observations are well suited to situations in which the precise movements of multiple employees must be tracked in the same location with precise timing of events within the video. Table 11.4 compares the advantages of

⁴ List compiled from various sources including Thompson et al. (1996), Gilovich et al. (2002), Rubin (1996), Neisser & Fivush (1994), Clegg et al. (1996), Belli (1998), and Singer & Blagov (2004).

Table 11.4 Advantages of live and video observations.

Live observations	Video observations
Collect highly detailed data about work performed	Collect precise data about movements of employees and timing
Observer not stationary and can continue to collect data if the incumbent moves	Video data can be collected for multiple employees simultaneously (i.e., one camera)
Observer able to adapt to changes during the observation	Data can be coded by multiple coders times to assess reliability
Observer able to capture important contextual information	Coders can pause and rewind video to ensure that data are coded precisely
Observer has the ability to ask clarifying or probing questions	Many observations can be conducted with small marginal costs
No investment in video equipment or software	Does not require well-trained observers

live and video observations. The methodology chosen should be driven by on the data needed in the case.

Observations of all varieties are time intensive and costly, thus making sampling necessary. A sample size of 30 observations is generally sufficient to be able to obtain a stable pattern of behavior across observations and to detect meaningful variability that may exist and have been accepted in several lawsuits (e.g., *Akaosugi v. Benihana National Corp.* 2012; *Aburto v. Verizon California, Inc.* 2012; *Cook v. Denny's Inc.* 2006). In addition to the typical demographic factors that are used for sampling in general, observation studies may also require sampling based on factors such as day of week and shift time. The need for taking several sampling factors into account can be illustrated by the complexity of selecting restaurants to observe in for an observational study. Weekends tend to have more customers (i.e., more time on tasks related to customer service) and mid-week tends to have fewer customers (i.e., more administrative tasks). In addition, morning shifts tend to involve different tasks (e.g., setting up tills, receiving deliveries, preparing the bank deposit, or checking food temperatures) than a mid or closing shift (e.g., cashing out servers, inspecting side work, and filling out closing accounting reports). Because restaurants typically (1) have three work shifts (e.g., open, mid, and close); (2) differ in customer flow across restaurants, days of the week, and times of the day; and (3) require employees to perform different tasks across days of the week, all of these factors should be reflected in the sample of restaurants

observed. In general, objective differences in the sample observed (e.g., shifts, days of the week) should mirror the range of differences found in the population. Disproportionality in observed days or shifts may result in a biased view of how the job is performed.

11.3.3 Live Observations

Live observations capture a detailed description of a “day in the life” of incumbents by adapting time-and-motion methodology that has been used since the 1890s (Pigage and Tucker 1954). The time-and-motion methodology was initially developed to determine the time required to perform a repetitive task such as assembling a part. However, time-and-motion methodology adapted for wage and hour compliance has some key differences. Although both involve an observer tracking the duration of tasks, the goal of a wage and hour observation study is to describe what work an employee performs across an entire day or week, as opposed to describing how much time it takes for a group of employees to perform a single task or set of tasks. Full-day observations almost always result in the description of unique tasks and time transitioning from one task to the next (e.g., walking to the office to get a report). This information would not be included in a traditional time-and-motion study. The adapted time-and-motion methodology is now regularly used to capture all the tasks performed by a single employee and the duration of each task across a fixed period of time (see Banks and

Aubry 2005; Boedeker 2013; Eash 2013). These data are used to study wage and hour issues and most commonly, whether a job is misclassified as exempt (vs. nonexempt).

Observations involve a trained job analyst directly observing and tracking work performed by a single job incumbent. Through observation, observers are able to capture highly detailed descriptions of the work incumbents perform and the amount of time spent performing categories of tasks (e.g., exempt vs. nonexempt tasks). Observers follow the incumbent (also called “shadowing”) wherever the incumbent goes during the shift. Observers are also close enough to the incumbent to capture details regarding the task performed such as the reports being reviewed or what is being said to other employees. Without that level of detail, it is difficult to code a task as either exempt or nonexempt, for example. Observers also capture important contextual information because they can see and hear what is going on around them which may be important for properly interpreting the task performed and thus the proper coding of that task. Observers also ask clarifying and probing questions when it is necessary for understanding what the incumbent is doing. However, interaction with the incumbent is minimized to avoid influence the observer may have on the work the incumbent performs. Therefore, observers interact with the incumbent only when it is crucial for properly understanding the work an incumbent is performing.

The key steps of a live observation study are listed below (some of which are described in more detail in the next section):

- *Background research.* Review existing company materials, conduct site visits, and subject matter expert (SME) meetings to become familiar with the organization and job.
- *Task list.* Develop comprehensive list of tasks employees may perform to guide coding
- *Observation protocol.* Create written observation protocol to standardize data collection.
- *Select sample.* Select a representative sample that will allow inferences to be made to the population.
- *Communication plan.* Develop and implement a communication plan to standardize

the information that observation participants receive.

- *Scheduling.* Schedule observations such that each work day/shift is appropriately represented.
- *Conduct observations.* Conduct observations to collect detailed information about the work performed such as task description and duration.
- *Code tasks.* Assign tasks to task areas to allow observations to be summarized and review coding for consistency.
- *Analyze data.* Analyze the data that were collected and coded.

Live observations cannot be conducted without the incumbent’s knowledge for practical and ethical reasons. Therefore, a communication plan is helpful for notifying key employees about the study and for ensuring standardization of information received by those being observed. Formally scripted communication can help to avoid incumbents speculating about the reasons for, or implications of, the study due to the absence of complete information about the study. The value of the data is dependent on the job analyst’s ability to observe the incumbent’s behavior on the job as it is normally performed; a properly scripted communication plan can help to ensure that this occurs. In particular, it should be clearly communicated to those being observed that their performance is not being evaluated and that they should perform their job normally during the observation. This helps to minimize the likelihood that incumbents will purposely distort their behavior during the observation to project a favorable image. This message is most impactful when it is repeated multiple times by several company representatives and especially by their direct supervisor and the job analyst.

The observation itself can be a tiring endeavor as it requires a trained job analyst to observe a manager for an entire workday which may last over 9 h or more. This is because the observer records each and every task that the manager performs for the entire day, along with the start and stop time of each task. For an exemption analysis, each task is also coded as either exempt or nonexempt. Despite technological advancements

with advent of handheld devices which electronically record data from observations, there are distinct advantages to recording data using an old-fashioned pen and paper. Most important is the ability to record detailed task statements that describe exactly what the job analyst observes—this information cannot be preprogrammed in electronic devices. Recording data using smartphones or tablets may enable greater precision in the time stamping of tasks but the use of these generally requires observers to report what tasks are performed by selecting from a predefined list, thus not allowing the observer to report precisely what was performed and in great detail. The trade-offs are an important consideration when deciding which method that will generate the most useful data.

After all data have been recorded, the coding of each task (into task areas) is reviewed by an independent coder to ensure accuracy and consistency of coding across observers. Once the observation coding is finalized, an observation record is generated for each incumbent, and this record captures all tasks performed throughout the shift, the duration of each task, and the task area in which the task belongs. Time spent performing tasks in each task area can be aggregated. For an exemption analysis, time spent performing tasks in exempt task areas can be summed and time spent performing tasks in nonexempt task areas can be summed, yielding a total time spent for exempt and nonexempt work.

One important factor to consider when conducting an observational study is the well-known psychological phenomenon known as the Hawthorne effect (see Roethlisberger and Dickson 1939) or alternatively, the Heisenberg effect (Heisenberg 1927). That is, without proper controls, the fact that the employee is being observed may influence the employee to alter his or her behavior. It is advisable to implement controls to minimize if not entirely eliminate these potential effects. First, as noted, it is important that incumbents are aware that their performance is not being evaluated, and that they are expected to perform their job as they normally would. We have found it useful to ask incumbents at the end

of the observation whether they would have done anything different if they had not been observed. In our experience, virtually none of the incumbents said they would have done anything differently. Second, observers should minimize interactions with the incumbent and stay out of the incumbent's line of sight as much as possible. By implementing these controls, incumbents seem to habituate to the observation and go about their typical job duties.

As mentioned above, one of the primary advantages of an observation study is that it results in a record of work performed that is extremely rich in detail. Some attorneys and judges find data collected using this method particularly persuasive because it paints a very clear picture of what employees actually do. The method also does not rely on the memory or language ability of incumbents to gather reliable and valid data. Moreover, it is much more difficult to purposefully distort the data resulting from an observation study. This is because it is difficult to make significant changes to one's behavior while working with other employees and being expected to accomplish work tasks. Also, this method of data collection does not take employees away from their jobs, a fact that is very important to operations managers from a cost perspective.

There are a few limitations associated with observations. Observations provide a "snapshot" of the work an incumbent performs at one point in time (i.e., "day in the life"), and what this particular incumbent does over the week may change and will not be captured. To the extent that the job an incumbent performs changes significantly over time, the observation record may not be generalizable to all other periods of time. Another limitation is that an observer can only record tasks that can be observed and cannot record most mental tasks. As mentioned earlier, observation studies tend to underestimate the amount of exempt time as a result of this limitation. Still another limitation is that this method is focused on tasks performed on the job and does not indicate directly the role of the incumbent in hiring, firing, or exercising discretion on the job—other exemption criteria that would

be important to know in evaluating exemption status. Observational data alone are unlikely to be sufficient to establish whether employees do have this authority.

11.3.4 Video Observation

Observational data can also be collected using video technology. This methodology involves capturing video of employees performing work, coding the videos, and analyzing the data. Video observations have several advantages, as noted in Table 11.4. Video observations can be used to capture data regarding employee tasks and activities over a designated period of time. Two contexts in which this method is particularly useful are determining meal and rest break compliance and occurrence of off-the-clock work.

Video data also can be collected to precisely measure the time that certain activities are performed. This information is especially useful when determining the amount of time that employees spent donning or doffing uniforms and PPE. This is important when time data are required to resolve whether the amount of paid compensated time allocated by the company is sufficient to cover the actual time it takes to don and doff uniforms and PPE. Data can be collected from many employees simultaneously to capture the range of time it takes to don and doff, giving the court the information it needs to make a decision about the occurrence and duration of off-the-clock work. The court can also decide if the uncompensated time is *de minimis*.

Depending on the physical layout of the work location, a small number of cameras could capture the movements of many or all employees. After the data are captured, they must be reviewed, coded, and then analyzed. The coding process is made easier by the fact that coders can review the video as many times as needed for coding accuracy. Indeed, multiple coders can code the same video to verify that the data are coded reliably.

There are practical advantages to video observations. Unlike live observation, the costs

associated with collecting additional data are minimal. Once the video cameras are purchased and installed, no other significant costs will be incurred by letting the cameras run over time. This is an advantage when a large amount of data are desired. The company will then pay only the marginal costs associated with additional coding time. Fortunately, coding skills are relatively low level, and coders can be deployed relatively inexpensively.

There are limitations to video observations. Most importantly, data can be collected only when employees are in the camera's view; when employees move outside of the camera's view, data are lost. Even when employees are within view of the camera, it may be difficult to record much detail about *what* work they are performing. For example, it is difficult to tell what information an employee is reading (e.g., sales report or personal email) or the content of their conversations (e.g., taking a customer's order or evaluating customer service)—both of which may be important to know if the task being performed is exempt or nonexempt, for example. In addition, privacy laws in some states may restrict the use of video and audio recording in the workplace. For example, there may be restrictions which prevent the placement of cameras in specific locations (e.g., changing rooms) or require the posting of a notification that the area is under video surveillance. All of these limitations need to be considered when choosing this methodology as it may compromise one's ability to collect crucial data.

11.3.5 Structured Interviews

Another methodology that can be very useful in wage and hour cases is structured interviews. A structured interview allows one to systematically collect employees' verbal reports of their work at a high level of detail. This is very useful when studying jobs in industries where the jobs are highly technical (e.g., silicon chip development, financial analysis) or the tasks involved are complex and vary widely person to person. Typical self-report job analysis questionnaires preload questions

about the work performed; a structured interview may better reflect the potentially large range of tasks involved and skill sets required to perform such complex work. Open-ended structured questions allow the employee to elaborate on exactly what he or she does and how he/she performs the work, enabling the job analyst to capture each employee's job uniquely and precisely.

Examination of certain exemptions is easier and more precise with this methodology compared to others. Evaluation of the administrative and professional exemptions, for example, often require contextual information about the work performed, such as the purpose that tasks are performed, the impact of the work on the company's business operations, and the specific KSAOs required to perform the job effectively. This information is often easier to communicate in an interview because probing questions can be asked to clarify responses.

Most practitioners are familiar with structured interviews in the selection context. Although we use the same label here, we are describing a different process. The process described here involves asking questions that are similar to those in a job analysis questionnaire; the difference is that the structured interview gives the employee opportunity to provide unlimited detail about their work to provide rich, in-depth information about tasks performed that otherwise would not be captured by standardized, fixed format methods. Each structured interview can be as much as 2 h in duration.

When used in the legal context, an expert needs to ensure that the data are collected verbatim and not paraphrased or interpreted by the job analyst. It is also important to assure the interviewee that his or her answers are captured precisely by the job analyst. Both of these objectives can be accomplished by allowing the interviewee to read, review, and edit all answers recorded by the job analyst to verify that answers are recorded accurately and in the interviewee's own words. One way to do this is to conduct the interview in person or by using online meeting software that allows the interviewee to view and comment on the job analyst's recorded answers in real time. Using this technique avoids problems with

opposing parties' objections to the data, alleging that answers were not recorded accurately.

11.3.6 Analysis of Legal Documents

Another methodology is an analysis of legal documents that were either produced for the litigation (e.g., internal company documents) or generated as part of the litigation (e.g., deposition testimony, declarations). One must decide whether this information can answer relevant questions in the case and what weight it should be given when forming one's opinion. While this is described as a separate methodology, document analysis is often conducted in conjunction with other methodologies or for providing convergent evidence supporting data collected using another methodology. In this section, we discuss some factors that should be considered when analyzing documents.

Depositions Deposition transcripts are often available to analyze from several important parties in a lawsuit such as named plaintiffs, other putative class members, company experts ("persons most knowledgeable"), testifying experts, among others. Depositions are taken under oath and carry the same weight as testimony given in a court of law. This characteristic is meaningful for many in the legal profession. The presumption is that because answers to questions are given under oath, they can be used as a "truth" stated by the deponent and therefore can be treated like a response on a questionnaire or inventory. However, there are a number of issues that must be addressed to make meaningful use of deposition testimony.

The first issues are sampling method and sample size. In some cases, a random sample of potential class members will be deposed; most of the time, selection of deponents is not random but rather highly selective. In cases where the attorneys select the deponents, a biased sample results and limits conclusions that can be drawn.

An additional issue is the wording of the questions asked by the opposing attorney in the

deposition. Organizational scientists put great care into designing psychometrically sound questions to maximize reliability and validity of self-reports. For example, questions are typically designed to be standardized, unambiguous, and easy to understand. However, deposition questions rarely meet this standard and in fact, may be designed to trick or confuse the deponent in order to extract an answer useful to their side whether accurate or not. Questions are nonstandardized (e.g., use different wording across deponents), ambiguous (e.g., contain legal terms with specific meanings that are not widely understood, unclear time period referenced), and complex (e.g., long, double barreled, contain incorrect premises in the question). In addition, a question may not be asked to all deponents, making it difficult to compare deponents' responses.

Another issue is the way deponents answer deposition questions. To conduct a quantitative analysis of deposition transcripts, responses must be coded, typically following a content analysis strategy. Therefore, job analysts must be able to reliably code responses which means that deponents must clearly answer the question asked. This is often not the case. For example, a deponent could answer part of a question, not understand a question, have their attorney object to the question, give a different response to the same question later in the deposition, provide ambiguous information, or state that they do not know the answer to the question. These situations are common and make it difficult to code data reliably and compare testimony across deponents.

Depositions also rarely go into enough detail to learn about the entire content of a job performed by the deponent. Unless the attorney asks about all work that an employee performs, it is not possible to quantify the amount of time spent on different job duties—a key calculation for exemption analysis. Content analyses typically result in binary data (e.g., I do perform this work, I do not perform this work) which is descriptive at some level but is insufficient for determining the percent of time employees spend performing exempt work.

Despite these limitations, a review of depositions is not without merit. In general, they tend to be most useful in gathering background information or providing anecdotal evidence supporting other scientifically sound study results.

Declarations Another commonly available data source is declarations. Attorneys from both sides will produce sworn declarations from incumbents, former employees, or other relevant parties (e.g., management) in which individuals report important details about the job such as tasks performed, level of discretion exercised, the frequency of meal or rest break taken/missed, and hours worked. Like depositions, these documents are statements made under penalty of perjury but there are many issues to address before this information can be used meaningfully.

First, declarations are often written using “boilerplate” templates, modified slightly and signed by the declarant. One of the consequences of this is that declarants' statements are constrained by the format, potentially eliminating other important information from his or her statement. The boilerplate variety of declarations may also reduce the true variability in work performed across putative class members, underestimating the degree of individual differences in how the job is performed—a critical question for the court when deciding whether to certify the class. A second consequence is that declarations rarely go into a level of detail about the job that is considered acceptable from a scientific standpoint, resulting in overly general or incomplete descriptions of work performed. Perhaps most important, declarations are often generated and submitted by attorneys in support of their position. Declarants are not randomly selected and are offered to the court to make a favorable case for their own position.

Like depositions, declarations can be useful. When declarations are produced using a boilerplate format, significant variability in work performed reported by declarants could be useful in making an argument that variability exists across putative class members, suggesting that putative class members should be examined individually

and not as a group. However, if variability does not exist across declarations, it is not known whether variability is truly absent or unreported. Declarations also provide useful preliminary information about the job for selecting a data collection methodology and/or for creating a preliminary task list.

11.3.7 Analysis of Existing Company Materials

Another methodology is the review internal company documents such as operations manuals, training materials, job descriptions, job postings, and performance appraisals. These are very useful sources for obtaining detailed information about the job in general, but their value for describing what individual employees do on the job and what they actually perform is limited.

First, company policies describe how work *should be* performed, not necessarily how work *is actually* performed. While it is useful to know how the job is expected to be performed, this information needs to be verified in order to confirm that employees perform the job as expected by the company and that most of the employees perform the job in the expected manner. Second, companies generally strive to standardize policies and procedures to the extent possible to maximize efficiency and effectiveness. The result of this is a single training manual, job description, performance appraisal, and so on for all employees in the same job title. Looking at this set of documents gives the impression that all employees perform the job in the same way. As most job analysts know, it is quite common for employees to perform the same job differently based on tenure and experience and to be given different levels of authority. The extent to which this occurs is unknown without measuring what work employees are actually performing.

Because company documents are not descriptive of what any particular employee does in the job, they are most useful for providing preliminary information about the job and the context of the work. This information can serve as a starting

point for generating the variety of tasks an employee might perform and for understanding how meal and rest breaks and clocking in/out may be executed on the job. This information is very useful for choosing data collection methods and preparing preliminary task lists.

11.4 Sampling

Wage and hour class actions usually follow a sampling approach rather than measurement of the entire class. It is rare that data can be collected from all class members regardless of the methodology chosen. Even if data can be collected from all current employees, the class includes former employees who are difficult to locate or who choose not to participate. Collecting data through observation for former employees is obviously impossible and nearly impossible if collected through a lengthy job analysis questionnaire mailed to them. The job analyst also has to consider whether the data from former employees might be unreliable for a variety of reasons including distorted responding for financial gain, inaccurate reports due to memory lapses, and motivated responding arising from leftover feelings about the company (e.g., following involuntary termination). Therefore, it is necessary to select a representative sample that allows inferences to be drawn about the members of the putative class. We do not intend to provide a full description of sampling here but we do find it appropriate to discuss some unique sampling issues in wage and hour litigation.

One of these issues is the definition of the population. Generally, the population to which a researcher would like to generalize is the entire class, which is defined by plaintiffs filing the lawsuit. Sometimes this is clearly defined, and other times it is not⁵. To the extent possible, the

⁵ As an example, plaintiffs define the class as employees in the job title of “store manager” but the organization does not use that exact job title. They instead have “retail managers” and “general managers” depending on the store type. It is unclear whether employees with both job titles are included in the class.

job analyst needs to understand who is included within the class in order to determine the appropriate representation in the job study. In addition, the time period of the lawsuit should also be defined because it impacts which, if any, former employees are included.

The class may be redefined during the course of the lawsuit depending on the interests of plaintiffs. The change in definition of the population may require resampling (if data have not already been collected) or discarding data (if data have been collected from employees who were removed from the class). For example, plaintiffs in one case we participated in originally defined the class as employees in three job classification bands but later redefined the class to only include two of those bands. Because of this, the previously collected data had to be reanalyzed after removing employees in the excluded band.

Sometimes, despite the class definition, it is prudent to collect data only from current employees (e.g., observational study). Consistent with job analysis practice, data should be collected from persons who are most knowledgeable about the job and best situated to provide job data. Because of serious potential problems with former employee data, one might choose to collect data from current employees who are holding the job title now. In this circumstance, it may be necessary to define the population as all current employees in the job title. The impact of this decision is that the sample results generalize to current employees and are relevant to former employees in that they were employees at some point during the class period and were likely to have performed the job in a manner similar to those currently in the job. Therefore, current employees provide the best estimates of work performed for former employees during a time when they were also employees in the job title. If the job has not changed significantly across the class period, information about how the job is performed now is informative about how the job was performed during the entire class period.

A recent case dealt specifically with the issue of sampling and may have an impact on the use of sampling in California wage and hour cases.

The California Supreme Court in *Duran v. US Bank* (2014) ruled that the trial court's use of sampling for purposes of *establishing liability* in an outside sales exemption dispute was inappropriate for several reasons including a small sample size and a nonrandom sample. The ruling did not prohibit the use of sampling in exemption cases but will likely have an impact on experts by requiring them fully explain their sampling plan at the class certification stage and present a sampling plan that is reliable and follows scientific standards.

11.5 Level of Specificity

When studying wage and hour compliance, it is important to consider the proper level of specificity in describing the work performed. At too specific a level of description, the task is described almost as a motion or step in a process performed by the employee such as the following: “walk to check stand,” “scan grocery items,” “print receipt,” and “thank customer for coming in.” The overall purpose of the tasks described here is lost because they are described separately even though they are naturally performed together as a set such as “check-out customer's purchase at register.”

At too general a level of description, the task described loses important features that provide meaningful information about the nature and complexity of the task such as the following: “answer customer questions” and “prepare store for open.” This is particularly a problem in describing high-tech jobs such as software engineers because the level of description may make the difference between perceiving the job as exempt or nonexempt. For example, one can describe a task performed as “run tests,” “write code,” and “answer customer questions” but these descriptions are so general that they do not reflect the level of complexity involved in these types of tasks and the degree to which discretion is embedded in the performance of these tasks—important considerations in an exemption analysis. In addition, studying the job at an overly generalized level will prevent a researcher from

detecting meaningful differences in the work performed by different employees which limits the usefulness at the class certification stage. At an overly general level, important characteristics of the work are lost and two highly specialized jobs can appear similar.

The level of specificity should be fine enough to reflect the true nature of the task that reflects its detail and complexity without reducing it to disjointed actions. At this level of specificity, meaningful comparisons can be made between employees and judgments can be made about the tasks meeting one or more exemption criteria. This level of specificity also allows determination of the KSAOs required for performing this work—whether a bachelor’s, master’s, or no college degree is required. This distinction is crucial in determining whether an employee qualifies in part for the professional exemption. Overall, professional judgment should guide what level of specificity achieves the right balance between overly general and overly specific description. Ultimately, the best guiding principle is whether the data collected will be sufficient to properly answer the legal questions in the case.

11.6 Types of Analyses Performed

The appropriate analyses depend on the stage of the lawsuit. The statistical questions and therefore the analyses for wage and hour cases differ in meaningful ways depending on the stage of litigation. Therefore, we describe the analysis separately for class certification and merits stages.

At the class certification stage, the analyses must address whether the degree of variability is such that the claims of the putative class members are capable of being resolved on a class-wide basis. A comparison of any group of employees will reveal *some* variability so the question is whether the amount of variability is so great that class treatment becomes inappropriate. A variety of descriptive statistics is available to address variability (e.g., range, standard deviation, coefficient of variation); however, the lack of defined thresholds makes it difficult to

objectively determine and then draw conclusions about variability. Class certification evaluations present an interesting challenge because of the absence of commonly accepted standards for determining how much variability is too much to be considered a class. As a result, experts, enforcement agencies, attorneys, and judges have used various methods and thresholds to arrive at conclusions about whether individuals are similar enough to certify a class. Some recent strategies have been proposed for establishing objective thresholds including rules of thumb for the coefficient of variation (Murphy 2014) and repeated measures strategies (Hanvey 2014). No strategy has yet been widely accepted and applied. Therefore, experts adopt a holistic view of a number of different factors including the size of the standard deviation (or coefficient of variation), the range, shape of the frequency distribution, the percent of individuals for whom violations exist (e.g., misclassified, denied meal breaks, worked off the clock), variation in factors that impact the results (e.g., regions, sales volume), and unique features of the job that apply to some individuals such as special roles or assignment or unique features of certain locations and not others (e.g., operating hours, unique policies, or procedures).

Analyses at the merits stage are relatively straightforward. For example, in a misclassification case, the primary research question is the percent of time the class members spend on exempt work. Once the proper data have been collected, the analysis is little more than simply adding up exempt and nonexempt time and dividing by the total for each individual in the job study and then computing statistics on the group’s average amount of exempt time worked and distribution of class members who meet versus do-not-meet-exemption criteria. Of course, there are many steps required to prepare the dataset for analysis. For meal and rest break cases, calculation of the frequency with which breaks were denied, shorted, or interrupted requires straightforward analyses. For allegations of work off the clock, frequency of off-the-clock work and amount of time spent working off the clock is also straightforward.

11.7 Case Study 1: Executive Exemption Observation Study

This case study describes an observation study that was conducted to determine whether a putative class of California restaurant managers met the criteria for the executive exemption. The putative class included approximately 50 individuals, most of whom were currently employed and working in a California restaurant. The defendant retained an expert to provide an opinion on two questions: (1) What percent of time do potential class members spend performing exempt tasks and (2) what is the degree of variability between potential class members.

A live observation method was used for several reasons: The study was conducted prior to class certification, the majority of tasks were observable, the potential class was relatively small and geographically compact, the job had only nonsubstantive changes over time, and many incumbents had difficulty communicating in English (making questionnaires and structured interviews undesirable). All of these factors support the choice of a live observation methodology.

The first step was to understand the job and the organization. Information was collected from three sources: internal company document review, SME focus groups, and site visits. Internal company documents included job descriptions, training and orientation materials, organizational charts, daily and weekly checklists, performance appraisals, store performance reports, and provided information about the job and how it is expected to be performed. These documents also described many tasks that managers may perform which helped to generate a preliminary task list.

To learn more about the tasks performed by managers and to validate what was learned from the document review, focus groups with SMEs were conducted. The direct supervisors of putative class members were chosen as SMEs because they have a broad view of the organization but interact regularly with the class members and therefore have direct knowledge of how the job is actually performed. A group of four district managers supervised all restaurants in California

and all participated in a 5-h meeting. The meeting topics included the structure of a restaurant (e.g., number of employees and job titles), job duties of managers, factors that impact how managers spend their time (e.g., sales volume, number of managers in restaurant), differences between the positions in the restaurant, and level of authority that managers have.

Another preliminary step was to physically visit a small sample of restaurants to get a first-hand look at how they operate. Six “site visits” were conducted that involved meeting with one incumbent at a time for 3–4 h during their shift to observe and interview them. During site visits, job analysts can collect data from direct observation of the incumbent and predetermined interview questions. Job analysts minimize their impact on the incumbent by asking the questions at convenient times (when it is not busy) and observing during the remaining time. Job analysts are able to capture preliminary information about what work managers perform, what tools they use (e.g., computer programs), who they interact with, and what decisions they make. This information was used to create the task list and design the observational protocol.

Based on the information learned from the documents, focus groups, and site visits, a preliminary task list was developed. The task list is a comprehensive list of all tasks that a manager *may* perform and includes both exempt and nonexempt tasks. Common nonexempt tasks in a restaurant include serving customers and cooking food which managers may perform (as plaintiffs allege). It is important to include nonexempt tasks on the task list in order to measure time spent performing nonexempt work.

The final task list included approximately 250 tasks which were grouped into 14 task areas (listed in Table 11.5), homogeneous groups of tasks that serve a particular function. For example, the “serving customers” task area included all tasks related to directly serving customers (e.g., taking orders, delivering food, refilling drinks, dropping check). In addition, tasks were also grouped such that *all* tasks within a task area were either exempt or nonexempt which is necessary to

Table 11.5 Task areas and sample tasks

No.	Task area	Exempt/Nonexempt	Sample tasks
1	Serving guests and processing payments	Nonexempt	Take reservations and edit reservations list/book; take guests' names for waitlist; seat guests at table and distribute menus; take guest orders; enter guest food and beverage orders into POS system; deliver food to guests' tables
2	Overseeing guest service	Exempt	Monitor and inspect dining areas and tables for appearance and readiness for guest seating; monitor servers' compliance with service standards; respond to guest complaints
3	Directing guest service	Exempt	Direct hosts to seat guests; assign servers to tables; apply special transactions in POS system for guest checks; direct chefs to make special orders or remake orders for guests
4	Preparing food	Nonexempt	Pull product from freezer; prep ingredients (e.g., measure, weigh, and preportion); stock food items at chef stations; place labels and dates on food products
5	Overseeing food prep and recipe execution	Exempt	Review completed prep checklists and discuss with employees; monitor and evaluate chef's recipe execution; inspect coolers in kitchen to verify that the temperatures are correct and that food is fresh; direct employees to pull and discard expired product
6	Processing inventory	Nonexempt	Rotate product in walk-ins, freezers, and dry storage; conduct food inventory; store food items in appropriate storage area
7	Controlling inventory	Exempt	Place food and beverage orders; check vendor deliveries for completeness and accuracy; direct employees to put deliveries away; evaluate and adjust purchasing based on forecasts
8	Managing personnel	Exempt	Conduct pre-shift and staff meetings; conduct applicant interviews; discuss employee performance issues with other managers; update employee information in personnel system; conduct performance evaluations of employees
9	Training and development	Exempt	Train employees on recipe execution, customer service, and company standards; direct employee to take online courses; give feedback to employees about guest complaints and compliments
10	Controlling scheduling and labor hours	Exempt	Evaluate projected sales, sales trends, guest count trends, reservations, and labor budget for scheduling purposes; set labor hours based on projected sales; create and post weekly schedules;
11	Managing store performance and profitability	Exempt	Run, review, and evaluate restaurant sales reports; review and analyze P&L statement; evaluate labor reports; review and research food and beverage variance reports to monitor food costs
12	Cash handling and preventing loss	Exempt	Count and reconcile cash drawers; take deposit to bank and retrieve change; make change for bartenders and servers from cash registers; run and reconcile credit card reports
13	Cleaning and maintaining facility and equipment	Nonexempt	Clean and sanitize kitchen equipment and prep area; clean pots and pans; clean interior/exterior windows; clean exterior entryway, walkways, and parking lot; sweep, mop, and vacuum floors
14	Overseeing facility maintenance	Exempt	Monitor and direct sidework execution; complete internal and external facility inspection; schedule vendor equipment repairs; monitor and inspect vendor repairs

POS point of sales, *P&L* profit and loss

calculate the total percent time spent on exempt and nonexempt tasks.

A sample of 30 managers was selected to be observed using a stratified random sampling strategy. The sample was selected to be representative of the population on several key variables including region, tenure, restaurant sales volume, and number of employees.

To standardize the data collection, a written observational protocol was developed to ensure that all observers followed the same procedure. In addition, a communication plan including communication scripts were created to ensure that information about the project was communicated in an accurate and consistent manner. As part of the communication process, work schedules were collected for all managers in the sample to plan when to conduct the observations. Observations were scheduled by day of week and shift (open, mid, close) to represent all days and shifts that the managers actually worked.

Each observation was conducted for the selected employee's entire shift. Observers recorded every observable task performed by the manager and the start/stop time of each task from the moment they arrive until the manager left at the end of the shift. The observer also coded each observed task into one of the 14 task areas based on the task list. Each observation lasted 8–12 h and consisted of 300–500 tasks. Across all 30 observations, more than 12,000 tasks were observed and recorded across more than 300 h of observation time.

Once data were collected, the coding of all tasks was reviewed to ensure reliability and consistency across observers. Each task was reviewed and re-coded by an independent coder and all discrepancies were discussed and resolved. The outcome of each observation is a record of every task that was performed throughout the day including: (1) task description, (2) task duration, and (3) the task area. For each observed manager, the amount and percent of time spent performing tasks in each task area was calculated and the amount and percent of time spent performing all exempt tasks and nonexempt tasks was calculated.

The results showed that all 30 observer managers spent more than 50% of their time performing exempt tasks with an average of 78%. To address issues of class certification, variability statistics were calculated. In particular, the percent of time spent on exempt tasks ranged from 57 to 94%. The percent of time spent on individual task areas also varied person to person. For example, time spent on serving guests and processing payments ranged from 2 to 35%, meaning that one manager spent 35% of their time performing this work while another manager spent only 2%. Time spent on controlling labor hours ranged from 2 to 30% and time spent on overseeing guest service ranged from 8 to 36%.

The results of the study were submitted to the court and class certification was denied. After this ruling, several plaintiffs chose to proceed with individual lawsuits. A few of the plaintiffs were included in the observation sample and observed as part of the study. All of the observed plaintiffs spent more than 50% of their time on exempt tasks. The results from their observations and the overall results were presented at trial and the jury found in favor of defendant, deciding that the managers were properly classified as exempt.

11.8 Case Study 2: Meal and Rest Break Survey

This case study describes a self-report survey that was developed to determine frequency of missed meal and rest breaks by nonexempt hourly employees at a nation-wide fast food chain. Plaintiffs were a class of nonexempt California employees who alleged that they were systematically denied 30-min meal periods and 10-min rest breaks. The goal of the survey was to determine: (1) What proportion of hourly employees took meal and rest breaks, (2) how frequently did employees not take meal and rest breaks, and (3) what were the reasons for missed meal and rest breaks? Recently, the *California Supreme Court in Brinker Rest. Corp. v. Superior Court (2012)*; discussed in an earlier section) clarified that an employer's obligation to "provide" breaks means

only that they must make breaks available, not ensure that they are taken. Therefore, the reasons that meal or rest periods are missed become relevant.

To develop the survey, preliminary research was conducted to gain an understanding of the job and the work environment including (1) a review of company documents such as job descriptions, training manuals and performance appraisals, and operations policies and procedures, (2) seven "site visits" in which a job analysts visited sites for a few hours and talked to employees, and (3) an SME meeting with six area managers (one level above the store level).

The survey items in a meal and rest break case must be worded very carefully in order to properly address the legal issues. Poorly worded items either lead to (1) confusion by test takers which results in unreliable data or (2) ambiguous results that do not clearly indicate whether the law was violated. California's meal and rest break regulations have many aspects and it is not uncommon for poorly designed surveys to be written such that the responses cannot adequately evaluate the allegations. For example, consider the survey item: "Have you taken a meal break on every day you worked in the past year?" While this seems like a simple item in which a negative response indicates a violation and an affirmative response indicates compliance, this may not be the case. In California, employees are only entitled to a meal break if they work more than 5 h. If certain conditions are met, they may also waive their break if they work fewer than 6 h. Therefore, a part-time employee who works partial shifts may not be entitled to a meal break and an affirmative response to that question does not indicate a violation. On the other hand, all meal breaks must be at least 30 consecutive, uninterrupted minutes. An employee who takes a 20-min break every day would respond affirmatively to the question, even though a violation occurs every day they work.

Several steps were also taken to reduce the possibility of intentional distortion. First, the survey was branded as an "Employee Experience Survey" and questions about meal and rest breaks were buried within the survey to reduce sensitivity to these items and to reduce the likelihood that

respondents would answer these questions in a socially desirable manner. Other questions were included in the survey that are equally relevant to respondents to help disguise the true focus of the survey. Several "lie items" (items which were known in advance to always be true or false) were also included to identify respondents who displayed unreliable responses. Questions were phrased in both the positive and negative direction to counteract a potential response bias favoring affirmative responding. Employees were also assured that their responses would be kept confidential in order to collect an honest and candid report of meal and rest break experience.

Questions were written simply and clearly to avoid misinterpretation and misunderstanding of the item content. The survey contained a sufficient number of questions to assess the instrument's reliability but was not so lengthy as to cause response errors and random responding due to fatigue.

It was learned from site visits and focus groups that employees spoke two dominant languages, English and Spanish. Therefore, the survey was written in both languages. Translation has the potential to introduce a number of potential confounds. For example, professional translations may use formal language and terminology, which would have been problematic in this case because many employees had limited education and reading comprehension (in any language). It was also learned from background research that employees frequently used slang terms to refer to items and procedures in the workplace. It was important that the survey items were simple and clear and used terms and phrases that the employees understood. Therefore, the survey was reviewed by bilingual restaurant manager who made numerous suggestions to modify the Spanish version of the questionnaire to include terms and phrases that could be clearly understood by employees.

Before the survey was administered, it was pilot tested by to ensure the instructions and items were clear and unambiguous. The pilot was administered in person by trained consultants to 68 hourly employees in eight different restaurants. The pilot sample was chosen to reflect the variation on demographic variables (e.g., sales

volume, restaurant type) and to mirror the employee population in California. After employees completed the pilot survey, a session was held to collect feedback on the survey process including the instructions, content, and format of the survey items and response scales. Based on feedback from the pilot survey, the wording of several questions was simplified to be easier to understand.

The final version of the survey contained 146 items and covered the following topics: work history, position, work schedule and hours worked, job tasks performed, experience working at the restaurant, activities engaged in during rest breaks, and activities engaged in during lunch breaks. Five “lie” items were also included to detect random or careless responding.

Sampling was complicated by the fact that it was not possible to select individual employees for participation. The questionnaire needed to be administered in the restaurant because most employees did not have access to reliable transportation and could not meet at a central administration location. Because consultants were traveling to the stores, the available participants were only those who were working on the day of the administration. Therefore, sampling was done by store. The population of stores consisted of all nonfranchised restaurants in California. Of the 140 total restaurants in California, 60 were selected for the sample. The sample was selected using a stratified random sampling strategy based on three factors: restaurant type, region, and sales volume.

The survey was administered in a highly structured manner by trained consultants to ensure consistency of administration and to minimize factors that may result in distorted responding. A team of eight consultants travelled to the selected stores and administered the survey in person. To preserve confidentiality and minimize distractions, the survey was administered as far as possible away from operations and other staff. Consultants strictly followed an administration protocol which included an introduction script to standardize the administration procedures and ensure that all employees received the same information, instructions, and assurances. To minimize impact to operations, consultants did

not administer surveys during lunch or dinner rush periods.

Managers at each selected restaurant were notified by an internal contact that a consultant would be administering surveys to employees in the restaurant and their cooperation was requested. When the consultant arrived at the restaurant, they introduced themselves to the manager on duty and read a script to them that explained the purpose for the visit and asked the manager to release employees to complete the survey as they became available. The script also stated that employees were to remain clocked in while they took the survey. Each participant indicated whether they preferred to take the survey in English or Spanish and the consultant then read the scripted instructions to the employee in their preferred language. Most participants completed the survey in less than 30 min and consultants documented all questions that were asked during the administration along with the response they provided.

Approximately 330 employees (12% of the population) completed the survey, with approximately half taking the English version. One participant was eliminated based on their responses to lie items and one was eliminated because they never worked a shift long enough to qualify for a break. The sample of participants closely mirrored the population based on region, sales volume, and restaurant type. Responses to lie items and Chronbach’s alpha coefficients both indicated that the responses were reliable.

The results indicated that almost all team members regularly took their full 30-min meal breaks, with a slightly lower percentage regularly taking their full 10-min rest breaks. Among those who did not take all their assigned breaks, the reasons for not taking breaks varied from person to person. The results were presented to the client and the case settled before trial.

11.9 Case Study 3: Off-the-Clock Work Observation Study

This case study describes a study that was conducted to help determine the amount of time that employees spent working off the clock. The plaintiffs in this case were nonexempt employees

at a nation-wide specialty retailer. Specifically, plaintiffs alleged that they were forced to perform uncompensated work at the end of the night after clocking out. Each night, the employee closing the store was required to run an “end of day” program on the store computer. Once the program was initiated, a sequence of automated steps occurred that took approximately 10–15 min to complete. One of the steps in the sequence clocked out all employees so that payroll could be calculated for the day and transmitted to the corporate office. When the end-of-day program was completed and the store was ready for closing (e.g. cleaned and organized), the closing employee locked up the store, set the alarm, and went home. Plaintiffs alleged that the amount of time elapsed between the time the employee was automatically clocked out and the time they were actually free to leave the premises was significant and uncompensated. The defendants retained an expert to measure the actual amount of time employees spent closing their stores and in particular, the amount of time spent between clock out and exiting the store.

The class, which was already certified, included all current and former nonexempt hourly workers employed by defendants in California dating back 4 years. As discussed in an earlier section, one of the consequences of conducting the study post certification was that the study could not involve direct contact with class members. Therefore, a study had to be designed that could determine the amount of time that class members work off the clock at the end of the night without interacting with any hourly employees in California.

There were some important considerations in determining an appropriate method for collecting data in this case. For example, one possible method would be to simply compare the time that employees clocked out to the time that the alarm was set (which is at the door where employees exit). Unfortunately, it was learned that the clocks on these two systems are not linked and any comparisons of those two times would be inaccurate in an unknown direction and magnitude in each

store. Although it would have required minimal time and effort, this dataset was considered unusable for this purpose of this case. Another potential option for collecting data was to review security video to determine how long employees work after clocking out. However, this case required the measurement of time to begin at the moment a specific automated task was performed by the “end of day” computer program. The existing video was not able to capture this information because of the position and quality of the video cameras and could not accurately determine how much time employees worked after being clocked out.

Therefore, it was determined that live observations would be the best method to collect the necessary data. Because the class had previously been certified and observers could not interact with class members, observations were conducted outside the state of California. Before determining whether out-of-state data could be generalized to the California population, it first had to be determined whether there were substantive differences between stores in California and stores in other states. Through SME interviews, it was learned that stores in surrounding states operated under the same procedures, performed the same closing tasks, and ran the same closing programs as those in California and the results that were obtained from other states could reasonably be generalized to the California population.

A simple random sample of 50 stores was chosen. Stores were eliminated from the sample if they had highly unusual circumstances during the time of the observation (e.g., renovations), the closing employee had previous contact with counsel, the closing manager was still in training or was training another manager, or the store was a 24-h location (i.e., did not close). Observations were scheduled across all 7 days of the week.

To prepare observers, screenshots of the different computer screens were captured and provided to assist them with the task of identifying the moment when employees were automatically clocked out. Data collection sheets were created along with specific rules for tracking time.

In particular, observers were instructed to track the exact time (to the nearest second) that (1) the doors were locked to the public, (2) employees were clocked out, and (3) the employee exits the store. These three time points provided sufficient information to calculate the total duration of the closing procedures and more specifically, the amount of time that employees performed closing activities while clocked out. Observers used atomic watches to track time to ensure accuracy. Observers were trained on the protocol which included watching videos of the end-of-day sequence, reviewing the protocol and the data collection tools and conducting simulated practice observations by watching videos of the end-of-day sequence.

A communication plan was created to ensure that all employees in the sample received a consistent message about the study. In particular, each was assured that their performance was not being evaluated and that they should perform their work as he/she normally would and not do anything different because they were being observed. The observer called each selected store in advance to let them know when they would be conducting the observation and to repeat the information they previously received. This information was again repeated when the observer arrived for the observation.

Once the doors were locked at the end of the night, the observer began the observation by tracking the time that each key activity occurred on the data collection sheet. At the end of the shift, the observer asked two closing questions to determine whether the observed closing was particularly unusual or whether the closing employee did anything differently because they were being observed. The data were then entered into an electronic database and analyzed.

The results of the study showed that the total closing procedures took approximately 25 min, on average. More importantly, the results showed that employees were clocked out approximately 4.5 min before they left the store. The results of the study were presented by the defendants as evidence and the case settled before trial.

Legal Commentary

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Testifying experts play a critical role in wage and hour litigation. A large percentage of wage and hour lawsuits require a detailed analysis of workplace behavior and an expert must be able to collect this information in a scientifically sound manner. The methods used by I/O psychologists are ideal for doing just that.

Wage and hour litigation often requires the litigants to evaluate whether an individual employee was appropriately classified as exempt from overtime. In so doing, the litigants must consider how the employee actually spends his or her time. They must consider whether the employee's practice diverges from the employer's realistic expectations, and whether there was any concrete expression of employer displeasure over an employee's substandard performance. An employer should not simply assume an employee is exempt just because their job description identifies them as exempt. Exempt status is based on the employee's performance of actual job duties. In California, when a job requires the employee to perform nonexempt duties the majority of the time, they are a nonexempt employee, regardless of what duties are listed in their job description. By the same token, an employee in an otherwise exempt position may not surreptitiously perform nonexempt duties which are not within the realistic expectations of the employer in order to defeat exempt status. This means, analyzing whether an employee is exempt requires a thorough analysis into the employee's actual performance of job duties and whether that performance comports with the reasonable expectations of the employer.

Wage and hour litigation also requires litigants to perform detailed job analysis into whether employees worked off the clock and, if so, the reasons for such work. It also requires analysis into whether each employee was provided with an opportunity to take legally mandated meal or rest periods. If breaks are not being taken at all or within the legally required timeframe, the litigants must figure out why. Is the employer interfering with the employee's breaks, or is the employee choosing to skip breaks on his or her own?

In a nutshell, wage and hour lawsuits put everything the employee did during a workday under a microscope. The employee's behavior and the reasoning behind this behavior may be analyzed scientifically. I/O methods are uniquely suited to help litigants perform this analysis. Here are just a few examples of how I/O methods are being applied in wage and hour litigation:

Overtime Exemptions

Under California and federal law, each of the "white collar" exemptions has two components: a salary test and a job duties test. To qualify for these exemptions, an employee's monthly salary must be at least two times the minimum wage for full-time employment. Proving the salary requirement is generally the easy part.

The "job duties" tests under California law differ significantly from the federal counterpart. In general, employers must look to the type of work in which an employee is "primarily engaged" to determine if the employee's job duties meet the requirements of an exemption. The job duties test under California law is considered quantitative, as opposed to the more qualitative federal test. That is, the California law defines the work in which an employee is "primarily engaged" based on the amount of time the employee is engaged in exempt activities. If an employee spends more than half of his/her work time engaged in exempt duties, the employee is exempt. Employers cannot simply rely on

job titles or job descriptions to perform the analysis—an employer must look at how the employee actually spends his/her time. In contrast, federal law asks what an employee's "primary duty" is, and is less concerned with ascertaining whether more than 50% of the employee's time is occupied by exempt tasks.

How do you show an employee spends more than 50% of his/her time performing exempt tasks and who bears the burden to do so?

Employers bear the burden of proving exemption at trial. This is because exemption is an affirmative defense. Employees are presumptively entitled to overtime. They do not have to prove they were doing anything other than working for the employer more than 40 h a week (and/or 8 h a day in California) to meet their burden of proving overtime might be owed. For this reason, plaintiffs typically offer their own testimony about the amount of time they spend performing exempt or nonexempt duties and it is generally, very vague and conclusory. During a deposition or trial, a plaintiff might state he/she spent most of his/her time every workweek performing tasks like washing dishes, waiting tables, or operating the cash register. He/she will not testify how much time, specifically, he/she spent on doing each task. He/she will simply say he/she knows it the majority of every workweek was spent on non-exempt tasks.

Now the employer must prove the employee's assertions are false. First, the employer will have to identify what tasks qualify as exempt or nonexempt. That is the legal part. Then, the employer must quantify the time the employee spends performing these tasks. That is where the I/O methods can be invaluable.

Job analysis surveys are extremely useful in this context. Working with a job analysis expert such as an I/O psychologist, litigants, and their counsel can identify the tasks and activities an employee is expected to perform on the job by creating a "task list." Second, litigants work with the expert to determine

how much time employees spend performing tasks that are presumptively exempt and presumptively nonexempt. To do this, the expert can develop a customized questionnaire (survey) in which employees are asked to identify the tasks that they do perform and then identify the amount of time they spend performing the job related tasks.

The job analysis survey can be delivered directly to a litigant during deposition or it can be administered to a class of employees in a group setting, often at a neutral location (e.g., hotel conference room) during work time. Giving the survey to the named plaintiff can provide direct evidence of what the employee does with his or her time. Unfortunately, the direct evidence is not always the most reliable. Plaintiffs who are claiming they are nonexempt will likely self-report performing less exempt work than nonlitigants. This is known as a litigation bias. So even in a single-plaintiff case, it is generally helpful to administer the same survey to a class of workers with the same job duties and title as the plaintiff. This gives you a baseline to compare against the plaintiff's survey response.

In California, an employee cannot underperform his/her way into nonexempt status, by violating the employer's reasonable expectations for how the job should be performed. If the employee plaintiff self-reports performing nonexempt tasks the majority of the workweek, but the class of employees with the same job duties all report that they performed the job in an exempt manner, this suggests that either the employee plaintiff's survey responses are unreliable or that the employee plaintiff was not performing the job in accordance with the employer's reasonable expectations which is a defense to an overtime claim.

Experts can also analyze exemption issues through time and motion (observational studies). In essence, they "job shadow" employees. The observer tracks all tasks performed and the duration of those tasks for an entire shift and then the expert prepares a report

based upon what he or she observed. In general, it is difficult to job shadow the named plaintiff in a lawsuit because the plaintiff will be a former employee. Even when it is possible to job shadow the plaintiff, there is still a risk of litigation bias. A plaintiff who has filed suit and hired counsel may perform tasks differently when compared to other workers. So, it is often useful to have a representative class of workers job shadowed to establish a baseline for how the job is being performed. If the vast majority of those observed are performing the job in an exempt manner, it suggests the employer's expectation that the job should be performed in an exempt manner was reasonable.

Class Actions

I/O methods can be used to prove class treatment is appropriate or inappropriate. Before a case can be certified as a class action, the court must find common questions of law and fact predominate over individual questions. If there are too many individual issues to establish liability to the putative class, the court will not allow the case to proceed on a class-wide basis.

Through job analysis surveys or time-and-motion studies, I/O methods can help establish the degree of variability in how employees perform their jobs. The data permit litigants to prove the degree of variability in the ways employees perform the same work, and the variability in the nature of the work being performed by employees in the same job category. The "variability" data allow the litigants to argue for or against class treatment. If the variability is relevant to the issues being tried and it is high, class treatment would be less appropriate.

For example, if the case concerns overtime exemption issues, and the data show employees varied greatly on how much time they spent performing exempt tasks, a defendant would argue class treatment is inappropriate. Exemption requires a detailed analysis of the exempt duties performed by each employee and the amount of time spent per-

forming those tasks to determine if the 50% threshold is exceeded. If this analysis must be done on a case-by-case basis for each employee, individual issues predominate over common questions, and class treatment is inappropriate. Conversely, if the variability does not impact the liability analysis or if it is minimal, plaintiffs will argue class treatment is appropriate. Plaintiff counsel will generally claim the variability in the way employees performed their job was minimal, and I/O data may support this conclusion. Regardless of the variability data, plaintiff attorneys will claim the class as a whole spent less than 50% of their workweek performing exempt duties. They will point to some uniform policy or procedure that they say violated the Labor Code and will contend that the employer's enforcement of the policy precluded individual employees from ever performing exempt tasks a majority of the time.

Regardless of which side of the issue the litigant is on, I/O methods provide critical data points which will be argued at the class certification stage.

Meal and Rest Breaks

I/O methods can also be used to establish liability in meal and rest period class actions. In California, nonexempt employees are entitled to a 30-min unpaid, duty-free meal period which must begin before the end of the fifth hour worked. In addition to meal periods, rest periods must be "permitted" for every 4 h of work or "major fraction" of 4 h (which the Supreme Court has interpreted as 2 h). This means that for any employee working 3½ h or more in a workday, the following number of 10-min rest breaks must be provided: 3½ h to 6 h = one; over 6 h to 10 h = two; over 10 h to 14 h = three.

Surveys can be administered to determine the percentage of employees who report that they regularly take uninterrupted 10-min rest breaks and uninterrupted 30-min meal periods and to also identify the timing of the meal and rest breaks. In California, an em-

ployer must simply provide or make these breaks available to employees. The employer need not ensure that they are taken. Thus, the reasoning behind any employee's decision to skip a meal or rest break is an important factor in determining an employer's potential liability. For those who did not regularly take breaks, surveys can be used to determine whether the employees knew meal and rest breaks were provided by the employer, yet the employees routinely skipped the breaks on their own accord.

All told, the application of I/O methods is critical to wage and hour litigation. There are myriad applications. Because the analysis of an expert can make or break a wage and hour case, it is important for litigants to retain qualified professionals who follow best practices and methodologies.

Recommended References

The academic literature on wage and hour issues is somewhat sparse compared to many of the other topics covered in this book. However, the following references are good sources of information.

- Banks, C. G., & Cohen, L. (2005). Wage and Hour Litigation: I-O Psychology's New Frontier. In F. J. Landy, *Employment Discrimination Litigation*. Jossey-Bass/Pfeiffer.
 - This book chapter was the first introduction to wage and hour issues for most I/O psychologists and provides a thorough overview of the wage and hour landscape.
- Banks, C. G., & Aubry, L. W. (2005). How to Conduct a Wage and Hour Audit for Exemptions to Overtime Laws. *Bender's Labor & Employment Bulletin*, 292–302.
 - This article is written jointly by an I/O practitioner and attorney. It provides step-by-step guidance for evaluating exempt status.
- Banks, C. G. (2004). Keeping Exempt Jobs Exempt. *HR Advisor: Legal and Practical Guidance*, 21–27.

- This article discusses strategies to avoid managerial misclassification from an operational perspective. Specifically, the article provides a discussion of potential causes for misclassification and solutions for employers to minimize their risk.
 - Seyfarth Shaw, LLP. (2014). Annual Workplace Class Action Litigation Report: 2014 Edition.
 - This annual update on class action litigation is prepared by an employment law firm. This thorough report provides trends and statistics and serves as a great reference tool because it provides summaries and citations from many important cases from the previous year.
 - Levine, D. I., & Lewin, D. (2006). The New “Managerial Misclassification” Challenge to Old Wage and Hour Law; Or, What is Managerial Work? In D. Lewin, *Contemporary Issues in Employment Relations* (pp. 189–222). Champaign, IL: Labor and Employment Relations Association.
 - This book chapter addresses wage and hour issues from a management perspective including a discussion of statistics, trends, and possible explanations for increases in wage and hour litigation.
- this is often used to refer to off-the-clock time that is too small for an employer to be held liable. Many courts have used a 10-min-per-day threshold.
- *Donning and doffing*: Putting on and removing work-related clothing or equipment. Depending on the type of clothing/equipment and the nature of the work performed, this time may be compensable.
 - *Executive exemption*: An exemption for which employees can qualify which makes them “exempt” from Fair Labor Standards Act (FLSA) or state labor law protections. There are several criteria that must be met to qualify for this exemption including regularly managing at least two employees.
 - *Exempt employee*: An employee who is not entitled to Fair Labor Standards Act (FLSA) and state labor law protections. Exempt employees are typically paid on a salary basis and not entitled to overtime, meal and rest breaks, or other employee protections.
 - *Nonexempt employee*: An employee who is entitled to Fair Labor Standards Act (FLSA) and state labor law protections. Nonexempt employees are typically paid on an hourly basis and are entitled to overtime, meal and rest breaks (in some states), and other employee protections.
 - *Independent contractor*: A self-employed individual who provides services for an organization (as opposed to being an employee of the organization). This employment relationship has several implications related to taxes, benefits, and wage and hour protections.
 - *Misclassification*: Indicates that one or more employee was incorrectly classified by an organization in relation to wage and hour laws. Employees may be misclassified with respect to exempt status (e.g., managerial misclassification) or independent contractor status.
 - *Observation study*: Job analysis methodology in which data are collected through direct observation. This is often performed by a job analyst who is physically present or reviews video data. This is a common method used in wage and hour cases, especially those alleging exemption managerial misclassification.

Glossary

- *Administrative exemption*: An exemption for which employees can qualify which makes them “exempt” from Fair Labor Standards Act (FLSA) or state labor law protections. There are several criteria that must be met to qualify for this exemption including the employee’s primary duty must be “directly related to management or general business operations.”
- *Class certification*: The stage in litigation in which a judge determines whether the lawsuit can proceed to trial as a class action. The decision is based on whether the claims of the putative class members are capable of being resolved on a class-wide basis.
- *De minimis*: Term used in the courts to describe trivial matters. In the wage and hour context,

- *Outside sales exemption*: An exemption for which employees can qualify which makes them “exempt” from FLSA or state labor law protections. There are several criteria that must be met to qualify for this exemption including the employee’s primary duties must be “making sales.”
- *Primary duty*: The threshold used in federal courts to determine whether employees are exempt from FLSA protections. This threshold is interpreted qualitatively and is typically more lenient than the 50% of time threshold used in California.
- *Primarily engaged*: The threshold used by California state court to determine whether employees are exempt from state labor laws. This is consistently operationalized as greater than 50% of one’s work time which is considered a stricter threshold than federal threshold.
- *Professional exemption*: An exemption for which employees can qualify which makes them “exempt” from Fair Labor Standards Act (FLSA) or state labor law protections. There are two professional exemptions: learned professional and creative professional.
- *Off-the-clock work*: Compensable work performed by nonexempt employees that is not compensated.
- *Similarly situated*: The standard used to certify a collective action under section 216(b) of the Fair Labor Standards Act (FLSA). This is often based on factors such as the degree of variability in tasks performed by the potential class members.

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