

# EconOne

INSIDE

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## DECLARATIONS AND SURVEYS IN WAGE AND HOUR SUITS: IT'S ALL IN HOW YOU ASK

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It's tough to defend against a wage and hour lawsuit. Unlike employment discrimination lawsuits, which are based on the interpretation of measurable statistical disparities between employee groups, wage and hour lawsuits tend to turn on allegations of work effort that is, by assumption, not measured by the employer.

### Case study of an off-the-clock wage and hour class action

In a recent wage and hour class action (which subsequently settled), pharmacists at a major west coast grocery store chain alleged that they were denied the opportunity to take uninterrupted, duty-free meal breaks (e.g., they were routinely required to answer customer's questions and even fill prescriptions during their meal break period). In the state in which the collective action was filed, the pharmacists were classified as non-exempt employees and entitled to one or two 30-minute, duty-free meal breaks depending on the amount of time worked.

Both the extent of and commonality of the off-the-clock wage and hour violation allegations were at issue. Attorneys looked to declaration statements and surveys administered to the stores' pharmacists to determine the percentage of the time pharmacists believed their meal breaks were interrupted by work-related duties.

General survey and declaration statement design techniques used in a missed meal break analysis are useful in other types of off-the-clock work cases as well.

**Generally, your survey or declaration statement needs to have several main characteristics.**

Design principle #1: Use a sampling routine to construct the data

Sampling is an excellent alternative where potential class members are too numerous or geographically dispersed to make a total census count feasible. For example, in our case study, the 700 potential members of the class worked in over 325 geographically dispersed locations throughout the state with at least one pharmacist on duty 24 hours a day. A total census count of active potential class members would have involved administering a survey, over a short period of time, to employees spread over 2,800 different work shifts (700 members x 4 shifts). Additional effort would be needed to administer the survey to pharmacists no longer working for the company.

Total census counts, even if feasible, may not be desirable. Responses can become "contaminated" as statements are collected from potential class members over a period of time. For example, once word of the survey (or the lawsuit) gets out, later respondents may go back and review pay-stubs or other documents to arrive at estimated off-the-clock work in a different

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manner than earlier respondents. That variation in the basis of the responses across class members may yield misleading results.

A well-designed sample in a wage and hour class action will help ameliorate many of the problems associated with attempting to take a complete census count of the entire potential class.

In our case study, declaration statements were taken from a random sample of 125 pharmacists across all store locations within the state. The pharmacist sample, which used a technique called stratified random sampling, appropriately reflected the stores located in the northern and southern parts of the state, as well as the different shifts the pharmacists worked.

Design principle #2: Ask as few questions as possible

Once the random sample is selected, the questions must be carefully designed. As a general rule, shorter forms and shorter questions tend to increase the amount of effort and thought that each potential class member puts into completing the survey. Do not include questions about information that can be directly obtained from other sources. For example, length of employment or work schedule can be gleaned from human resources or time card records. Any additional work required to match the respondent's information to the survey responses is outweighed by the benefits of a shorter form.

In our case study, the attorneys, with the assistance of economists and statisticians, devised a detailed declaration statement. The document had 10 questions pertaining to meal breaks, the frequency with which those meal breaks were interrupted, knowledge of company policy concerning meal breaks, and time clock punch activity.

Design principle #3: Ask the right questions  
in the right way

The questions should be focused and closed-end whenever possible. Closed-end questions yield a choice-based response which allows for quantitative analysis. Furthermore, important issues should be probed from several angles. Differently worded questions can yield different responses. When appropriate, the document should include follow-up or check questions that can help verify the validity of the initial response.

In our case study it was important to determine if the fact that a person did not clock out for a meal break meant that they did not actually take a meal break. Anecdotal evidence suggested that many of the pharmacists took uninterrupted meal breaks but simply did not clock out for the meals. To address the issue, the following survey questions were asked of the potential class members.

Question #1: I estimate that I punched out for my meal period \_\_\_\_% of the days that I worked during the 12/31/02 to 12/31/04 time period.  
Please enter a number between 0% and 100% in the blank.

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If Question #1 indicated that only a small percentage of people actually punched out for meals, then it would be inappropriate to assume that a pharmacist who did not punch out for a meal automatically missed their meal break. Question #2 (which contains both a closed-end multiple choice response and an open-end response option), provides insight into why pharmacists

were not clocking out for meal breaks. Responses to Question #2 could either buttress or refute anecdotal evidence that pharmacists generally did not see themselves as “clock punchers.” Another important question pertained to an employee’s understanding of company policy. Questions #3 and #4 were asked of the potential class members to address this issue.

Question #2: If you answered 0% to Question #1, do not answer this question.  
If I punched out for my meal period during the 12/31/02 to 12/31/04 time period, it was most commonly because:  
A. There was another pharmacist on duty during my scheduled hours  
B. There were few customers in the pharmacy at the time  
Other: \_\_\_\_\_

Question #3: During the 12/31/02 to 12/31/04 time period, it was my understanding that if there was no emergency in the store, company policy allowed me to take a meal break of at least 30 minutes without being interrupted with work duties.  
A. True  
B. False  
C. I did not know what the company’s policies concerning meal breaks were during the 12/31/02 to 12/31/04 time period.

Question #4: I estimate that I took an uninterrupted meal break of at least 30 minutes on approximately \_\_\_\_\_% of the days that I worked during the 12/31/02 to 12/31/04 time period.  
Please enter a number between 0% and 100% in the blank.

For example, in our case study, the employer contended that its policies concerning meal breaks varied across stores. Examining the degree to which the pharmacists reported missed meal breaks (Question #4) by level of knowledge of the meal break policies (Question #3) on a store-by-store basis, could help

demonstrate the degree of dissimilarity in meal break policies across stores.

Bottom line, wage and hour cases are not easy to analyze. However, results generated from a carefully constructed declaration statement or survey of potential class members can provide the necessary insights.