

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the
Changing Wage-and-Hour Landscape



Tools for Studying Your Employees' Duties

Featuring [Elizabeth Arnold](#) and [Chester Hanvey](#)

In this week's *Five on Friday*, we are joined by Organizational Consulting Expert Elizabeth Arnold and Industrial/Organizational Psychologist Chester Hanvey from the consulting firm, [Berkeley Research Group \(BRG\)](#). Elizabeth and Chester regularly analyze job duties to help clients evaluate compliance with state and federal wage and hour laws. They use a variety of job analysis data collection methods to study the nature and duration of employees' work, including time and motion observations, structured interviews, and surveys.

Q In prior installments, we've discussed the fact that the FLSA's "primary duty" tests could possibly shift to a California-like, quantitative requirement. If this happens, employers may need to examine employees' time spent on exempt versus nonexempt work to determine whether they can be classified properly as exempt. Exempt employees don't record their time. More to the point, they don't keep records of their time spent on exempt versus nonexempt duties. Given that, how can employers "examine" these buckets of employee working time?

A A variety of job analysis methods exist for this purpose. Three that we commonly use in the context of evaluating exemption status are (i) time-and-motion observations, (ii) job analysis questionnaires, and (iii) structured interviews. Each has advantages depending on the specifics of the job and the exemption being evaluated. Regardless of the method used, it is critical to collect reliable data that accurately and comprehensively describes the work employees actually perform.

Q You mentioned that each method of job analysis—time-and-motion observations, questionnaires, and structured interviews—has certain advantages. At a high level, can you help our readers understand when the time-and-motion observation study makes the most sense, as well as any drawbacks?

Yes, happy to. We conduct observation studies in many different environments—from tax preparers and garbage truck drivers to recruiters, store managers and beverage salespeople. The major benefit of this type of data collection is that it produces rich, detailed records that reflect the actual work employees perform on the job. Many people, including judges and juries (and even the occasional DOL investigator), like the fact that the data is "real" and is not dependent on the memory or accuracy of self-reports from employees.

Observation studies typically involve observing the entire workday of a carefully-selected sample of employees. For many jobs, we also ensure that observations are scheduled to capture different days of the week and shift

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times to ensure that many aspects of the job are observed. Observations involve a trained job analyst “shadowing” and recording all tasks performed in tiny segments of time for an *entire work day* without interfering with the employee—it’s a tough job! The final product is a detailed and quantitative measure of what employees are actually spending time on the job doing.

As with all methods, there are a few potential drawbacks to an observational approach. First, observers can only record visible tasks. That is, mental tasks—so many of which are exempt—are more challenging to observe, making jobs comprised primarily of these types of tasks not as well-suited for an observational approach. In addition, data can only be collected for tasks that the employee performed on the days the employee was observed and may not include information about unusual or unpredictable activities. Also, to the extent a job is influenced by season or time of year, the observations may not cover these activities. If you work at a party supply store, for example, you want to make sure you have at least some holidays covered in your study.

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And how about the questionnaire option?

We have used this method for many organizations using different administration methods, including online tools. One major advantage is that we can collect data from a large number of employees relatively quickly and inexpensively. Questionnaires that are designed to evaluate exempt status must be carefully designed with multiple sections to cover different aspects of the job. The process of developing such a questionnaire is intensive and requires involvement from a variety of internal resources.

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Self-report instruments like questionnaires have the advantage of measuring non-observable mental tasks, like planning, strategizing, and identifying solutions to problems. We can include questions asking the employees to report when and how often they perform these tasks. In addition, questionnaires allow employees to report their work experience over a longer period of time, going back several years if necessary. Of course any method that involves collecting retrospective self-reports must be designed carefully to avoid issues related to bias and memory decay. Fortunately, there is a large body of research on this topic that can be utilized to generate reliable self-reports.

Another consideration is the fact that, the questionnaire administrator may not have as much control over the administration process as they would like. If the questionnaire is online, for example, the administrator may not be certain that participants reading all instructions carefully and completing the questionnaire in one sitting.

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That leaves structured interviews. What do those look like, and where do you typically use them?

We have been using this approach more recently to study jobs that are highly technical or widely diverse in terms of tasks. Our structured interview tool is similar to a job analysis questionnaire in that it has multiple sections, each with questions about different aspects of the job. The key difference, aside from questions being asked verbally, is that most questions are open-ended, which gives employees the opportunity to provide detailed responses. This affords a much deeper understanding of the job. Like the questionnaires, interviews are lengthy—several hours each—and can be conducted in-person or virtually using an online meeting software such as WebEx. During the interviews, employees can see the questions and responses being recording in real-time, which allows them to make corrections and ensures accurate data—which may come into play in litigation.

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Depending on the resources available, the number of employees which can be included in the study may be limited because of the time required to conduct each interview. In addition, because the responses are qualitative and often quite lengthy, a significant amount effort and time may be required to analyze the data.

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Some organizations might lack the resources to conduct a full audit of each exempt employee’s duties. If they want to conduct an audit, then how should they decide which jobs to prioritize?

Most organizations employ some jobs that are clearly exempt (e.g., upper management) and others that are clearly non-exempt (e.g., manual laborers). Jobs in between, like first-line supervisors, are where exemption status is so

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commonly disputed. We recommend identifying the “gray area” in the organization and starting by reviewing those jobs and consulting with counsel to determine the legal implications of the data collected.

Of course, for all of these methods, we believe it’s wise to involve a business’s capable wage and hour lawyers to ensure that the analyses can be best protected under one of the privileges against disclosure in litigation, in the regrettable event that an employee later files suit.

For a further discussion of how businesses might use the analyses that Elizabeth and Chester describe as they consider the impact of the FLSA’s new exemption rules on their operations, please contact *Five on Friday*’s editors, [Brett Bartlett](#) and [Kevin Young](#), or any of the other excellent attorneys in our national [Wage and Hour Litigation Practice Group](#), whose bios and contact information you may access by clicking [here](#). And, of course, you may contact [Elizabeth](#) and [Chester](#) directly.

We at *Five on Friday* want to hear from you! If there’s a topic or question that you would like us to cover in a future installment, please email it to FiveonFriday@seyfarth.com—we promise to keep you and your company’s identity confidential when we cover it in a future post. If you’d like to access a past installment, you can do so by visiting. If you’d like to access a past installment, you can do so by visiting www.wagehourlitigation.com/five-on-friday—the password is **seyfarth**. ■

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