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Data is the black box of wage and hour mediation

In wage and hour and PAGA mediations, employer data acts like a plane's black box—both sides analyze it to reconstruct work realities, test assumptions and align narratives, turning potential courtroom crashes into controlled settlements.

By Leonid M. Zilberman

When a commercial airplane accident occurs, investigators first examine the plane's black box to determine the cause, understand what happened and prevent future accidents. In California wageandhour class and PAGA cases, data serves the same role as a black box.

Everyone wants to open a black box after a lawsuit is filed to see how the employer documented wages. Defense practitioners often point to the black box to show that the flight was smooth and on autopilot; plaintiffs' practitioners point to the same data and contend that the instruments captured a series of alarms that were never addressed—like unpaid overtime, regular rate violations and missed meal breaks. The mediation room becomes the place where two narratives converge and both sides decide how much confidence to place in the documented recordings versus the employee's lived experience.

Across many mediations, one pattern repeats: both sides arrive heavily invested in their models but are not always aligned on the underlying route. The employer's team may come armed with spreadsheets, charts and scenarios built on its own assumptions about violation rates, limitations and "discounted" penalties. Plaintiffs' counsel often respond with stories, patterns, declarations and an alternative model that treats gaps in the data as evidence of systemic underpayment



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rather than small random errors. The cases that get resolved at mediation tend to be those where parties are willing to examine their data critically, test their assumptions and situate the numbers in the reality of how work actually occurs. In other words, they pragmatically apply the "provable" and objective facts and don't rely on cookie cutter models.

Preserving and framing the data

On the defense side, effective mediations begin long before the actual session, when the employer secures and organizes its core records, which experienced counsel will share with the other side, well in advance of mediation. These cases are essentially largescale reconstructions of the workday. Employers that do well in mediation typically have, at a minimum, an accurate ros-

ter identifying who worked, where, and in what roles during the relevant period; detailed timekeeping data showing clockin and clockout times, meal period punches, edits, approvals and audit logs; payroll and wage statement data reflecting what was actually paid, including overtime, premiums, differentials, bonuses and commissions; and policy and configuration materials explaining how the systems were supposed to operate, including rounding rules, autodeduct settings, attestations and reimbursement procedures that make up almost all cases.

With those building blocks, defense counsel construct exposure models that break the case down by claim, period and subgroup rather than reacting to global figures. A typical approach is to define the class or PAGA group, calculate basic metrics for each claim (such as the percentage of shifts with late, short or

missing meals), and then layer in legal assumptions about penalties and limitations. The result is a set of scenarios—often labeled "low," "likely" and "high," giving the defense team a sense of the range in which a court might reasonably fall. Importantly, it is critical to share these metrics with decision makers, so that they know what to expect in terms of settlement ranges well ahead of mediation day.

On the plaintiffs' side, the same datasets are often viewed with significant caution. Practitioners representing workers frequently assume that written policies and configuration settings capture only part of the story. Experience shows that a timekeeping system can generate records of nearperfect meal compliance in an environment where employees routinely eat while working, that "no exceptions" reports can coexist with unwritten expectations not to record all duties, and that reimbursement policies can be on the books even when employees are discouraged from submitting claims. As a result, plaintiffs' counsel often attempt to independently define the class or PAGA universe using discovery, worker interviews and outside records, then compare that definition to the employer's data. Differences in headcount, job categories or time periods can materially alter exposure and are usually highlighted early in mediation.

The resulting tension is not a defect in the process; it is the raw material of the negotiation. One side emphasizes the orderliness of the

instruments, the other the gaps between those instruments and the daytoday reality. The question in mediation becomes not simply which story is “right,” but how a judge or jury is likely to view the interplay between policy, data and practice.

Claimspecific patterns the data tends to reveal

While lawyers on both sides often try to argue for the “unique” nature of their particular case, in reality, certain recurring patterns emerge, and those patterns frequently drive risk assessment in any PAGA or wage-and-hour class action mediation.

For meal and rest break claims, defense teams typically rely on time-stamped punches and signed attestations to show that employees were provided timely, dutyfree breaks and that premiums were paid when breaks were missed, short or late. Plaintiffs frequently respond that these records captured only when the system was told a break occurred, not whether employees were actually relieved of all duty. Attestations with prepopulated language may be viewed as less reliable than they appear on their face. Mediations gain traction when employers acknowledge that data is informative but not infallible, and when plaintiffs’ counsel are able to specify where exactly they contend the records fail to reflect reality. For example, by pointing to perfect compliance in understaffed workplaces or during peak periods.

Offtheclockallegationsoftenpresent similar dynamics. Employers point to neatly bounded shifts and the absence of exceptions as proof that all work was recorded. Plaintiffs point to preshift tasks such as booting up systems or donning gear, postshift duties like closing out tills or completing paperwork, and offhours communications that do not appear on timecards. In some matters, system logs, email records or text-messaging platforms show employees working outside recorded hours. When those discrepancies are brought into the mediation, they tend to increase perceived risk on the defense side and give plaintiffs a more concrete foundation for their exposure assumptions.

Overtime and minimum wage issues tend to turn on how the reg-

ular rate is calculated and whether supposedly “discretionary” payments are, in economic substance, tied to hours or performance. Employers usually present detailed explanations of how overtime rates were derived and why certain bonuses were excluded from the regular rate. Plaintiffs compare those structures to the incentive programs and argue that some payments function as nondiscretionary compensation. While these are technical disputes, in mediation they are usually framed in terms of what a factfinder would likely perceive as fair or manipulative.

Reimbursement claims often highlight the gap between formal policy and daytoday behavior. Employers typically emphasize policies inviting expense submissions and point to spreadsheets showing that reimbursements were, at least sometimes, paid. Plaintiffs look at the overall volume of reimbursements in light of how heavily the business relies on personal phones, vehicles or home internet. When mediations focus on concrete examples—such as a worksite that requires extensive use of personal devices but has almost no recorded reimbursements—both sides can better appreciate how a judge or jury might interpret those facts.

How mediations translate data into risk

Successful mediations tend not to revolve around whose spreadsheet looks more polished or who is “right” and “wrong.” Instead, they focus on the assumptions that drive each side’s models and how those assumptions align with the available data and the likely reactions of courts and jurors.

One common feature of productive sessions is a shift away from debating bottom lines toward examining the levers behind them. Rather than beginning with “What is your number?”, discussions often turn first to how many employees and pay periods are at issue under each side’s definition; what the employer’s own data shows about the frequency and distribution of anomalies such as late meals, missing premiums or rounding losses; how credible attestations, and regular rate calculations are likely to appear once worker testimony and

expert analysis are layered on; and what range of penalties is realistically available in light of statutory limits, case law and trial court tendencies in similar matters.

When those levers are made explicit, it becomes easier for each side to recognize where its own model is conservative and where it may be too optimistic. Defense practitioners may concede that certain assumptions about minimal violation rates could be vulnerable. Plaintiffs’ practitioners may acknowledge that maximum penalties across every subgroup are unlikely. That recognition, even if only implicit, allows both sides to negotiate within a risk envelope rather than bargaining exclusively from their “bestday” scenarios, no matter how accurately calculated.

Another feature of effective mediations is the use of “whatif” scenarios. Defense teams are sometimes asked to model outcomes using higher violation rates, a broader class definition, or a narrower view of limitations and goodfaith defenses to understand a realistic upper limit. Plaintiffs’ teams may be encouraged to consider scenarios that credit compliance efforts, apply penalties more conservatively or segment exposure by facility. These exercises do not require either side to concede its positions. Instead, they highlight the range of results that a neutral decisionmaker could reach, which in turn helps both sides calibrate offers and demands.

Narrative also plays a central role. Employers often seek to use data to support a story of goodfaith compliance efforts, ongoing training and remediation—changes such as eliminating rounding, improving break scheduling, upgraded timekeeping or enhancing reimbursement practices. Those steps can meaningfully reduce perceived ongoing risk and support lower settlement values than backwardlooking damage models might suggest. Plaintiffs aim to connect worker accounts of missed breaks, offtheclock work, or unreimbursed expenses to patterns visible in the data, demonstrating that the stories are not isolated anecdotes but reflect broader trends. When both kinds of narrative are grounded in the same datasets, the mediation turns on which explanation better fits the combined record.

Gliding the wage-and-hour case toward a controlled landing

Viewed through this lens, wage-andhour and PAGA mediations resemble postaccident reviews more than abstract debates. Data allows the parties to reconstruct what happened; testimony and operational context explain why it happened; and the legal framework sets the outer boundaries of risk. Employers that invest early in preserving and understanding their data, and that pair their models with candid acknowledgment of weak spots and remediation, tend to negotiate from a position of both strength and controlled realism. Plaintiffs who test and contextualize that same data, and build models grounded in both numbers and worker experience, tend to command more attention and better outcomes than those who make broad general allegations.

In that environment, the mediator’s task is to help the parties use the black box—rather than be used by it. When the data and the stories are placed side by side, and when both sides are willing to explore what reasonable decisionmakers might do with that combined record, the odds of a controlled landing or settlement increase significantly, and the need to reenact the crash before a judge or jury diminishes. That avoids a bad outcome for either side and benefits all.

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