



# **The Role and Value of an Expert in Labor and Employment Litigation**

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# Agenda

- I. Introduction
- II. Primary Research Examples
- III. Secondary Research Examples
- IV. Other Examples
- V. Value versus Cost of an Expert





# I. INTRODUCTION

# Berkeley Research Group (BRG)



**Berkeley Research Group, LLC** is a leading global expert services and consulting firm that provides independent expert testimony, litigation and regulatory support, authoritative studies, strategic advice, and document and data analytics to major law firms, Fortune 500 corporations, government agencies, and regulatory bodies around the world. From testifying in high-stakes litigation to consulting on large-scale projects, BRG experts and consultants combine intellectual rigor with practical, real-world experience and an in-depth understanding of industries and markets. Their expertise spans economics and finance, labor and employment, data analytics and statistics, and public policy in many of the major sectors of our economy, including healthcare, banking, information technology, energy, construction, and real estate. BRG is headquartered in Emeryville, California, with 25 offices across the United States and in Australia, Canada, Latin America, and the United Kingdom.

# Three Main Types of Expert Work



## A. Primary Research and Analysis - New data

- Surveys
- Interviews
- Observational studies

## B. Secondary Research and Analysis - Existing data

- Company policies, practices, and financial performance
- Electronic monitoring: GPS and geocoded data, videotapes, audiotapes
- Benchmark analysis using government data
- Declarations, deposition testimony, trial testimony
- Other documents

## C. Rebuttal Analysis

- Critiques of other experts' work
- Primary research
- Secondary research

# Litigation Issues in Which Experts are Used



## **A. Discrimination**

1. Age
2. Gender
3. Ethnicity
4. Disability

## **B. Wrongful Termination**

## **C. Wage and Hour**

## **D. Misclassification**

1. Exempt versus non-exempt
2. Independent contractor versus employee status

## **E. Executive Compensation**

## **F. Human Resource Management Practices**

# Litigation Stages and Roles in Which Experts are Used



## ➤ Stages

- A. Class Certification  
(where applicable)
- B. Liability
- C. Damages

## ➤ Roles

- A. Consulting
- B. Testifying



## II. PRIMARY RESEARCH EXAMPLES



# A Survey Example

- **Conducted a mail survey of 350 store managers (out of a population of 1,120) of a large national retail-store chain involved in litigation. Plaintiffs alleged that store managers should be classified as non-exempt from the FLSA and California law.**
  1. The survey data were used to document the extent to which store managers performed managerial work as distinct from non-managerial (i.e., employee) work. The survey data were quantitatively analyzed.
  2. The findings from this survey showed that store managers spent an average of 76 percent of their time performing managerial work, with a standard deviation of 8.5 percent and a range between 39 percent and 92 percent. Plaintiffs had claimed that store managers spent upwards of 60 percent of their time performing non-managerial work.

# Survey Questions: Store Manager Work Hours



1. Does the timekeeping system accurately reflect the hours you actually worked as a Store Manager during the last week? Yes\_\_\_\_\_ No\_\_\_\_\_

2. Does the store schedule accurately reflect the hours you actually worked as a Store Manager during the last week? Yes\_\_\_\_\_ No\_\_\_\_\_

3. Please provide the hours you worked during last week as a Store Manager. (For days off, write "OFF" in the start time)

a. Monday	Start Time_____	End Time_____	Total Hours_____
b. Tuesday	Start Time_____	End Time_____	Total Hours_____
c. Wednesday	Start Time_____	End Time_____	Total Hours_____
d. Thursday	Start Time_____	End Time_____	Total Hours_____
e. Friday	Start Time_____	End Time_____	Total Hours_____
f. Saturday	Start Time_____	End Time_____	Total Hours_____
g. Sunday	Start Time_____	End Time_____	Total Hours_____

4. Was the last week representative of the weeks in the last month? Yes\_\_\_ No\_\_\_

5. If not, did you work more or less. \_\_\_hours more \_\_\_hours less

# Survey Questions: Store Manager Discretion and Authority



**1. As a store manager, do you have the authority to purchase merchandise that you believe fits the preferences of the customers at your store?**

Yes\_\_\_\_\_ No\_\_\_\_\_

a. (If yes) What percentage of the merchandise purchase decisions in your store are made by you rather than by corporate allocation?

\_\_\_\_\_ %

**2. As a store manager, do you have the authority to determine what products go into the end-caps of your store?**

Yes\_\_\_\_\_ No\_\_\_\_\_

a. (If yes) what percentage of the products in the end-caps of your store are products that you selected?

\_\_\_\_\_ %

**3. As a store manager, do you have the authority to hire new associates?**

Yes\_\_\_\_\_ No\_\_\_\_\_

a. (If No) Please provide the title of the person who has the authority to hire new associates in your store:

Title:\_\_\_\_\_

b. (If No) Do you have the authority to recommend the hiring of new associates?

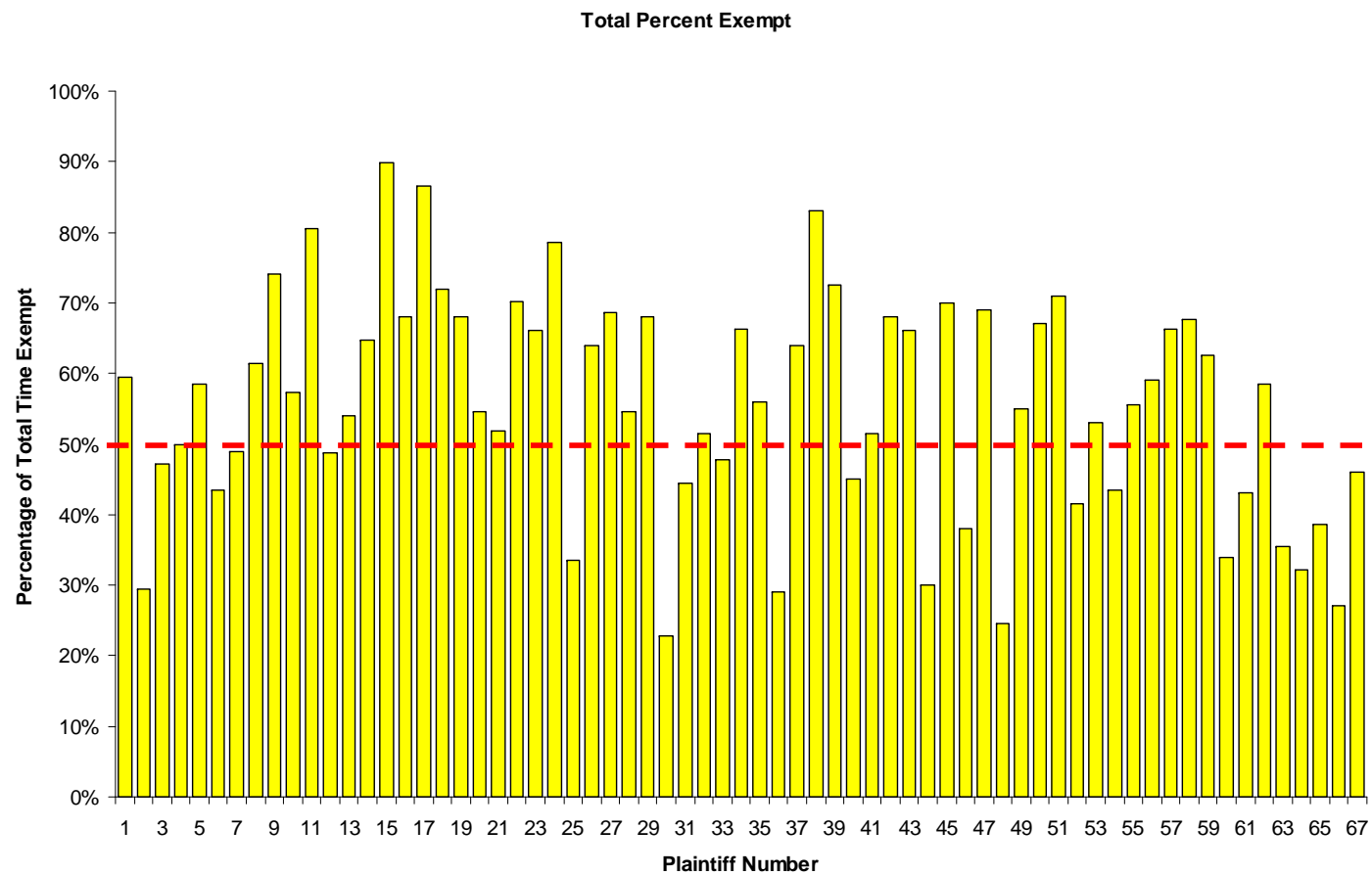
Yes\_\_\_\_\_ No\_\_\_\_\_

c. (If Yes to b) What percentage of the new hire recommendations you have made have been approved?

\_\_\_\_\_ %

# Store Manager Work Time

## Variation in Reported Percentage of Total Time Spent on Exempt Duties

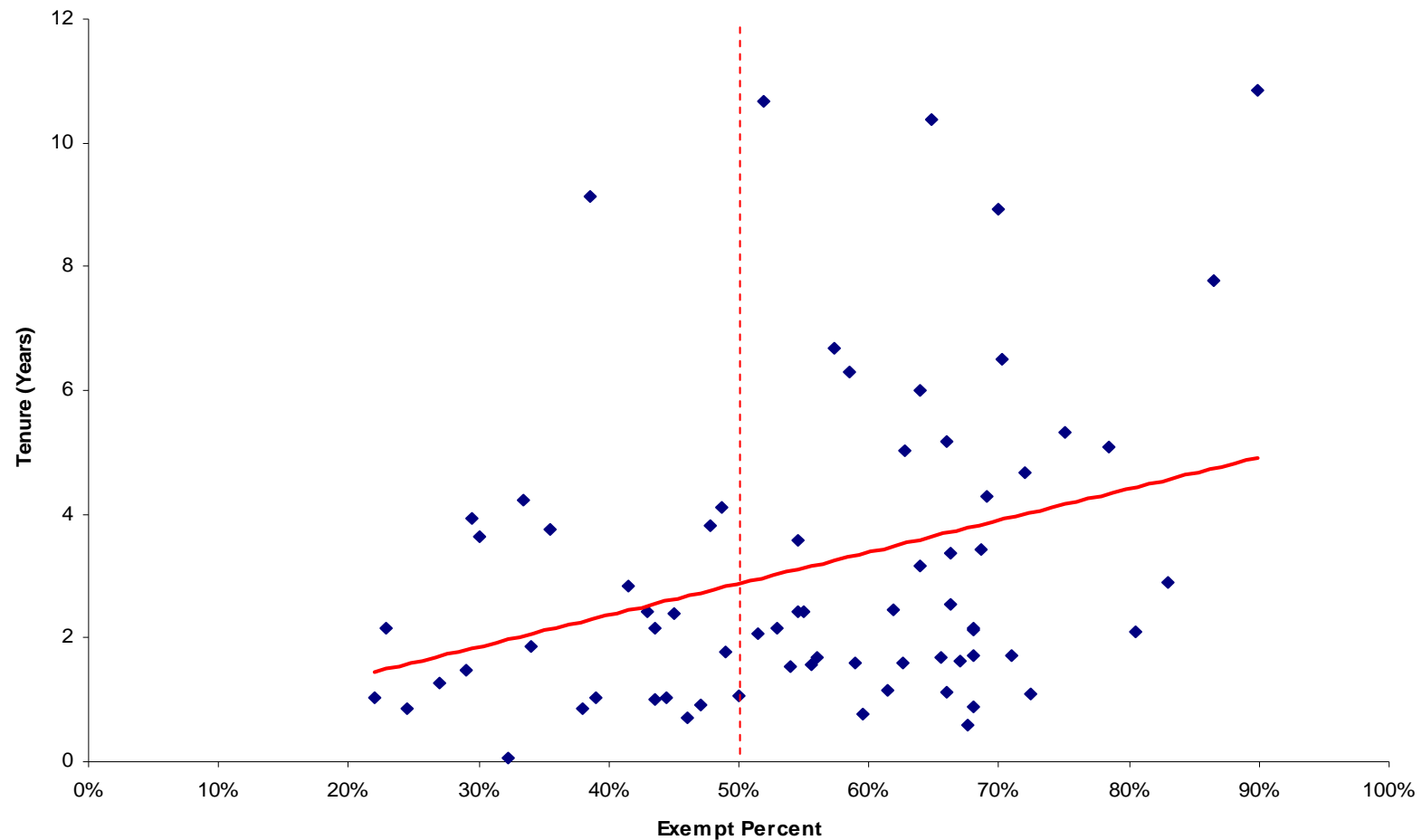




# The Role of an Independent Variable

**Store Manager Percentage of Exempt Work Time Positively  
Correlated with Tenure**

**Exempt Percent vs. Tenure**



## An Interview Example



- **Conducted semi-structured interviews of twenty-four claims adjusters and four interviews of executives and managers (who were previously claims adjusters) for a large national insurance company involved in litigation. Plaintiffs alleged that claims adjusters should be classified as non-exempt from the FLSA and Illinois law.**
  1. The interviews were used to document the extent to which claims adjusters exercised independent judgment and discretion in performing their work. The interview data were analyzed both quantitatively and qualitatively.
  2. The BRG expert testified at trial in this matter.

## An Observational Study Example



➤ **Observed the work tasks and time spent performing these tasks by sales representatives of a large pharmaceutical company who were declared by a district court to be non-exempt from the FLSA.**

1. Selected a stratified random sample of 135 sales reps (out of a 3,200 population).
2. Used 30 trained observers to accompany sales reps on their jobs for five consecutive or interrupted work days, and recorded work tasks and time spent on them using iPads with a customized timekeeping app. Also accounted for work time spent at home and in overnight hotel stays as well as driving time.
3. Estimated that sales reps worked an average of 40.6 hours per week (with a standard error of 0.7 hours) rather than the 70+ hours per week claimed by plaintiffs.

## Another Observational Study Example



- **Observed videotapes of two store managers performing their work for a large retail store chain company that features economy pricing. The report was used in connection with a class certification issue.**

Seventy-seven former members of the decertified class then filed individual lawsuits. Six of these cases were tried in various California courts, some with one plaintiff and others with up to three plaintiffs. The BRG expert testified in each of these cases, combining the observational analysis with analysis of each store manager's employment history and prior deposition testimony.



# Pros and Cons of Surveys, Interviews, and Observations



## ➤ **Surveys**

1. Pros: large sample, easy to administer, inexpensive
2. Cons: provide thin data, respondent bias, non-response bias

## ➤ **Interviews**

1. Pros: provide deep qualitative data, allow amplification, easy to administer
2. Cons: small sample, interviewer bias, relatively expensive

## ➤ **Observational Studies**

1. Pros: repeated observations, provide deep quantitative data
2. Cons: small sample, potential job behavior alteration, expensive



### **III. SECONDARY RESEARCH EXAMPLES**

## An Insurance Company Example



- Analyzed company records, email correspondence, deposition testimony, and other documents of a national insurance company in a case in which plaintiff, a former district manager in California, claimed that he was an employee rather than an independent contractor and was therefore entitled to regular pay, overtime pay, and benefits for the period in which he served in this capacity.
  1. Secondary research conducted by BRG found that plaintiff was a successful insurance agent who had been promoted to district manager and, in that capacity, led his organization as an entrepreneur who regularly performed the functions of planning, organizing, staffing, directing, and control.
  2. The BRG expert testified at trial in this matter.

## A Ground Transportation Company Example



- **Conducted a detailed analysis of several gigabytes of Global Positioning System (GPS) data for a ground transportation company in which a class of independent contractor van drivers filed a lawsuit claiming that they were employees and therefore should have been compensated as employees (including for overtime work).**

Selected a random sample of van-driver trips over a three-month period. Results of the analysis showed that drivers used their vehicles for a variety of transportation services beyond those provided by the defendant company.



## A High-Tech Company Example



- **Conducted analyses of a prominent semiconductor manufacturing company's broad-based stock option plan in a case in which the commissioner of the Internal Revenue Service alleged that employee gains from the sale of vested company stock were wages for labor services that constituted an intangible research and development expense that had to be shared with operating subsidiaries. Doing so would have increased the U.S.-based company's operating income and therefore tax liability by about \$1 billion.**
  1. Following detailed analysis of the company's two stock option plans, the BRG expert wrote a report regarding whether employee gains from the sale of vested company stock constituted a return to capital rather than wages for labor services.
  2. The BRG expert testified at trial in U.S. Tax Court.



## **IV. OTHER EXAMPLES**

## A Financial Services Example



- **Analyzed the report of a plaintiff's expert in a case brought by a class of female account executives against a large bank; the executives alleged that they were undercompensated and therefore suffered gender discrimination because senior management assigned them inferior books of business compared to their male counterparts.**

Conducted a statistical analysis of account executive compensation and found no statistically significant female–male compensation differences after controlling for education, tenure, and product specialty. Also analyzed plaintiff's expert's report and found that no significant gender-based compensation differences occurred once the expert's analysis was adjusted to take account of other contributing factors.

## A Supermarket Example



- Analyzed the report of defendant's expert in a class action brought by current and former store managers of a large supermarket chain who claimed that they performed mainly employee work rather than managerial work and were therefore misclassified and entitled to overtime pay.

A detailed review and analysis of defendant's expert's report found violations of generally accepted standards of survey design and analysis, including lack of sample selection criteria, bias in wording of survey questions, and requiring subject store managers to complete the survey in store facilities with senior management present.



## A Professional Sports Example



- Analyzed the report and deposition testimony of a plaintiff's expert in a case brought by a former general manager of a National Basketball Association (NBA) team against the team and the NBA claiming that he had been undercompensated and thereby discriminated against on the basis of age and race.

Analyzed historical NBA general manager compensation data for all teams and found that plaintiff's tenure of employment was five times the league average and the performance of his team was the poorest in the league over a 22-year period.



## **V. VALUE VERSUS COST OF AN EXPERT**

# The Value Added by an Expert



- A. Subject Matter Expertise** – Labor and Employment (Specific Areas and Issues)
- B. Independence**
- C. Primary and Secondary Research Capability**
- D. Comparable Work in Related Litigation**
- E. Consulting vis-à-vis Testifying Capability**
- F. Judicial Recognition of Expertise** (see next three slides)

## Excerpt From Court Decision No. 1



- “Defendant’s expert, UCLA Professor from the Anderson School of Business and Director and Head of the Berkeley Research Group David Lewin testified that, based on his review of the documents and evidence provided to him, PLAINTIFF was hired to develop what business economists call ‘human capital.’ In the process of doing so, he testified that based on his review of the evidence the PLAINTIFF exercised all the rights and prerogatives of a business owner. Specifically, PLAINTIFF engaged in risk sharing, or the use of his own capital to build the success of his organization; he worked at maintaining that base so that it generated revenues for him and he did this using his own operating systems and processes. In reviewing the evidence, he noted that PLAINTIFF referred to himself as the leader of his own organization, for which he did all things.”—Superior Court of California, County of Sacramento, Michael Pexa v. Farmers Group, Inc., November 5, 2012, pp. 28–29.

## Excerpt From Court Decision No. 2



- “Dr. David Lewin, Professor of Management for the Anderson School at U.C.L.A., testified as an expert in the field of human resource management and employment relations. Dr. Lewin reviewed numerous materials in forming his opinion, including company manuals, handbooks and documents; footage of a company training session held for store managers; two ‘Day in the Life’ videos of two store managers at two different Tuesday Morning locations engaged in day-to-day activities; the deposition testimony of Plaintiffs and the declaration of Ms. Mauck... Dr. Lewin opined that both Ms. Mauck and Mr. Riskedahl spent more than one-half of their time engaged in management duties. Dr. Lewin further opined that Defendant expected its store managers to primarily perform management duties. The Court found Dr. Lewin’s testimony credible.”—Superior Court for the State of California, County of Los Angeles, Claudette Mauck v. Tuesday Morning Stores Incorporated, January 30, 2012, p. 4.

## Excerpt From Court Decision No. 3



- “The Court qualified Allstate’s expert, Dr. David Lewin, as an expert in the areas of human resources management; organizational behavior; employee relations; job design; management control, including evaluating the degree of employee autonomy or an employee’s exercise of discretion and judgment; performance management; and employee compensation. Significantly, Dr. Lewin has testified many times as an expert before in this field, twice as often in support of plaintiffs... Lewin analyzed documents, including Allstate’s written policies, procedures and manuals, and interviewed 28 current and former adjusters regarding their exercise of judgment and discretion in the performance of their job duties. Lewin concluded: In providing this service and as the analysis presented...indicates, casualty adjusters and auto adjusters regularly exercise considerable independent judgment and discretion...Lewin also concluded that the ratio of adjusters to FPLs (Front Line Performance Leaders)...is much wider than traditional industry standards.”— In The Circuit Court of Cook County, Illinois, County Department, Chancery Division, Shelene A. Nettles and Ed Czarnecki v. Allstate Insurance Company, July 6, 2010, pp. 40–41.

# The Cost Added by an Expert



- A. Actual Cost of an Engagement**
- B. Opportunity Cost** (of Management and Employee Time Spent with an Expert)
- C. Risk of Unfavorable Findings**
- D. Communications and Discovery**
- E. Conflicts of Interest**



## Other Issues in Expert Retention



- A. Determining Work that Can be Done in House by Legal and HR Staffs**
- B. Expert Selection – Prior Work for One Side or the Other versus Both**
- C. Quality of an Expert's Staff**
- D. Retention as Consulting Expert versus Testifying Expert**