



## Due Process Concerns Sinks Overtime Class Action against Employer, California Court Rules

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Reversing a \$15 million judgment against an employer in a class action for alleged unpaid overtime, the California Court of Appeal, First Appellate District, has held that the trial court's trial management plan, which used sampling evidence to prove class liability, denied the employer due process by preventing it from defending against over 90% of class claims. *Duran v. U.S. Bank Nat'l Ass'n*, Nos. A125557 & A126827 (Cal. Ct. App. Feb. 6, 2012). The Court found the plan "was fatally flawed" and concluded the lower court's adherence to it denied the employer due process because the court based its evidentiary rulings on the plan, rather than trial testimony. The Court reversed the judgment and ordered the class to be decertified.

The opinion highlights many of due process concerns raised by using sampling evidence instead of individualized testimony when establishing class liability. The case may be appealed to the California Supreme Court.

### Background

U.S. Bank National Association employed Amina Rafiqzada and others as business banking officers ("BBOs"). BBOs were responsible for developing and managing small business banking customer relationships by selling financial services. The employer required BBOs to spend more than 80% of their time on "outside sales activity" outside of the office. It categorized BBOs as exempt outside salespersons ineligible for overtime under California Industrial Wage Commission Wage Order No. 4-2001, Cal. Code Regs., tit. 8, § 11040.

In 2001, Rafiqzada filed a class action complaint against the employer, alleging it had misclassified BBOs as exempt and denied them overtime. The employer opposed the class certification, arguing the employees could not establish common issues of law or fact. The trial court denied the motion and certified a class of 260 employees.

As the case progressed, the plaintiffs filed a proposed trial management plan that used a survey of data from which a representative sample of class members would be selected to determine liability and damages for the entire class. The employer objected to the proposal and argued, among other things, that the methodology would violate its due process right to assert its affirmative defense against each individual class member. It proposed an alternate plan that required multiple hearings before a special master.

Thereafter, on its own initiative, the trial court proposed selecting a random sample of 20 plaintiffs to testify at trial. The employer again objected on due process grounds. The trial court nevertheless proceeded and the court clerk drew the names of 25 of the class members. Twenty were designated as class representatives and five as alternates. The representatives became known as the 20-person random witness group ("RWG") members.

During the liability phase of the trial, the RWG members testified that they spent more than half of their work time in the office and worked varying amounts of overtime. The employer attempted to introduce evidence from other class members showing that they were exempt, but the trial court repeatedly denied its requests. At the close of

the liability phase, the employer asked the court to enter judgment in its favor, arguing that the plaintiffs failed to show that each BBO was misclassified. The trial court rejected this contention and asserted that its use of the RWG members was authorized by a California Court of Appeal in *Bell v. Farms Ins. Exchange*, 115 Cal. App. 4th 715 (Cal. Ct. App. 2004). The trial court concluded that, based on the testimony of 19 RWGs, all class members were misclassified and worked overtime.

During the damages phase of the trial, the court heard expert testimony and determined that the best estimate was “the [average] class [member] worked 11.86 [hours of] overtime per week” (plus or minus 5.14 hours), with a “margin of error of [] 43%.” Based on the expert testimony, the court computed the overtime owed to the class as \$8,953,832, plus interest. The employer appealed, arguing the trial management plan and the trial proceedings denied it due process.

## Applicable Law

Due process principles are designed to ensure a party is afforded his or her right to be heard during adversarial proceedings. Courts will examine “whether, under the specific facts and circumstances of a given situation, the affected individual has had a fundamentally fair chance to present his or her side of the story.” *In re Nineteen Appeals*, 982 F.2d 603, 611 (1st Cir. 1992).

## Due Process Denied

The Court of Appeal found that the employer was denied due process as a result of the trial management plan and the trial court’s evidentiary rulings.

### *Law Did Not Authorize a Trial by Formula*

The Court found the trial court’s reliance on *Bell* for using the RWG members was misplaced. The court in *Bell* used representative sample to determine damages only, not class-wide liability, as the trial court did here. Moreover, unlike in *Bell*, the trial court did not follow statistical procedures in adopting its RWG members; it simply randomly selected 20 witnesses, without regard to a probable margin of error and without using any surveys or pilot studies. The Court also found “the repeated restrictions the trial court placed on [the employer’s] ability to present arguably relevant evidence in its defense,” distinguished this case from *Bell*.

In addition, the Court agreed with the employer that other state and federal case law did not support the trial court’s use of representative sampling. Indeed, one federal court noted that it could not locate any case “in which a court permitted a plaintiff to establish the nonexempt status of class members, especially with respect to the outside sales exemption, through statistical evidence or representative testimony.” *In re Wells Fargo Home Mortg. Overtime Pay Lit.*, 268 F.R.D. 604, 612 (N.D. Cal. 2010).

The Court found the trial court’s plan fundamentally flawed. There was no statistical foundation for the initial assumption that 20 out of 260 was a sufficient size for a representative sample by which to extrapolate either liability or damages. It pointed out that neither party suggested the plan; rather, the trial court appeared “to have arrived at this procedure on its own, without reliance on legal precedent or the advice of expert witnesses.”

The Court also pointed out that, while the appeal in this case was pending, the U.S. Supreme Court rejected a similar approach taken by the Ninth Circuit in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Wal-Mart*, a class of 1.5 million female workers was certified based on representative sampling studies. The Supreme Court disapproved the “Trial by Formula” procedures authorized by the Ninth Circuit and stated that a “class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” This is “essentially what happened” in this case and the California court found the result “untenable.”

### *Trial Procedures Denied Due Process*

The Court found that the trial court’s procedures denied the employer due process because they were fundamentally unfair. By its evidentiary rulings, the trial court “hobbled” the employer’s ability to prove its

affirmative defense. For example, the employer repeatedly attempted to introduce evidence pertaining to non-RWG members, such as sworn declarations and deposition testimony in which they averred to having spent the majority of their time outside the office. This evidence would show they were classified correctly under Wage Order No. 4 and refute their potential claims for recovery. The trial court determined the evidence was not relevant because it did not comport with the plan. However, its rulings on relevancy should have been based on the testimony in the courtroom, not the plan, the Court held. By constructing a set of ground rules in the “interest of expediency” that unfairly prevented the employer from defending itself, according to the Court, the trial court denied it due process. A “trial in which one side is almost completely prevented from making its case does not comport with standards of due process,” the Court stated.

The Court also noted that the 43% margin of error in the expert’s damages calculations also implicated a due process violation because the results were so unreliable as to undermine the validity of the judgment.

Finally, the Court ruled that the trial court erred in denying the employer’s motion to decertify the class because of the underlying flaws in the plan and the various due process violations discussed above.

Accordingly, the Court reversed the trial court’s judgment and ordered the case decertified as a class action.

## What This Means for California Employers

*Duran* may be a positive development for California employers. Its significance may depend on its probable resolution by the California Supreme Court, and its interpretation by other California courts.

This is the first decision to analyze thoroughly the employer’s due process rights in a class action. It provides employers and their counsel a guide to trial procedures that raise due process red flags and, barring California Supreme Court review, will provide authority for employers (and courts) when developing trial management plans in class actions.

However, the case does not necessarily preclude the use of statistical sampling or representative testimony as a way to try class action litigation. Jackson Lewis attorneys are available to answer questions about this decision and class action cases.

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