



Wage and Hour in 2026: Newest Trends and the Importance of Data

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AGENDA

- Federal Developments
 - State Law Developments: Key Jurisdictions
- Importance of Data
- Practical Takeaways and Action Items

INDEPENDENT CONTRACTORS VS. EMPLOYEES

Is the worker an employee under the FLSA or an independent contractor in business for themselves?

- Opportunity for profit or loss depending on managerial skill
- Investments by the worker and the employer
- Permanence of the work relationship
- Nature and degree of control
- Whether the work performed is integral to the employer's business, and
- Skill and initiative
- Is worker economically dependent on the employer for work?

INDEPENDENT CONTRACTORS VS. EMPLOYEES (CONT.)

Stricter test in California: The “ABC” Test:

Under the ABC test, a worker is considered an employee and not an independent contractor, unless the hiring entity **satisfies all three** of the following conditions:

- 1) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- 2) The worker performs work that is outside the usual course of the hiring entity’s business; **and**
- 3) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

EXEMPT VS. NON-EXEMPT

Threshold: Salary Basis Test – Differs from State to State

- Executive
- Professional
- Administrative
- Computer
- Highly Compensated Exemption (“HCE”)

Note: No highly compensated or “combined” exemption in California, Pennsylvania, Connecticut

-- New York?

WHAT IS COMPENSABLE WORK?

- Under the FLSA, time that needs to be compensated is time where the individual is suffered or permitted to work.
- The workday includes the time between when an employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities and includes time spent on activities integral and indispensable to those principal activities.

WHAT IS COMPENSABLE WORK? (CON'T.)

- Boot up/power down time
- Donning and doffing
- Training time
- Travel Time
- On-call time
 - Waiting to be engaged vs
 - Engaged to wait



WHAT IS COMPENSABLE WORK? (CON'T.)

- Walking time
 - PA: Walking through facility to reach a time clock or retrieve required equipment may be compensable time
- Security Checks
 - Federal law vs State Law



OVERTIME

- Pay at the “regular rate of pay” for all time worked over 40 hours in a workweek
- CA: Over 8 hours in one day
- Nevada: Over 8 hours in a one day if employee makes less than 1.5x minimum wage

REGULAR RATE OF PAY

What needs to be included?

- Non-discretionary bonus
 - Flat sum bonus (treated differently in CA)
 - Production bonus
- Commissions, shift-differentials, cash and non-cash prizes / awards / gift cards
 - *Not included: vacation, sick, holiday, other PTO, discretionary bonus*

Payroll Register Detail Only							
Pay Dates from 01/01/2024 to 07/31/2024 - Sorted by Employee Name							
[REDACTED]		Net Amt: 1,474.17	DD Amt: 1,474.17	Check Amt: 0.00	Voucher: 001472	Check Dt: 03/29/2024	
Emp ID : V69603	Dept : 1499	EE Number:		Check No: 13442838		Period: 03/10/2024-03/23/2024	
Pay Type	Hours/Units	Rate	Pay	Taxes	Tax Amounts	Deductions	EE Ded Amts
COMMISSION	1.00	174.3200	174.32	FEDERAL INCOME TAX	0.00		
MEAL PREMIUM API	1.00	18.5000	18.50	FICA - MEDICARE EE	23.73		
OVERTIME	0.50	27.7500	13.88	FICA - OASDI EE	101.48		
REGULAR	77.30	18.5000	1,430.05	CA INCOME TAX	19.37		
				CA DISABILITY	18.00		
Total Pay	79.80		1,636.75	Total Taxes	162.58	Total Deductions	

REGULAR RATE OF PAY (RROP) CALCULATIONS ARE A COMMON BLIND SPOT

Earnings and Hours	
Bonus Earned in Week	\$1,000
Regular Hours	40
Overtime Hours	10

FLSA Method	
Bonus RROP = Bonus / (Regular + Overtime Hours)	\$20
Owed Overtime Premium = 0.5 * Bonus RROP * Overtime Hours	\$100

California DART (Flat-Sum) Method	
Bonus RROP = Bonus / Regular Hours	\$25
Owed Overtime Premium = 1.5 * Bonus RROP * Overtime Hours	\$375

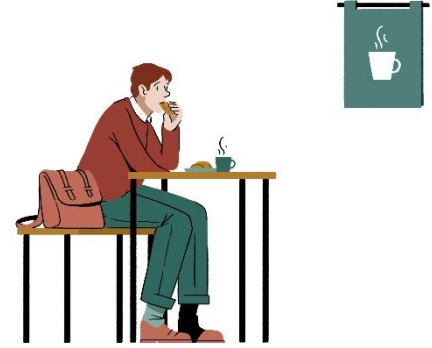
Additional Considerations: Bonus earned over multiple weeks, impact on other payments that depend on the RROP (e.g., sick pay in CA), and statutory penalties.

DAY RATES

- Paying a flat rate regardless of how many hours are worked in a day
 - Important: Day rate does not equal independent contractor
- Still eligible for overtime

MEAL AND REST PERIODS

- CA, CO, IL, KY, MA, MN, NV, OR, WA
- Meal Periods (CA)
 - Must be 30 minutes in length and start no later than the end of the fifth hour of work
 - Actual start and end times must be recorded to the minute
- Rest Breaks (CA)
 - Triggered after working 3.5 hours
 - 10 minutes of paid time for every 4 hours worked, or fraction thereof



ROUNDING

- Time Records: Masking Problem

Type of Punch	In	Meal Out	Meal In	Out	Issue?
Rounded	9:00 am	12:30 pm	1:00 pm	5:30 pm	Masked Non-Compliant Meal Period

Type of Punch	In	Meal Out	Meal In	Out	
Actual Punch	9:01 am	12:31 pm	12:59 pm	5:28 pm	

BUSINESS REIMBURSEMENT

- Certain states (including CA, IL, MN, MT, NH, SD) require that employees be reimbursed for all reasonably incurred business expenses
 - Tools? Uniforms? Cell Phones? Home office?
- NY and PA require reimbursement if promised in offer letter, employment agreement or company policy



IMPORTANCE OF DATA: WHAT DATA SETS?

- Scheduling records
- Timekeeping records, including certifications
- Wage statements
- Payroll records, including all forms of compensation
- Onboarding documents and personnel files: waivers, advances and repayments
- Handbooks and other timekeeping/payroll policies

IMPORTANCE OF DATA: LITIGATION AND INVESTIGATIONS

- **Exposure modeling for class and collective actions:** Sampling versus the full population, violation rates, and damages and penalty calculations
- **Early-stage defense:** Use data to challenge boilerplate complaints



COMMON DATA ISSUES IN WAGE AND HOUR MATTERS

- **Missing data or data storage issues.**
- **Failure to include all relevant compensation into the regular rate.**
- **Incorrect calculation of overtime hours (e.g., failure to aggregate hours for employees working on multiple sites during the day or week).**
- **Lack of a common identifier to link the timecard and payroll systems.**
- **Recalculation of the regular rate (“true-ups”) due to incentive or bonus compensation earned over multiple pay periods.**
- **Meal period/rest break state requirements.**

LAYERING MULTIPLE DATA SOURCES TOGETHER TO RECREATE EMPLOYEE'S DAY

Source 1: Time Clock

In Time	8:00
Out Time	12:03
In Time	13:05
Out Time	17:02

Source 2: Security Access

Parking	7:52
Suite	7:58
Suite	11:20
Suite	13:03
Suite	14:37

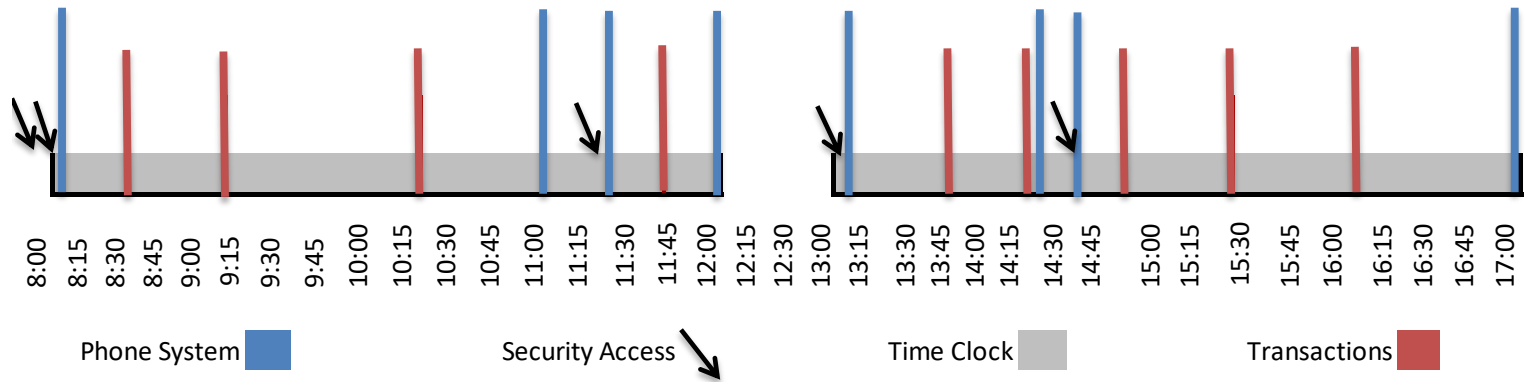
Source 3: Phone System

Log On	8:02
Log Off	11:10
Log On	11:21
Log Off	12:00
Log On	13:06
Log Off	14:20
Log On	14:37
Log Off	17:00

Source 4: Transactions (Sales)

Sale	8:30
Sale	9:07
Sale	10:15
Sale	11:43
Sale	13:45
Sale	14:17
Sale	14:48
Sale	15:22
Sale	16:04

LAYERING MULTIPLE DATA SOURCES TOGETHER TO RECREATE EMPLOYEE'S DAY



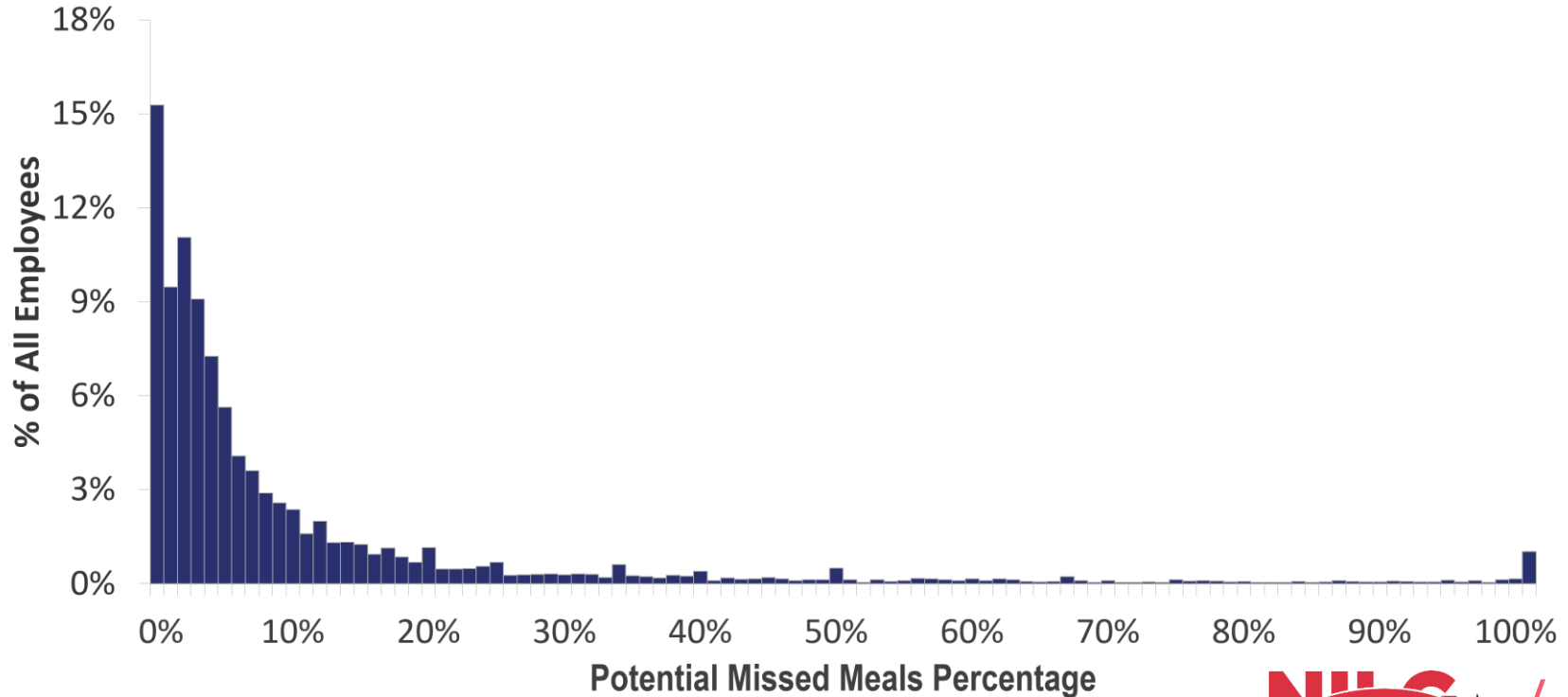
Once combined this information allows measures of potential off-the clock time to be derived

LEVERAGING DATA TO EVALUATE MEAL PERIOD CLAIMS

Action	Date	Time	Data Source	Begin Time	End Time	Duration
Punch In Early	04/13/25	5:52	Time			
Shift Start Time	04/13/25	6:00	Time			
No Activity for 30+ Minutes	04/13/25	12:19	Activity Data	12:19	13:10	50.4
Punch Out Early	04/13/25	15:17	Time			
Punch In Early	04/14/25	5:56	Time			
Shift Start Time	04/14/25	6:00	Time			
No Activity for 30+ Minutes	04/14/25	11:55	Activity Data	11:55	12:52	56.3
Shift End Time	04/14/25	16:30	Time			
Punch Out	04/14/25	16:38	Time			
Punch In Early	04/15/25	5:48	Time			
Shift Start Time	04/15/25	6:00	Time			
No Activity for 30+ Minutes	04/15/25	11:26	Activity Data	11:26	12:24	58.2
Shift End Time	04/15/25	16:30	Time			
Punch Out	04/15/25	17:05	Time			
Punch In Early	04/16/25	5:46	Time			
Shift Start Time	04/16/25	6:00	Time			
No Activity for 30+ Minutes	04/16/25	12:04	Activity Data	12:04	12:43	39.1
Punch Out Early	04/16/25	16:19	Time			

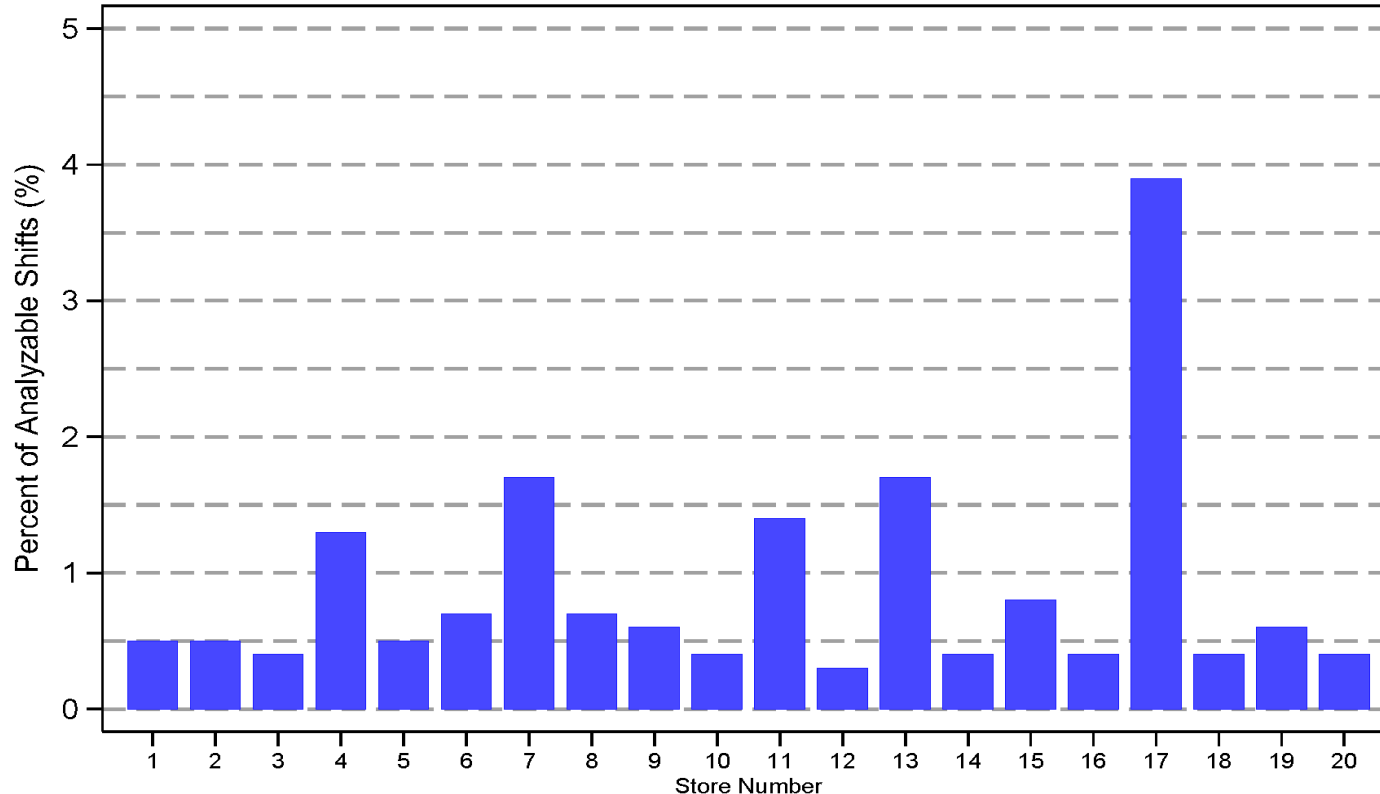
OUTLIERS ALSO APPEAR IN W&H MATTERS

INVESTIGATING OUTLIERS IS A BEST PRACTICE



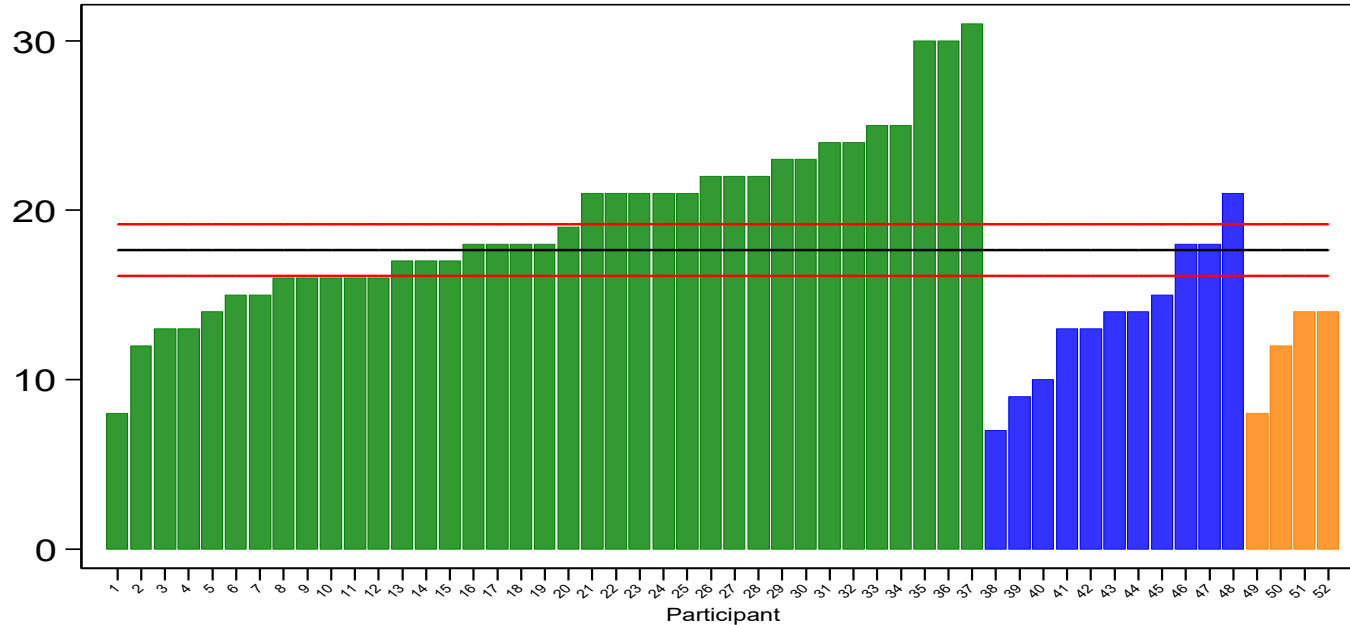
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INVESTIGATING OUTLIERS IS A BEST PRACTICE

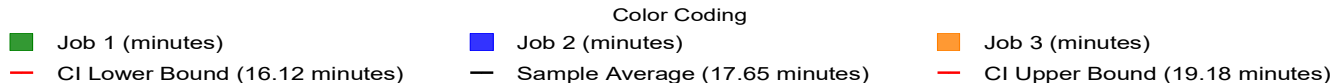


Question:
**Impact of Managerial Edits
on Hours Paid**

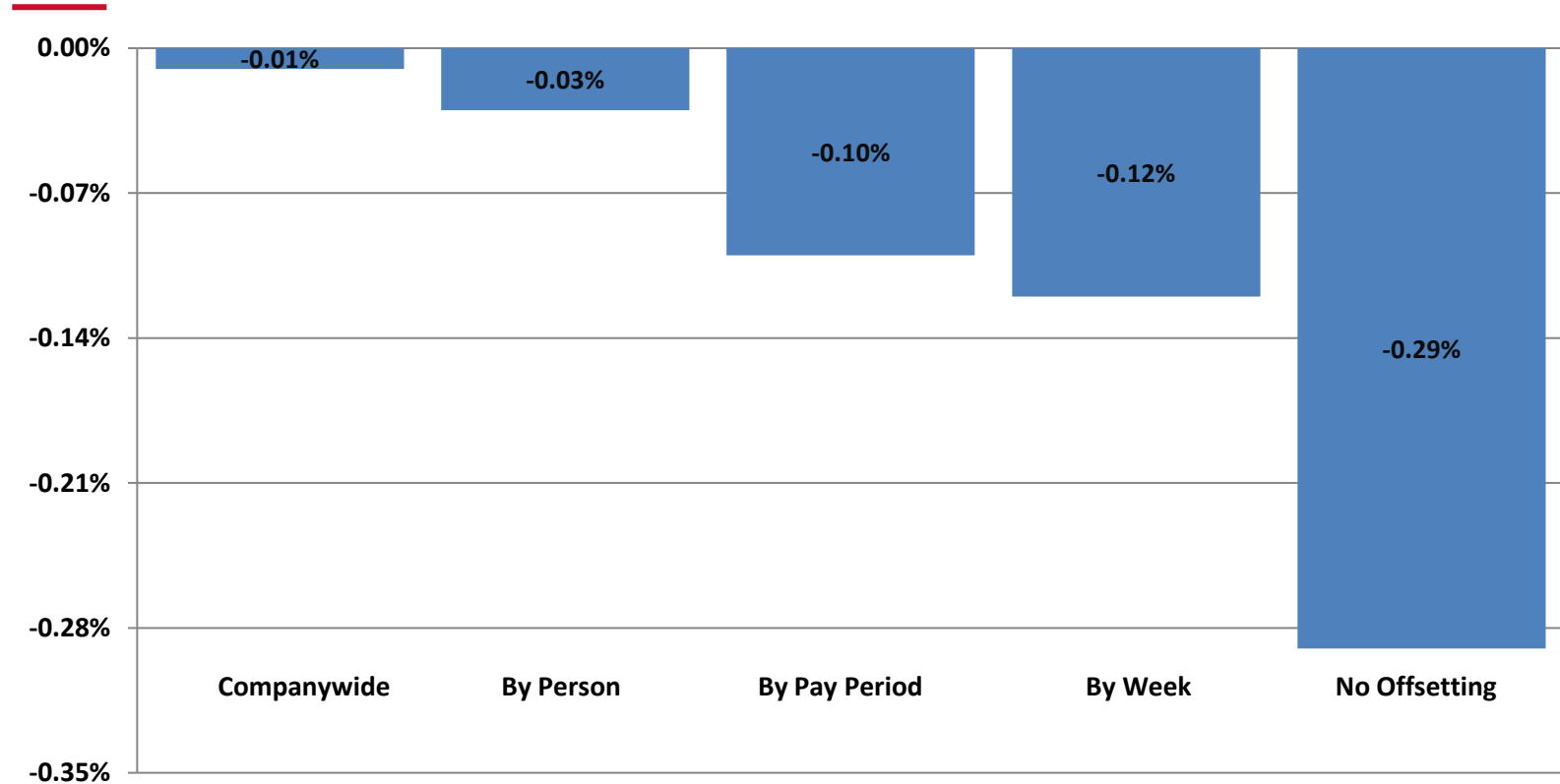
OFF-THE-CLOCK WORK CLAIMS: INDIVIDUALS VARY



Question:
How Long Does it Take
to Walk from the Gate
to the Clock?



EVALUATING ROUNDING CLAIMS



PRATICAL TAKEAWAYS: AUDITS

- Review all handbooks and policies and ensure proper training regarding same
- Audit timekeeping and payroll systems and retain results of the audit (retain data dictionaries)
- Review worker and exemption classifications
- Prioritize the most common claims first: regular rate, off-the-clock work, rounding, meal and rest breaks, and wage statements.
- Consider arbitration agreements with class action waivers

QUESTIONS?



Thank You

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