

**ANSWERS TO FREQUENTLY ASKED QUESTIONS
For Persons Considering Participating in the Case**

This has been updated as of 10/26/00 because of rulings by Judge Lipscomb to issues presented to him at a hearing that was held on September 25. (One ruling was not made until the 13th October.)

See Question 6, and new questions 12 - 14.

1. If I decide to participate in this case and make a wage claim, what practical protection will I have against retaliation?

The State Whistle Blower statutes provide that no employer may retaliate against an employee for bringing a claim against the employer. The statute would cover you. These types of cases are litigated all the time, and an employee's ability to succeed depends on the proof of retaliation, which usually comes down to analyzing the employer's motive for disciplining, terminating, or failing to promote an employee. As a practical matter, the employer will have to prove that it had a good faith business reason for its actions, and that your participation in a case did not effect its decision.

John Hoag has previously filed three different class action lawsuits against the State of Oregon for violations of the Fair Labor Standards Act. Approximately 100 employees participated in those three cases. Of those employees, only one has raised an issue of retaliation. The lead plaintiff in one case was promoted during the litigation. In summary, the odds of even having a claim of retaliation based on this track record are approximately one percent.

2. What do I do if I am pressured at work not to participate in this case?

You should immediately call the Law Office of John Hoag, (541) 342-8100 or 1-800-964-1783. The Attorney General's Office is committed to ensuring that State employees are not subject to retaliation for participating in this case. Retaliation only creates more work for that office. In those cases John Hoag will go over the facts with the employee, and he will present the problem to the Attorney General's Office and demand an immediate proactive response to eliminate any retaliation.

3. Why was the process that provides for resolving each overtime claim with the potential for arbitration, set up as opposed to a dispute over a claim being handled as part of a class action lawsuit in court?

This is the most efficient way to handle the case. The State suggested this process because it did not want to be overwhelmed with this case settling at once in a traditional matter. Normally a class action lawsuit proceeds to trial or settlement with the court, in the end, approving all of the claims, costs, and attorney's fees at one time. In a case of this size, that would create a tremendous backlog of work for the State, which motivated

it to suggest setting up a system to resolve all of the claims on an individual basis. In return for this process, the State agreed to pick up the costs of having an entity, which the parties agreed would be Oregon Survey Research Laboratory, process the claims in a neutral and fair manner, and the State agreed to pay the costs of mediation and arbitration if those steps are utilized. In a normal class action lawsuit, each member of the class would be responsible for a share of those costs. This is a significant financial savings to the class as OSRL's cost estimates for processing the claims are in excess of \$350,000.00.

In addition, in a pretrial conference, Judge Lipscomb indicated that he would have appointed a special master to hear these claims if this alternative procedure had not been adopted. Usually the plaintiff class would pay the costs associated with the special master.

Lastly, John Hoag has been litigating cases for over 25 years. He uses the arbitration process extensively in his labor practice and believes that it has a number of advantages which will benefit Plaintiffs in this case, which are the speed in which the case can proceed as opposed to ordinary litigation and relative inexpensiveness of the process. The only disadvantage to arbitration is that the decision of the arbitrator is final and not subject to appeal except on extremely rare grounds, such as an allegation that the arbitrator exceeded his or her statutory authority or was subject to bribery. However, no litigation system offers a guarantee of perfect "justice."

4. How was OSRL, Oregon Survey Research Laboratory, appointed to process my claim? Isn't OSRL a State entity?

The use of OSRL was suggested by John Hoag. In previous private sector litigation, John Hoag was introduced to Professor Gwartney who was hired by a large economist firm to train its personnel in how to do objective interviews for processing wage and hour claims. Professor Gwartney's expertise was accepted at trial of that case by a U.S. District Court Judge. John Hoag had approached Professor Gwartney to ask her to assist him in processing the claims of the Plaintiff class before the State even suggested a neutral entity to process the claims. John Hoag suggested that OSRL be retained, and since various branches of the State, including the Department of Administrative Services, have used OSRL in the past for surveys, the State agreed to do so.

5. What if I do not have records showing the overtime I actually worked during those time periods? How do I proceed with my claim?

OSRL is developing a format to assist you in making your best possible estimates of the overtime hours that you worked during the relevant time period. Follow its instructions, and your estimate will be as accurate as it could be. There is plenty of case law through litigation under the Federal Fair Labor Standards Act that if an employer did not require its employees to keep exact time records, then employees' estimates are

usually accepted by a court, or in this case an arbitrator, unless the employer can specifically disprove them.

6. What about weeks when I did not work 40 hours?

Under the State statute each week is determined separately. If you actually worked over 40 hours in a week, then you are entitled either overtime pay or compensatory time if both you and the State agree to it. Those weeks where you did not work 40 hours will not offset the weeks when you did.

(New) The State argued that if employees are to be paid at the rate of time and one half instead of half time (see question 12) then each week where an employee actually worked less than 40 hours and did not utilize other paid time, such as vacation time, holiday time or sick time, to bring the employee's totals up to 40 hours, that the State should be able to claim an offset against other weeks when the employee actually worked overtime. The Court denied the State's theory for this. However, the State is going to appeal this ruling. Therefore the questionnaire asks you to make your best estimates for weeks when you actually did not work 40 hours in a week and did not use paid time to supplement your hours of work. (This will affect you only if Plaintiffs prevail on appeal on their claim to be paid at time and a half, and the State then prevails on its theory that it is entitled to this offset.) John Hoag's best prediction is that the State will not prevail on this issue on appeal. However, in litigation, there is no certainty.

7. What about weeks when I took time off for vacation time, holiday time, or sick time?

Under the State statute only hours actually worked count toward the 40 hour overtime threshold. Paid time off in any form does not count. In other words if you were sick for eight hours on Monday and came in and worked eight hours on Saturday, even though if you were an hourly employee you would have been paid for eight hours of time and a half pursuant to most collective bargaining agreements, because this case is based on a statute, you would have no claim for overtime during that work week, assuming that you worked no other extra hours.

8. If I'm already retired, will this affect my retirement pay?

Yes it will. The definition of "salary" in the PERS statutes requires the State of Oregon to recalculate retirement benefits if monies are later added back into employee's salary for the relevant years in question. For those employees who retired on the "formula" this could be significant, as it could affect their highest 36 months of pay. For those who retired on the "money match" option this will not be as significant, but it will still increase their retirement benefit.

9. Suppose the State challenges my estimate of my hours worked? How will I prove that it is accurate?

There are many ways to do so. Co-workers or former supervisors could support your claims. Computer records could help. Building security systems might show after hours work. John Hoag's litigation experience is that an arbitrator will accept your estimates unless the State comes forth with evidence specifically disproving it. A mere, "we don't believe this claim" without specifics to back it up will probably be unsuccessful.

10. What process will occur if the State challenges my claim?

The State will provide information to John Hoag showing why it questions your claim. John Hoag will meet with you and go over the State's objections, and you will decide whether to accept some of them and modify your claim, or whether to proceed through the litigation process. The choice as to whether to litigate or attempt to settle the matter will be made by the client, namely you. At that point, you will start working with John Hoag, or David Snyder, and list potential evidence that can help support your claim.

If the State decides to take your deposition, which is a pretrial sworn statement, John or Dave will prepare you for the deposition and be there during it. If mediation is requested by the State, then John or Dave will be with you during the mediation process and work with you in deciding whether or not to accept a settlement. If the case does not settle, either John or Dave will prepare you for that process in presenting your claim to an arbitrator.

11. John Hoag will petition the Court to approve attorney's fees of 25% of every claim. Isn't that a lot of money?

Maybe. First, we don't know what 25% will be until this case is resolved. Secondly, it is traditional for attorneys to take class action litigation on a contingency fee basis. Under Oregon law, absent a statute or contract, the plaintiff or the person that brings a suit must bear the expense of litigation. That is why contingent fee agreements are used. In this particular case, the State's failure to pay you overtime does not give rise to a statutory claim which would entitle you to attorney's fees. There is no statutory provision for attorney's fees against an employer who violates the overtime statute in question, ORS 279.340.

Part of this lawsuit is also for those employees who terminated their employment and did not receive the proper amount of termination pay. This has been referred to as the "penalty pay" part of the lawsuit. Its statute does provide for attorney's fees. Given Judge Lipscomb's ruling, only those employees who left the state after the case was sent back to the Circuit Court, January 28, 2000, will qualify. See the progress report on the Web Page dated August 25, 2000, which describes that issue, and the Court's ruling in detail. Only time spent on that part of the case can be awarded as attorney fees. When divided among those Plaintiffs who receive penalty pay, it won't be very much.

Lastly, John Hoag's retainer agreement with the lead Plaintiff in the case, David Young, provided that attorney's fees of an award of 33 percent if a lawsuit had to be filed and for 40 percent if the case had to be appealed. That has already occurred. This is a fairly traditional part of the contingency fee agreement, and many attorneys charge 50 percent of an award if they have to undertake an appeal. In this case, John Hoag has indicated to David Young and to other lead Plaintiffs that he will reduce his request to 25 percent. This is subject to approval by Judge Lipscomb.

On December 1, 2000, a hearing will take place on the attorney's fees request. At that time, any Plaintiff may raise an objection to John Hoag's request for attorney's fees. This request includes the work done by other attorneys on the case for which John Hoag will be responsible, and for Court costs advanced to date, (filing fees, and Appellate fees) for which John Hoag will also take responsibility.

12. On October 13, Judge Lipscomb ruled that employees will not be paid time and one half of their hourly rate for work performed over 40 in a work week, but will only be paid on a fluctuating "half time" method which will be described below. Why did the Court rule this way, and what are the chances of this being overturned on appeal?

There are no reported cases discussing how damages are to be calculated under ORS 279.340 which is the statute upon which this lawsuit is based. The State argued that damages should be calculated using an FLSA method called the "half time method" which has been adopted by some Federal Courts in FLSA cases. The theory behind this method is that employees had agreed to work varying hours at a fixed salary, and therefore, the employer has already paid them for all of the straight time that they worked. Therefore, only a half time payment is owed.

The method of calculation of this half time is somewhat complicated. An employee's annual salary is taken and divided by 52 to determine a weekly salary. The number of hours actually worked each week is divided into that salary to get an hourly rate which will vary each week, depending upon the hours worked. For instance, an employee who works 40 hours in a week will have one hourly rate, but the next week if the employee works 50 hours, the hourly rate will be less. Each week, the hours in excess of 40 are then multiplied by .5 of that week's hourly rate. Therefore, if an employee works only 45 hours in a work week, those 5 overtime hours would have a higher hourly rate than if the employee 60 hours in a work week with 20 overtime hours.

Plaintiffs' believe that the plain language of the State statute does not allow for this method of computation and are appealing the Court's decision to the Court of Appeals. In the meanwhile, this case will proceed with the State making payments based upon the "half time" rate. If Plaintiffs are successful in overturning this decision, the State need only calculate the difference between the "half time" rate and time and one half, and additional payments will be made.

While there is no certainty in litigation, John Hoag's best prediction is that this case will be reversed with a payment at the time and one half rate. The case will take approximately one to two years to wind its way through the appellate process and resolve this issue.

13. The Court ruled that those employees who terminated their employment with the State on or after January 27, 2000 are entitled to penalty pay, which is one month's salary. Why did the Court pick that date for determining which employees were and were not entitled to penalty pay?

The State statute that is relevant to this issue, ORS 652.150, holds that if an employer willfully does not pay an employee all wages due when the employee terminates, that the employer can be liable for up to 30 days wages, unless the employer pays the wages that were owed within the 30 day time limit. In this particular case, the State argued that it does not owe any employee penalty pay because it didn't know how much it owed employees. The State also argued that until the Appellate Court's decisions were final, which reversed the Circuit Court's order dismissing this case, that it did not owe the amounts in question, because it was hopeful that the Supreme Court would reverse the Court of Appeal's decision. Plaintiffs argued that the statute has been interpreted to mean that if an employer makes a "knowing decision" not to pay wages that are due, then the employer is liable for penalty pay. Plaintiffs have argued that the penalty pay should apply to all employees who terminated their employment with the State after the statute came into effect that required the State to pay overtime, i.e., after June 6, 1995. Plaintiffs are appealing this issue to the Court of Appeals, and the State may cross appeal, arguing that it doesn't owe penalty pay to any employee. If it does so, then the penalty pay may not be paid out until the appeals have been exhausted.

14. The Court ruled that any time, which I did not work during my meal period is a deduction from my hours of work no matter how long. Doesn't State law require an employee to have a 30 minute uninterrupted meal period, or if that does not occur, then all of the meal period must count as hours worked?

State law does so hold. However, Judge Lipscomb ruled that that statute does not apply to this overtime case. Plaintiffs believe that Judge Lipscomb's ruling was wrong but decided not to appeal this issue for two reasons. The first is it would significantly delay getting the survey out, and make the survey form very complicated. Plaintiffs would have to estimate how the Court's ruling affects their hours of work and end up with two columns for overtime claims. Plaintiffs anticipate that would delay the case for at least a month or more.

The second and most important reason for not appealing is that the representative Plaintiffs, when consulted, all agreed that for the average employee, this calculation of meal periods would not make a significant effect on the overtime claim. All were supportive of the decision of the attorneys that this issue was not worth appealing given that most Plaintiffs would be making estimates. John Hoag consulted with a representative State Police Plaintiff as those employees generally have exact records of

