

FRIDAY MONDAY TUESDAY WEDNESDAY **TODAY**

TODAY'S COLUMNS LIBRARY

[Search >>](#)

[Previous](#) [Next](#) [Bookmark](#) [Reprints](#)

Computers Don't Sue for Overtime Pay...Yet

Eli M. Kantor has extensive experience as an attorney in private practice. He represents employers and employees in all aspects of labor, employment and immigration law. He can be reached at (310) 274-8216 or at ekantor@beverlyhillsemploymentlaw.com



Zachary M. Cantor, an associate at the Law Offices of Eli Kantor, represents employers and employees in all aspects of labor, employment and immigration law. He also writes and illustrates children's books. Visit his website at: www.zacharycantor.com



With the coming of Watson - I.B.M.'s new synthetic *Jeopardy!* contestant - jobs that require discretion and independent judgment may become a relic of the pre-digital age. This forecast may only exacerbate the plaintiffs' angst in *Hodge v. Aon Insurance Services*, 2011 DJDAR 3006, whom the 2nd District Court of Appeal designated as exempt administrative employees.

Kenneth Hodge was a class representative in a class action against his former employer, Cambridge - the parent company of Aon Insurance Services. Hodge routinely worked more than eight hours

in a single workday or more than 40 hours in a workweek. But he was not paid overtime compensation because Cambridge designated him as an exempt administrative employee. His job required him to investigate claims, review evidence, determine coverage questions, set reserves, and authorize settlement or litigation of claims. Hodge and his cohorts claimed they were misclassified, and they demanded overtime pay.

In rendering its holding, the court relied on the direct language of the Industrial Welfare Commission's Wage Order No. 4 (as amended in 2001), rather than now-distinguished precedent. In its broadest terms, Wage Order No. 4 requires an employer to pay overtime wages to an employee who works more than eight hours per workday or more than 40 hours per week, unless he or she falls under an exemption. An employee falls under the administrative exemption if that employee: "performs office or non-manual work directly related to management policies or general business operations" of the employer or customers; *and* "customarily and regularly exercises discretion and independent judgment."

This most recent version of Wage Order No. 4 expressly states that exempt and non-exempt work shall be construed similarly to federal regulations. This includes 29 Code of Federal Regulations Section 541.205, which provides that the phrase "directly

NEWS **RULI**

Thursday, March 10

Law Practice
Howrey Partners
After two poor financial years, Howrey Partners announced a serious decline that led to the firm scattering to other firms. Howrey LLP voted Wednesday to dissolve the firm as of next Tuesday for a final release.

Government
Governor's Plan
Gov. Brown's plan to reorganize state agencies calls for liquidating some holdings.

Employee Benefits
Employers Wake Up
Employers in California are being hit with more costly unemployment claims in light of the continuing recession and the growing state budget deficit.

International
Challenges in Colombia
With dozens of shipwrecks and thousands of sailors' lives, how many dollars paid in ransom? By David School.

Litigation
Suit Over Drug Patent
For the second time, a federal court in Oakland has thrown out a suit against 21 drug companies.

Entertainment & Media
Shorter Film Releases
As studios look to cut costs, they are scrambling to negotiate deals with independent kinds of Hollywood.

related to management policies or general business operation" of an employer "limits" the administrative exemption to those persons "who perform work of substantial importance to the management operations of the business." This means that the work that so-called white-collar workers perform (i.e. advising, planning, negotiating, and promoting) "affects policy" or "affects business operations to a substantial degree."

In light of the 2001 version of Wage Order No 4, the court distinguished Hodge's circumstances from the insurance adjusters in the leading case on insurance adjusters and the administrative exemption, *Bell v. Farmers Insurance Exchange* (2001) 87 Cal.App.4th 805. The court in *Bell* applied an "administrative/production worker dichotomy" in analyzing whether an insurance adjuster was exempt under former Wage Order No. 2. But the *Hodge* court rejected the suggestion that every enterprise can be subjected to "a simplistic parsing of its primary business function, for purposes of labeling administrative versus production-level, rank-and-file workers." Instead, the dichotomy is but one analytical tool, and all the facts must be considered.

I.B.M.'s executives have said that they intend to commercialize Watson to provide a new class of question-answering systems in business, education and medicine.

In *Bell*, the insurance adjusters' authority to settle claims was generally set at \$15,000 or lower. And on matters of greater importance, the claims representatives would gather information and pass it to their supervisors, who would dictate the resolution.

In *Hodge*, however, the court reasoned that the claims representatives did not act as mere "paper pushers," "conduits of information to supervisors," or "go-betweens" in conveying data to attorneys. Rather, they were highly skilled, specialized employees doing "important" and "critical" work, which, if not done well, could lead to substantial interference with business operations and even failure or bankruptcy of a client. Moreover, Hodge and his co-workers regularly made "independent conclusions about elements such as causation and appropriate compensation, using their personal judgment and discretion and specialized training, experience and skills." Basically, Hodge had the authority to use his own discretion in cases involving sums approaching \$1 million.

Turning back to the computer that may make workers like Hodge obsolete, Watson cannot make such decisions - at least not the current model. For example, on day two of the *Jeopardy!* challenge, host Alex Trebek gave a clue in the category "U.S. Cities." The clue was, "Its largest airport is named for a World War II hero; its second largest for a World War II battle." Both human contestants correctly answered: "What is Chicago?" Watson didn't just name the wrong city; its answer, Toronto, is not even in the United States. This kind of blunder would surely lead to the substantial interference with business operations that Hodge was employed to avoid.

The ability to exercise discretion and independent judgment means discerning relevant from irrelevant facts. But Watson doesn't understand relevance at all. It only gathers information and measures statistical frequencies. And so Watson cannot exercise the discretion and independent judgment that the administrative exemption requires. Still, many exempt workers are using computers to bolster their performance, and even replace their personal judgment and discretion. And this may

Real Estate
Real Estate Move
White O'Connor Fir
to stay at its current
another 10 years.

International
The Wrong Way
U.S. courts have dis
law when dealing w
Sloss of Santa Clara

Labor/Employme
When Is Workpl
Unlawful?
An action should qu
main motivation bel
Thomas L. Dorog

Government
Failed Vote Leav
The Senate failed to
Wednesday, while I
remain miles apart
regulatory agencies
host of other progr

Law Practice
Jenner & Block N
Linda D. Kornfeld, v
office of Dickstein &
inception in 2005, h
the insurance litigat
Jenner & Block LLP

Labor/Employme
Computers Don't
Pay...Yet
Exemption, my dea
classification may cl
technology. By **Eli** l
Cantor of the Law

Law Practice
Perkins Coie Hir
Perkins Coie LLP sc
project-developer
McCutchen LLP in 6

affect their exempt status.

In fact, many insurance adjusters now use a program called "Colossus" to evaluate a wide range of insurance claims. Colossus uses data that the adjuster inputs, and calculates the average settlement - taking into account similar past settlements. The adjuster plugs in factors such as vehicle damage, expected length of medical treatment, allowable cost of treatment, and many other variables to calculate the value of a personal injury claim.

Nevertheless, Colossus cannot compute the full extent of the claimant's actual pain and suffering. That involves a human touch. For example, Colossus cannot fully compute the cost of injuries to a secretary who was T-boned at an intersection, breaking her arm and leg and killing her husband. Colossus cannot understand how her injuries might affect her future work performance or her ability to hold and nurse her baby, or the difficulty of raising that child without a partner. Certainly, it is up to the adjuster to consider those human conditions (or, perhaps, a jury). But insurance companies are increasingly trusting Colossus' impartiality over human empathy for maintaining a reliable bottom-line.

Colossus has replaced the personal judgment and discretion, experience and skills that make adjusters like Hodge exempt. And therein lies the problem. Of course, programs like Colossus streamline settlements - promoting optimal efficiency. But in striving for efficiency, the insurance company may sacrifice prudence.

And so, computer programs have not only already begun to supplant independent judgment and to limit discretion, they even evaluate the value of human life. To be sure, I.B.M.'s executives have said that they intend to commercialize Watson to provide a new class of question-answering systems in business, education and medicine. And Watson's capabilities may evolve enough to rival human judgment and dwarf the faculties of Colossus.

Regardless of whether or not a computer program can truly replace the "personal judgment and discretion" of an exempt employee, its implementation will likely affect worker classification. Had the plaintiffs in *Hodge* used a program like Colossus, they would have been stripped of their independent judgment and discretion - and, thus, their exempt status.

For now, employers should think twice before replacing exempt workers with the likes of Watson. Employers who replace human judgment and discretion with computers and their algorithms may sacrifice common sense. And because those workers then become non-exempt, employers will also likely have to pay overtime where overtime was not previously due. Even though the *Hodge* decision reaffirms the administrative exemption, employers still must be extremely careful about whom they classify as exempt under Wage Order No. 4. And Watson will be of little help in making this legal distinction.

[Previous](#) [Next](#)

Legal Ethics & Professionalism: Attorney May Lose License
A lawyer who married a woman who should be disbarred for \$339,000 to his fan club ordered.

Professional Liability: Sanctions Cut for Pellicano
A state appellate court imposed a \$220,000 sanction on a lawyer associated with impugning Anthony Pellicano's fees, which were deemed frivolous.

Intellectual Property: The Patentability of a Field
It is easier to secure a patent in a field if the application detail is possible. By *Amgen v. H. Lundbeck*, Fenwick & West.

Government: Another File for Deputy District Attorney
Deputy District Attorney filed into the race for Los Angeles Attorney General on Wednesday.

Corporate: Claims Against S&P
A federal judge has ruled that investors claimed that S&P violated California's Bond Market Fund-backed securities law.

Family: Stay Sought in Gay Marriage Act
The Department of Justice sought a stay in a challenge to the Marriage Act in the Supreme Court. Congress more time to intervene in the case.

Letter to the Editor: Bankruptcy Lawyer Subject Themselves
Gary Watt of Archdiocese of San Francisco, "Volunteer Attorney for Bankruptcy Court's

Corporate
Judge Puts Kibos
A federal judge den
approval of a settler
Stores Inc. and sub
rental services of N

**Entertainment &
Lawyers Help St**
Summit Entertainm
studio behind the h
financing to pay off

Judicial Profile
Kathleen M. Jacc
Superior Court Commis
Riverside County (Hem

Public Interest
Shades of Free S
UC Berkeley, groun
movement of the 19
of campus protest
into the center of th
zeal as the protest p