

FRIDAY MONDAY TUESDAY WEDNESDAY **TODAY**

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

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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.

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## 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.

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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

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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.

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**Legal Ethics & Professionalism: Attorney May Lose License**  
A lawyer who married a woman while on the bench should be disbarred, a panel of the state supreme court ruled. The lawyer received a \$339,000 to his family as part of a settlement ordered.

**Professional Liability: Sanctions Cut for Attorney Pellicano**

A state appellate court has reduced a \$220,000 sanction imposed on attorney Anthony Pellicano for failing to appear at a hearing. The sanctions were deemed frivolous.

**Intellectual Property: The Patentability of Software**

It is easier to secure a patent in the software field if the application provides detail possible. By A. Fenwick & West.

**Government: Another File for Attorney**

Deputy District Attorney filed for bankruptcy protection into the race for Los Angeles County Attorney on Wednesday.

**Corporate: Claims Against S&P**

A federal judge has ruled that investors who claimed that Standard & Poor's violated California law by selling a Bond Market Fund backed securities were not harmed.

**Family: Stay Sought in Gay Marriage Case**

The Department of Justice has asked the Supreme Court to stay in a challenge to the Defense of Marriage Act in the case of *Windsor*. Congress more time to act before the court intervenes in the case.

**Letter to the Editor: Bankruptcy Law**

**Subject Themselves**  
Gary Watt of Archdiocese of San Francisco is a "Volunteer Attorney" for the Bankruptcy Court's

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