

5 Considerations For Using Survey Data In Employment Cases

By **Kristen Backor and Abby Turner** (September 2, 2020, 2:58 PM EDT)

Surveys are occasionally used by attorneys to collect data and information to be used as a part of employment litigation; for example, surveys may be used as a template for a series of declarations on behalf of all or a sample of plaintiffs or witnesses on behalf of the defense.

Furthermore, as the COVID-19 pandemic continues to limit interactions and reduce the feasibility of in-person interviews, written surveys remain a valid way for attorneys and consultants to collect data. The data arising from such a series of surveys can be a valuable part of building your case, especially when compiled into statistical evidence rather than anecdotal examples; however, a substandard survey leaves you open to criticism and can instead become a tool used against your case.[1]

For example, in 2014, the U.S. District Court for the Central District of California in *Sirko v. IBM Corp.* rejected the results of the plaintiffs' 47-question survey on work duties intended to certify the class. The court determined the survey "lack[ed] basic indicators of reliability," including that it "was devised and administered by plaintiffs' counsel, not a statistician or expert." [2]

Below are five considerations that should be taken into account when drafting any survey.



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1. Appropriate Ranges

Ranges (the allowable set of responses) used in a survey need to be carefully determined for their intended purpose. Providing respondents with the ability to give a valid and accurate response is a core part of survey design and helps reduce satisficing, in which respondents settle for satisfactory answers — rather than optimizing, in which respondents provide their most accurate response. If the provided range does not include the respondent's actual answer, such as capping responses at a maximum lower than the possible options, taking the survey becomes a more frustrating and confusing experience.

In addition, ranges give the respondent information about what is seen as normal or typical. For example, if asking about time spent donning or doffing protective gear, a respondent who believes

he/she spends the average amount of time for their location may look to the middle of the range as a likely option. Thus, the two illustrative lists below may result in very different averages.

<u>Minutes Spent</u> <u>Donning/Doffing per Shift</u>	<u>Minutes Spent</u> <u>Donning/Doffing per Shift</u>
<input type="radio"/> 0 minutes	<input type="radio"/> 0-5 minutes
<input type="radio"/> 1-2 minutes	<input type="radio"/> 6-10 minutes
<input type="radio"/> 3-5 minutes	<input type="radio"/> 11-15 minutes
<input type="radio"/> 6-10 minutes	<input type="radio"/> 16-20 minutes
<input type="radio"/> >10 minutes	<input type="radio"/> >20 minutes

The first suggests that a typical amount would be three to five minutes per shift, while the second suggests 11 to 15 minutes. Pretesting — interviewing potential respondents about the survey — can help inform understanding of appropriate ranges for a given question.

In addition, conducting a soft launch — first sending the survey to a smaller sample of people to identify errors before sending it to the full target population — and monitoring the survey during fielding can identify if many people seem to be choosing the top or bottom end of the scale, suggesting a potential need for more granularity or an adjusted range.

2. Appropriate Time Frames

In addition to ranges, time frames can be key for ensuring accurate recollection of past events. If a survey does not provide specific time frames, it can be difficult to interpret the magnitude of the responses.

As an exaggerated example, if conducting an employee engagement survey about diversity and inclusion, asking someone if they have interacted with colleagues of different racial/ethnic backgrounds does not tell you if someone regularly interacts with diverse coworkers, or just makes it a point to say hello to everyone at the annual holiday party.

In addition, memory recall for such questions may be poor if respondents are required to think across many years. It is also important to provide a time frame that fits the behavior being assessed.

For example, if conducting a survey about how often shift supervisors provide emergency management coverage, the time frame used (such as "in the past year") would likely be very different than if surveying employees about the frequency and length of their rest breaks, where daily or weekly might be more appropriate. Time frames that do not align with respondent thinking lead to mental math on the part of the respondents, which can cause survey fatigue and lead to errors in calculation.

For example, asking, "How many trips have you made to the office coffee machine in the past month?" will likely require many respondents to calculate number of times per day and then calculate to determine times per month.

Finally, there may be legal considerations that should inform the time frame, such as the statute of limitations or the timing of a change in a relevant workplace policy. Pretesting can again be helpful to understand whether the time frames provided are appropriate for the questions being asked, as well as ensuring appropriate knowledge of legal considerations.

3. Acquiescence Bias

Acquiescence bias refers to a tendency among respondents to agree, rather than disagree, with questions or statements provided in a survey. This behavior can be driven by several factors, including respondent personality traits (e.g., agreeableness), social desirability (wanting to appear a certain way to the asker), and satisficing (in this case, failing to consider a question fully enough to disagree).

One example might be the difference between asking someone how frequently they take rest breaks (i.e., once per shift, twice per shift, etc.) rather than asking them to agree or disagree with a statement like "I often ...," which would be subject to acquiescence bias. Questions need to be posed carefully to consider the potential impacts of acquiescence bias and how it might skew the final outcomes, particularly for research that will be put forward in litigation.

4. Leading Questions

Similarly, research in a litigation setting needs to be monitored for leading question language. In the survey literature, as opposed to the legal sphere, leading questions are those questions put or framed in such a form as to suggest the answer sought to be obtained by the person being asked.

As an example, think about a respondent presented with a statement like, "I understand that according to company policy, I am not supposed to perform any work for the company without recording it as work time." The intent of this statement would be evident — particularly if respondents are familiar with the litigation underway — and the wording seems to encourage respondents to agree to indicate an appropriate understanding of company policy.

The wording in this example also precludes more nuanced findings — such as a local understanding that supersedes company policy — which may further contribute to claims by the opposing side that a question has been asked in such a way as to lead to a specific conclusion.

5. Double-Barreled Questions

Double-barreled questions are those that ask multiple questions but require only one response. With these types of questions, answering can be a challenge if the responses to the different parts of the question are different.

For example, if you ask a respondent if they typically spend time working off the clock before their shifts or during their lunch breaks, and the respondent has only worked off the clock before their shifts, they may struggle to determine the appropriate response — should they still answer affirmatively even if doing so is only accurate for part of the question?

Similarly, interpretation can be difficult since it is not necessarily clear whether the particular response is being given in response to a single part of the question or the full question. In our example, the analysis cannot indicate whether the respondent has worked off the clock before their shift, during their lunch break or both. For some litigation issues, this nuance may not be important; however, this issue should still be considered during the survey-writing phase to ensure that the survey is clear and easy to answer for respondents.

While these five factors should always be considered when drafting a survey that will be used to inform

employment (or any type of) litigation, this is by no means an exhaustive list of ways in which such surveys can fall short.

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[1] In her "Reference Guide on Survey Research," professor Shari Seidman Diamond provides several examples of surveys that failed to be accepted by courts for a variety of reasons, including confusing or misleading questions, leading questions, and other core issues. Seidman Diamond, Shari. "Reference Guide on Survey Research." In Reference Manual on Scientific Evidence, 3rd ed., 388, Washington, DC, The National Academies Press, 2020, at <https://www.nap.edu/read/13163/chapter/9#388>.

[2] William C. Martucci, Ashley N. Harrison, "Using Statistics Effectively in Wage and Hour Litigation: An Employer's Offensive and Defensive Tactics," Corporate Counsel Business Journal, December 16, 2014, at <https://ccbjournal.com/articles/using-statistics-effectively-wage-and-hour-litigation-employers-offensive-and-defens>. See also, Rebecca Kirk Fair and Laura O'Laughlin, "Ensuring Validity and Admissibility of Consumer Surveys," ABA Section of Litigation, Consumer Litigation, Practice Points, March 31, 2017, at <https://www.americanbar.org/groups/litigation/committees/consumer/practice/2017/ensuring-validity-and-admissibility-of-consumer-surveys/>.