

Why leave money on the table?

By [L.M. Sixel](#)

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Wells Fargo will be paying out \$15 million in back overtime wages to nearly 4,500 current and former home mortgage consultants. That works out to about \$3,400 apiece, after the legal fees are paid.

But another 11,200 current and former loan officers who worked for Wells Fargo or its predecessor, Wachovia Corp., are not going to get a dime from the negotiated settlement. That's because they didn't "opt in" to the collective-action lawsuit when they had the opportunity.

In the end, only 28 percent of the current and former mortgage loan officers will be compensated for the late nights and weekends that they put in on the job but weren't paid for, said Houston attorney Rhonda Wills, who represents the workers who sued the bank.

"The sad thing is that 28 per- cent is a pretty high participation rate," said Houston employment lawyer Rex Burch, who points to recent reports that puts the average "opt-in" rate closer to 16 percent.

The number who join a collective-action lawsuit vary considerably depending upon the circumstances, said Burch, who specializes in wage-and-hour cases but is not connected to the Wells Fargo case.

If a labor union is involved, the opt-in rate is upward of 90 percent, he said. But if it is a nonunion lawsuit that involves a lot of current employees, then the opt-in rate is "abysmal."

Many employees are fearful of joining a lawsuit against their employer even though federal law prohibits employers from retaliating against those who take action to recover wages, Burch said.

That includes instances in which employees are notified they're entitled to receive a certain amount of back pay and all they have to do is sign a document acknowledging the payment, he added.

The Wells Fargo case got its start when seven ex-employees went to Wills to complain about the bank's practice of classifying its mortgage officers as exempt from overtime pay.

Soon after the court certified the case as a collective action, Wills sent out notices to current and former employees who would be eligible for up to three years of back wages. She also put up a website to seek out the bankers.

But as with many other back-wage claims, it appears many of those notices were ignored.

Lack understanding

Some people don't fully understand their rights and don't understand they can recover their back wages, Wills said.

Or they don't understand they may be owed a significant amount of money in unpaid wages. Most of the time, the notices go out early in the process to stop the statute of limitations from continuing to run.

(Back-wage claims can go back as far as three years; joining a lawsuit essentially stops the clock from eroding those lost wages.)

At that time, employees have no idea that they might have a four-, five- or six-figure check coming to them when the lawsuit is resolved. The amount depends, in part, on the time each individual employee spent on the job.

It's not uncommon for someone who gets a big legal packet in the mail to assume that it's much like a consumer settlement for, say, defective batteries that will net them a coupon for a new pack of batteries a year or two down the road.

"Without some understanding what is in it for them, people blow it off," Burch said.

Time slips away

It's also a matter of inertia.

Typically, an employee has 60 days to sign the documents and return them to be included in the case.

While some folks send it back right away, others figure they'll get around to it later. But they tend to forget as the notice languishes on the mail table along with all the magazines, bills and fliers also collecting dust.

It's not unusual for Wills to get packets of documents signed and returned months after the deadline. By then, it's too late.

She has noticed that states on the West and East coasts, those with a lot of their own wage-and-hour laws, have higher participation rates.

"People who are more informed about their rights tend to send them right in," she said.

Sometimes it's a matter of not being able to find the former workers. In some cases, companies hired day laborers and contend that they don't have their names or addresses.

One time Burch rented a billboard near a day labor hall asking anyone who worked for a particular company to call a special hot line.

"It was completely in-effectual," he said.

Campaigning against

And there are employers who lead campaigns against a pending wage-and-hour lawsuit, much like they do against union campaigns, Burch said. They hold captive audience meetings, they ask employees to sign statements that they won't participate and send their lawyers out to have one-on-one conversations with the employees.

The idea is to get across the message that if you join this lawsuit, it will ruin the company, Burch said.

While Burch is often able to get sanctions imposed by the court to stop the interference, by then the damage is done.

Instead of getting 20 percent participation, he said, it drops in half to 10 percent.