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## Telecommuters are suing employers

### New wave of suits over pay, benefits.

By Sheri Qualters  
STAFF REPORTER

A NEW CLASS action brought by telecommuters of Cigna Healthcare of California Inc. who say they were denied overtime and severance pay highlights the growth of a new type of legal dispute facing companies across the nation.

The Cigna case, which alleges that the company denied former home-based medical claims processors overtime and mileage compensation for traveling to and from mandatory meetings during the workday, follows a flood of cases filed by auto insurance claims adjusters in the past several years.

Newer cases have been filed by computer technical support workers and pharmaceutical sales representatives.

Cases involving work-at-home information technology workers, insurance employees and pharmaceutical sales representatives are clustered in California. Other cases have cropped up in Colorado, Illinois, Missouri, New Jersey, New York, Ohio and the District of Columbia in the past few years.

The ranks of full-time telecommuters in the United States spiked from 8.8 million in 2003 to 12.4 million in 2004, according to Scottsdale, Ariz.-based WorldatWork, a professional society and research organization for human resources professionals.

Although 2005 numbers dipped slightly to 12.2 million workers, the organization predicts that telecommuting numbers will climb for 2006, based on the strength of burgeoning employer acceptance of the practice and the accessibility of hand-held wireless communication devices, said Rose Stanley of WorldatWork.

The number of Americans who perform any part of their job from home has also climbed in the past couple of years to 45.1 million in 2005, compared with 41.3 million in 2003.

### 9th Circuit turns tide

Key victories scored by lawyers represent-

ing auto insurance claims adjusters in the California appeals courts over the past few years are threatened by a recent 9th U.S. Circuit Court of Appeals decision. In *re Farmers Insurance Exchange, Claims Representatives Overtime Pay Litigation*, 466 F.3d 853 (9th Cir.).

The court ruled that insurance claims representatives are exempt employees. The plaintiffs filed a petition for rehearing, and the court ordered the defendant-appellees to file a response.

Plaintiffs' lawyer Steven Zieff of San Francisco-based Rudy, Exelrod & Zieff said that it's "factually incorrect" that all insurance claims representatives are classified by the U.S. Department of Labor as exempt employees.

Barnes Ellis of Stoel Rives' Portland, Ore., office, a defense lawyer on the Farmers Insurance Exchange team, questioned whether all of the company's employees would truly prefer to be nonexempt employees earning overtime.

"Farmers management believes many claims representatives who do work from home like control of their hours and the ability to work when it's convenient," Ellis said. "If they are treated as nonexempt, it will change for many of them their lifestyle and how much freedom and control they really have over customizing their workday."

The barrage of overtime pay cases against insurance companies continues in other venues, including in Colorado federal court with a multidistrict litigation case against American Family Mutual Insurance Co. In *re American Family Mutual Insurance Co. Overtime Pay Litigation*, No. 06-17430 (D. Colo.).

Zieff, a plaintiffs' lawyer on the *American Family* case, said that overtime cases involving insurance claims representatives have "increased greatly" since 2001 and 2004 California appeals court rulings that



GOLDSMITH  
SCHWARTZ: Cigna  
treated its work-at-  
home employees as  
independent contractors.

culminated in a \$90 million jury verdict and a \$210 million payout against Farmers Insurance Exchange. *Bell v. Farmers Insurance Exchange*, (2001) 87 Calif. App. 4th 805, 820; *Bell v. Farmers Insurance Exchange*, 115 Calif. App. 4th 715, 735 (2004).

Defense attorneys in the *American Family* case, from Biegling, Shapiro & Burrus of Denver; Boardman, Suhr, Curry & Fields of Madison, Wis.; and McKenna Storer of Chicago, did not respond to

requests for interviews.

American Family Insurance Group spokesman Steve Witmer said that the Madison-based company "won't comment on the case while it's still in litigation."

### Opening 'Pandora's box'

The Cigna Healthcare case began as a severance dispute, said plaintiffs' attorney Thornton Davidson of the Fresno, Calif.-based ERISA Law Group LLP. It morphed into a wage-and-hour case when the firm learned that employees were not reimbursed for travel time during the workday and were not paid when the computer system was down, despite the expectation that they would stand by during computer outages.

The case alleges that Cigna Healthcare violated the Fair Labor Standards Act as well as California wage and hour laws. Davidson believes many more overtime cases related to telecommuting are on the horizon. *Swagerty v. Cigna Healthcare of California Inc.*, No. 06-01598 (E.D. Calif.).

"We believe that the work-at-home relationships are still being refined and there's still the potential for abuse out there," Davidson said. "I don't know if we're going to open a Pandora's box, but we've touched on a critical issue."

Cigna has yet to file a response to the Nov. 8 complaint, and spokeswoman Gloria Barone Rosanio said Cigna is not commenting on the case "at this time."

The complaint suggests that Cigna Healthcare treated its work-at-home employees as independent contractors, which may have led to its present legal troubles, said defense attorney Sara Goldsmith Schwartz of Andover, Mass.-based Schwartz Hannum, a labor and employment boutique that represents management.

"Most companies with a large work-at-home work force do offer the same benefits and wage and hour opportunities that they do to other employees," said Schwartz. "That's what struck me as different [about the Cigna case]."

### More overtime suits

James Finberg of Lief Cabraser Heimann & Bernstein in San Francisco, who was part of the plaintiffs' trial team in the most recent *Farmer's Insurance Exchange* case with Rubin, also has seen telecommuter overtime claims crop up in the information-technology sector.

Two of Finberg's other cases involve a mix of telecommuter and call-center plaintiffs. He settled a case for \$24 million against Computer Sciences Corp. in El Segundo, Calif., in April 2005. A case filed against Armonk, N.Y.-based International Business Machines Corp. in January was settled recently for \$65 million, according to IBM. *Fred Giannetto v. Computer Sciences Corp.*, No. 03-08201 (C.D. Calif.); *Thomas Rosenburg v. International Business Machines Corp.*, No. 06-00430 (N.D. Calif.).

"The law doesn't differentiate at where you do the job [for overtime]," Finberg said. "The relevant consideration is what are your job duties."

IBM's lawyers, from Jones Day offices around the country, either could not be reached for comment or said the company would not talk about the case. Computer Sciences' lawyers said the company would not comment beyond a press release last year, which stated that "about 30,000 current and former employees would be entitled to make claims from the settlement."

Cases involving autonomous workers who rarely report to an office are also spreading to the pharmaceutical industry.

Pharmaceutical sales representatives shouldn't be exempt because they don't have much discretion or control over their work, said plaintiffs' lawyer David Sanford of Sanford, Wittels & Heisler in Washington, whose firm is handling two cases against Novartis Corp. of New York that were consolidated into multidistrict litigation in a federal court in New York. *In re Novartis Wage and Hour Litigation*, No. 06-MD-01794 (S.D.N.Y.).

liability is usually very large."

### Formal agreements

Companies can minimize the risk of legal disputes with work-at-home employees by inking formal agreements about the work and hours, said Mark Batten, a Boston lawyer for New York-based Proskauer Rose.

Batten, a defense attorney, also recommends timesheets, a written policy banning overtime without prior approval and rules requiring employees to monitor and record work-related activities such logging on or off a computer.

Comparing the cost of hiring an independent contractor to the at-home worker's pay can also bolster a company's analysis of reasonable compensation, he said.

"Just allowing employees to work at home without an understanding about how much time is actually needed for work will get the employer in trouble," Batten said.

Beyond agreements about hours, contracts should include such nitty-gritty details as who owns the computer and what happens if someone slips and falls at home, Schwartz noted.

Davidson said the Cigna Healthcare contract with its former work-at-home employees referenced mandatory meetings, but contained no specific language about how traveling to such meetings would fit with their regularly scheduled work hours.

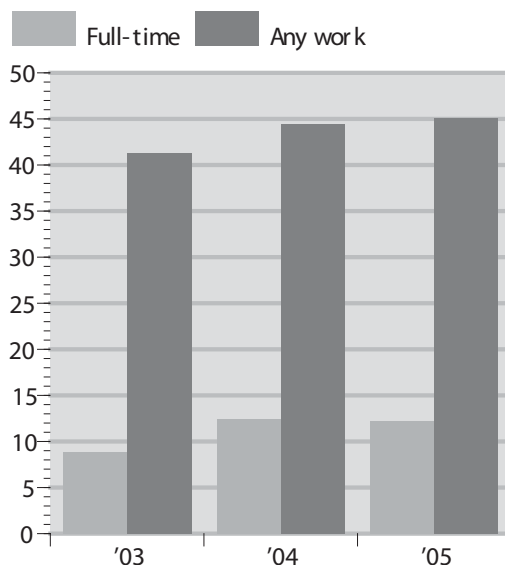
"We haven't fully determined the effect of some of those contractual provisions, but you can't contract around basic wage and hour provisions," Davidson said.

Telecommuting-related litigation is likely to grow in tandem with the telecommuting phenomenon unless companies are careful to treat all of their employees equally, Schwartz said.

"If companies treat them more like regular employees, there will be less litigation," Schwartz said. **NLJ**

## Working From Home

Numbers, in millions, of full-time teleworkers and of employed workers who do any work at home, 2003-2005.



Source: The Dieringer Research Group for the International Telework Association and Council

Sanford argued that the employees are essentially "marketing representatives" who don't actually sell product to doctors and who are required to follow a strict schedule and script.

Richard Schnadig of Chicago's Vedder, Price, Kaufman & Kammholz, the defense counsel in the *Novartis* case, countered that the representatives "do everything short of selling," with a great deal of individual judgment and discretion.

Schnadig also said employee plaintiffs' lawyers are searching for new arenas since discrimination cases aren't as "vibrant" as they once were.

"There's a great big bar of plaintiffs' lawyers out there looking to get rich," Schnadig said. "If you strike it rich in [Fair Labor Standards Act] cases, the