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Defending Wage and Hour Collective Actions Under the FLSA: Overview

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A Practice Note providing an overview of the key issues employers face in defending wage and hour collective actions under Section 216(b) of the Fair Labor Standards Act (FLSA), including certification, decertification, and summary judgment motions, discovery issues, remedies, and settlement. This Note also discusses state wage and hour class actions under Rule 23 of the Federal Rules of Civil Procedure (FRCP) and limitations on class and collective actions.

The federal Fair Labor Standards Act (FLSA) generally allows plaintiffs to assert claims individually or on behalf of similarly situated individuals in a collective action. The aggregate nature of FLSA collective actions means that even relatively small individual claims can add up to significant back pay awards. The procedure governing FLSA collective actions differs in significant ways from class actions under Federal Rule of Civil Procedure (FRCP) 23.

FLSA collective actions are some of the most expensive lawsuits employers can face. Nearly every aspect of an employer's payroll and compensation practices is a potential source of liability, including procedures for clocking in and out, meal and rest breaks, calculating overtime compensation, and the classification of certain employees as exempt. Employers facing an FLSA collective action or hoping to avoid one should therefore understand the nature of collective actions and the issues likely to arise during litigation.

This Note provides an overview of the major issues employers face when defending federal wage and hour collective actions, including certification, decertification, and summary judgment motions, discovery issues, remedies, and settlement. This Note also discusses class actions based on violations of state wage and hour laws and limitations on class and collective actions.

Common Allegations in FLSA Collective Actions

Federal wage and hour collective actions typically fall into two broad categories:

- Compensable time claims in which the plaintiffs allege they were not paid for all compensable working time.
- Misclassification claims in which the plaintiffs allege they were misclassified as:
  - exempt from the FLSA's minimum wage and overtime pay requirements; or
  - non-employees excluded from the FLSA's coverage, such as volunteers and independent contractors.

Compensable Time Cases

Plaintiffs in compensable time cases typically allege that their employers did not pay them for certain tasks, such as:

- Engaging in pre- and post-shift activities (sometimes referred to as preparatory and concluding activities) the plaintiffs claim are compensable, such as:
  - donning and doffing uniforms or safety gear;
  - cleaning equipment; or
  - going through security screening or bag checks.
- Performing work during unpaid meal or rest breaks.
- Attending work-related lectures, meetings, and training programs.
- Working outside of normal work hours, such as working from home after hours.
- Traveling for work.
- Waiting for available work, such as time spent on call.

Off-the-clock (OTC) work is a broad category of claims for work performed but not reported (or under-reported) for timekeeping and payroll purposes. OTC claims can involve various allegations, such as that employees attended mandatory pre-shift meetings before clocking in or worked overtime hours without reporting them.

Compensable time cases may also involve claims that time reported by employees is later reduced by a supervisor (often referred to as shaving time) to avoid, for example, the expense of overtime compensation or exceeding a labor budget.

State and local law may impose different or additional minimum wage and overtime pay requirements. Employers must comply with the applicable federal, state, or local law providing employees with the greatest rights or protections. For more information on state and local minimum wage and overtime pay requirements, see Practice Note, State and Local Minimum Wage Chart and Wage and Hour Laws: State Q&A Tool.

Misclassification Cases

The FLSA exempts from its minimum wage and overtime pay requirements employees who satisfy certain compensation and duty requirements, including employees who satisfy the requirements for certain exemptions, such as:

- The executive exemption.
- The administrative exemption.
- The professional exemption.
- The computer professional exemption.
- The outside sales exemption.

(29 U.S.C. § 213(a)(1).)

The FLSA's minimum wage and overtime pay requirements also do not apply to non-employees, including:

- Independent contractors.
- Unpaid interns.
- Private sector volunteers.

(29 U.S.C. § 203(e).)

Employees in misclassification cases typically allege that their employer improperly classified them as exempt or as non-employees and failed to compensate them correctly as a result.

An employer's burden in misclassification cases historically has been more difficult because of a longstanding principle that FLSA exemptions are construed narrowly against the employers asserting them (see *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Fezard v. United Cerebral Palsy of Cent. Ark.*, 809 F.3d 1006, 1010 (8th Cir. 2016)). The US Supreme Court, however, explicitly rejected the narrow construction rule in 2018. Under *Encino Motorcars, LLC v. Navarro*, courts are to give exemptions "a fair reading" rather than a narrow interpretation (*Encino Motorcars*, 138 S. Ct. 1134 (2018); see also Legal Update, SCOTUS Holds Service Advisors Are Exempt and Rejects Principle That FLSA Exemptions Should Be Construed Narrowly.)

However, stricter construction standards may apply under state or local law. For example, a recent Colorado wage order expressly provides that its exceptions and exemptions are to be narrowly construed (Colorado Overtime and Minimum Pay Standards (COMPS) Order #36, § 8.7). Thus, employers and their counsel should consider any applicable state and local standards when evaluating misclassification claims.

Collective Actions Versus Class Actions

The procedure for bringing an FLSA collective action is governed by 29 U.S.C. § 216(b) (Section 216(b)) (see *Mickles v. Country Club Inc.*, 887 F.3d 1270, 1275-76 (11th Cir. 2018)). Section 216(b) is similar to FRCP 23 to the extent it allows one or more named plaintiffs to bring a lawsuit on behalf of themselves and other potential plaintiffs. However, significant differences exist between FLSA collective actions and FRCP 23 class actions.

For more information on FRCP 23 class actions generally, see Practice Note, Class Actions: Overview.

Opt-In and Opt-Out Procedures

Perhaps the most significant difference between Section 216(b) and FRCP 23 is how members of class and collective actions become bound by the court's judgment.

FRCP 23 class actions generally bind all class members to any final judgment unless they affirmatively "opt out" of the lawsuit (FRCP 23(b)(3), (c)(2), and (e)(4)). By remaining silent, individual members of a class action generally waive their right to file separate lawsuits arising from the same set of facts.

In contrast, an individual wishing to participate in an FLSA collective action must affirmatively "opt in" to the lawsuit. Until the individual files a written consent to join

the lawsuit, they are not considered part of the collective action and are not bound by the court's judgment (29 U.S.C. § 216(b)). Therefore, an individual's silence does not waive their right to file a separate lawsuit under the FLSA, either individually or as a collective action.

FRCP 23's opt-out requirement means that employers usually do not have to defend against multiple class actions brought by members of the same class alleging the same claims. This is not necessarily true for collective actions under the FLSA.

Employers can, however, minimize the burdens associated with litigating multiple simultaneous collective actions. For example, an employer may seek to transfer all related collective actions to a single judge and ask for those actions to be consolidated into one case for trial (28 U.S.C. § 1404; FRCP 42(a)). Alternatively, where several collective actions are pending in different federal judicial districts, employers may seek pre-trial coordination of the lawsuits by the Judicial Panel on Multidistrict Litigation (JPML). The JPML, which consists of seven sitting federal judges, determines:

- Whether civil actions pending in different federal districts involve one or more common questions of fact so that the actions should be transferred to one federal district for coordinated or consolidated pre-trial proceedings.
- Which judge (or judges) and court should be assigned to conduct those proceedings.

(28 U.S.C. § 1407.)

For more information on multidistrict litigation, see Seeking a Multidistrict Litigation (MDL) Transfer Checklist.

Statute of Limitations and Tolling

Another major difference is that the statute of limitations for bringing an individual lawsuit based on the same facts as the class suit is tolled between the time an FRCP 23 class action complaint is filed and the time class certification is denied (see *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1806-09 (2018); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350-51 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 561 (1974)).

In contrast, filing the complaint in an FLSA collective action does **not** toll the limitations period for potential opt-in plaintiffs. Instead, the limitations period continues to run against each member of the putative collective action until they file a written consent to join. (29 U.S.C. § 256; 29 C.F.R. § 790.21(b)(2)(ii); see, for example, *Kutzback v. LMS Intellibound, LLC*, 233 F. Supp. 3d 623, 628 (W.D. Tenn. 2017).) Any potential opt-in plaintiff who does not file a consent by the end of the limitations period generally cannot participate in the lawsuit.

In an individual FLSA case, the statute of limitations runs until the plaintiff files the complaint (29 U.S.C. § 256; 29 C.F.R. § 790.21(b)(1)). However, while named plaintiffs need not file a consent to join in individual FLSA cases, federal courts generally require that they do so in collective actions (see *Acosta v. Tyson Foods, Inc.*, 800 F.3d 468, 472 (8th Cir. 2015); *Contrera v. Langer*, 290 F. Supp. 3d 269, 277-79 (S.D.N.Y. 2018)). Those courts, citing the Portal-to-Portal Act and the Department of Labor's (DOL) corresponding interpretations, typically conclude that in collective actions the statute of limitations is tolled for named plaintiffs on either:

- The date the complaint is filed, if the named plaintiff's written consent is also filed with the court on that date.
- The subsequent date when the named plaintiff's written consent is filed, if it was not filed on the same date as the complaint.

(29 U.S.C. § 256(a), (b); 29 C.F.R. § 790.21(b)(2); see also *Acosta*, 800 F.3d at 472; *Contrera*, 290 F. Supp. 3d at 277-79; *Frye v. Baptist Mem. Hosp., Inc.*, 495 F. App'x 669, 675 (6th Cir. 2012).)

Which document qualifies as a named plaintiff's written consent, however, is not always clear. For example, in *Contrera*, the Southern District of New York addressed an FLSA collective action where the named plaintiff filed the complaint and moved to conditionally certify the action before the statute of limitations had run, but did not file a consent to join form until after the limitations date. The court agreed that the written consent requirement applies even to the named plaintiff in a collective action. (*Contrera*, 290 F. Supp. 3d at 277-80.)

The court noted, however, that it is not clear what form the written consent must take, particularly for named plaintiffs. The named plaintiff's declaration, accompanying his motion for conditional certification, included the statement that he was "Plaintiff in this action" and the declaration was submitted "in support of Plaintiff's Motion" for conditional certification. The court concluded that the declaration qualified as written consent under 29 U.S.C. § 256 and the plaintiff's claim was timely filed. (*Contrera*, 290 F. Supp. 3d at 277-80.)

Courts typically reserve equitable tolling for exceptional circumstances (see *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990); *Sandoz v. Cingular Wireless, L.L.C.*, 700 F. App'x 317, 320-22 (5th Cir. 2017)). In FLSA collective

actions, some courts have also held that, because potential opt-in plaintiffs are not yet parties, named plaintiffs have no authority to seek equitable tolling on their behalf and the necessary individualized inquiry is not practicable (see, for example, *Richert v. LaBelle HomeHealth Care Serv. LLC*, 2017 WL 4349084, at *6-7 (S.D. Ohio Sept. 29, 2017); but see *Struck v. PNC Bank N.A.*, 931 F. Supp. 2d 842, 847 (S.D. Ohio 2013)).

Notice and Approval of Dismissal or Settlement

A class action certified under FRCP 23 may be voluntarily dismissed, settled, or compromised only after court approval (FRCP 23(e)). Class members are also entitled to notice of the dismissal, settlement, or compromise (FRCP 23(e)(1)).

Although the FLSA does not expressly require court approval of settlements, a majority of federal courts have held that unsupervised compromises of certain FLSA claims are invalid (see Settlement).

In contrast to the express notice requirements for settlement and dismissal of FRCP 23 class actions, the FLSA also has no formalized standard for notice (compare *Thompson v. Costco Wholesale Corp.*, 2017 WL 3840342, at *4-6 (S.D. Cal. Sept. 1, 2017) (evaluating the adequacy of notice of a proposed FLSA settlement) with *Bayles v. Am. Med. Response of Colo., Inc.*, 962 F. Supp. 1346, 1348 (D. Colo. 1997) (concluding that the FLSA did not have a notice provision analogous to the notice required for dismissal of FRCP 23 class actions)).

Interlocutory Appeals

Federal appellate courts may allow an interlocutory appeal from an order granting or denying FRCP 23 class certification if a petition for permission to appeal is filed with the appellate court within 14 days after the order is entered (FRCP 23(f)).

The FLSA contains no analogous provision. An appeal from an order granting or denying collective action certification or decertification generally must wait until after final judgment is entered (28 U.S.C. § 1291; *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1104-07 (9th Cir. 2018); *McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1141 (9th Cir. 2007); *Baldridge v. SBC Commc'ns Inc.*, 404 F.3d 930, 931 (5th Cir. 2005) (dismissing appeal of conditional certification for lack of jurisdiction, but noting that the collateral order exception may apply in certain circumstances); *Villarreal v. Caremark LLC*, 85 F. Supp. 3d 1063, 1070-71 (D. Ariz. 2015)).

Although defendants in a collective action may seek interlocutory review of a certification order under 28 U.S.C. § 1292(b), this review is rarely granted (see, for example, *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019) (denying the employer's mandamus petition seeking review of the district court's conditional certification of a collective action that included individuals with arbitration agreements after the district court declined to certify the order for interlocutory appeal and instead reviewing the district court's decision based on the appellate court's "supervisory authority to correct errant caselaw")). Because certification orders are usually unreviewable until after a final judgment is entered in the case, employers may feel immense pressure to settle soon after certification is granted, instead of going to trial and facing a potentially significant damages award. A district court's order granting or denying collective action certification also cannot be reversed unless the trial judge abused their discretion (see, for example, *Jones-Turner v. Yellow Enter. Sys., LLC*, 597 F. App'x 293, 296 (6th Cir. 2015)).

Federal circuit courts are split over whether opt-ins have standing to appeal certification or decertification orders. Individuals opting in to a collective action are party plaintiffs. If a collective action is decertified, the opt-ins are typically dismissed without prejudice and the named plaintiffs proceed individually. The US Court of Appeals for the Third Circuit has held that dismissal on decertification deprives opt-ins of party status and, therefore, of their ability to appeal their dismissal after final judgment. The court explained that once appellate review of the interlocutory decertification decision was available, only the named plaintiffs had authority to appeal. (*Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 229 (3d Cir. 2016).)

The US Court of Appeals for the Ninth Circuit, however, has held that opt-ins do have standing to appeal. In *Campbell*, the court explained that once the decertification order merges with final judgment and becomes appealable, opt-ins have standing to appeal their dismissal. The court explicitly rejected the Third Circuit's appealability reasoning in *Halle* and noted that the US Court of Appeals for the Eleventh Circuit's approach in *Mickles* "tracks our own, and is equally inconsistent with that in *Halle*." (*Campbell*, 903 F.3d at 1104-08.) In *Mickles*, the Eleventh Circuit held that an opt-in becomes a party plaintiff on filing their consent to join and that nothing further, including conditional certification, is required. Therefore, opt-in plaintiffs have standing to appeal a final order. (*Mickles*, 887 F.3d at 1278-79.)

Certifying an FLSA Collective Action

Soon after filing a collective action complaint, the named (or lead or original) plaintiffs typically move to certify the collective action and authorize notice of the lawsuit to other potential plaintiffs. To certify an FLSA collective action, the named plaintiffs must establish that other "similarly situated" individuals exist, a requirement that generally determines whether the case should proceed collectively (29 U.S.C. § 216(b)).

The FLSA does not provide a procedure for evaluating the viability of a collective action and federal courts generally use a two-stage approach (see Collective Action Certification: Two-Stage Analysis). Recently the Fifth Circuit adopted a new standard under which district courts, in lieu of the two-stage conditional certification analysis, must determine at the outset of the case whether merits questions can be answered collectively (see Collective Action Certification: Fifth Circuit Approach). The minority approach is to use an FRCP 23 analogy (see FRCP 23 Analysis).

The statute also does not define "similarly situated," and federal courts typically use either the so-called ad hoc approach or an FRCP 23 analysis (see The Similarly Situated Analysis).

Collective Action Certification: Two-Stage Analysis

Most federal courts examine the viability of an FLSA collective action in two stages. Courts generally refer to the first stage as the notice stage or the conditional, preliminary, or provisional certification stage and the second stage as the decertification stage. (See, for example, *Campbell*, 903 F.3d at 1108-11; *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 535-37 (3d Cir. 2012); *Greenhill v. Wise Alloys, LLC*, 2013 WL 5350662, at *1-2 (N.D. Ala. Sept. 23, 2013); *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 890-91 (N.D. Iowa 2008).)

The First Stage

Shortly after the pleading stage, the named plaintiffs typically move to conditionally certify the collective action and send court-facilitated notice of the lawsuit to potential opt-in plaintiffs. Courts generally make a preliminary determination that the similarly situated requirement is satisfied based on a review of the pleadings, but may also consider declarations and other limited evidence available at this early stage in the litigation. (See *Campbell*, 903 F.3d at 1108-11; *Kramer v. Am. Bank & Trust Co., N.A.*, 2017 WL 1196965, at *11 (N.D. Ill. Mar. 31, 2017); *Frebes v. Mask Rests., LLC*, 2014 WL 1848461, at *2 (N.D. Ill. May 8, 2014); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1262 n.41 (11th Cir. 2008).)

The named plaintiffs' burden on conditional certification is typically described as lenient. Articulated in various ways by different courts, the standard may require, for example, "substantial allegations," a "reasonable basis," or some "factual nexus," and, as described by the Ninth Circuit in *Campbell*, is "loosely akin to a plausibility standard, commensurate with the stage of the proceedings." (*Campbell*, 903 F.3d at 1109; see also *Zachary v. Cobalt Mortg., Inc.*, 2017 WL 1079374, at *2 (E.D. Tex. Mar. 22, 2017); *Serebryakov v. Golden Touch Transp. of NY, Inc.*, 181 F. Supp. 3d 169, 174 (E.D.N.Y. 2016); *Morgan*, 551 F.3d at 1260-61.)

If the court grants conditional certification, notice is sent to putative collective action members, advising them that they must file a consent to participate in the litigation. Courts have broad discretion to facilitate notice to potential opt-in plaintiffs and often require court approval of the format, content, and method of distribution. Courts also typically permit the named plaintiffs discovery sufficient to distribute the notice, such as the names and contact information of potential opt-ins (see Discovery Issues).

For more information on notice in an FLSA collective action, see Practice Note, Notice of an FLSA Collective Action: Key Considerations and Best Practices and Notice of an FLSA Collective Action Checklist.

After the potential plaintiffs are notified of the lawsuit, the parties engage in more extensive discovery (see Discovery Issues).

The Second Stage

At or after the close of relevant discovery, the employer moves to decertify (or the named plaintiffs move for final certification of) the conditionally certified collective action. At this second stage, frequently referred to as the decertification stage, courts conduct a more rigorous evaluation of the similarly situated requirement (see, for example, *Campbell*, 903 F.3d at 1109-10).

While the named plaintiffs' more lenient burden at the conditional certification stage helps ensure prompt notice to potential opt-ins for statute of limitations tolling purposes, the burden is more demanding at the decertification stage, in light of the certification-related discovery now available (see *Campbell*, 903 F.3d at 1109-10; *Morgan*, 551 F.3d at 1261; *Zavala*, 691 F.3d at 537 (comparing the lenient standard applied at the first stage with the burden required for final certification)). Therefore, employers are generally more likely to defeat a collective action at the decertification stage than conditional certification.

If the court finds that the named plaintiffs have demonstrated that the members of the proposed class are similarly situated, the case continues as a collective action. However, if the court determines at this stage that the action presents too many individualized issues, it may decertify the action, dismiss the opt-in plaintiffs without prejudice, and allow the named plaintiffs either to proceed with their individual action or voluntarily dismiss their case (see, for example, *Campbell*, 903 F.3d at 1110; *Alvarado v. City of Los Angeles*, 720 F. App'x 889, 903 (9th Cir. 2018); see also *Mickles*, 887 F.3d at 1276 (affirming denial of conditional certification and remanding to either dismiss the opt-ins without prejudice or allow them to remain in the lawsuit as individual plaintiffs "since discovery has been completed"); *Zuliani v. Santa Ana, LLC*, 2018 WL 3730889 (S.D. Fla. May 25, 2018) (citing *Mickles* and concluding that, following denial of conditional certification, the opt-ins should be dismissed because discovery to that point did not include opt-ins)).

Collective Action Certification: Fifth Circuit Approach

In 2021, in *Swales v. KLLM Transport Services, LLC*, a unanimous Fifth Circuit panel rejected the two-stage analysis in favor of an early determination of whether individuals are similarly situated for purposes of answering merits questions collectively. The court explained that the two-stage analysis is problematic because:

- Even those courts applying the two-stage analysis use different approaches based on the amount of discovery already completed.
- The FLSA says nothing about conditional certification or a two-stage analysis. Conditional certification is a judge-made doctrine.
- Courts cannot ensure that notice is distributed to similarly situated individuals if it is distributed before the court reaches merits issues. Alerting those who are not similarly situated and cannot participate in the collective action "merely stirs up litigation."

(*Swales*, 985 F.3d 430, 438-41 (5th Cir. 2021).)

Applying the Fifth Circuit's new standard, district courts must instead:

- Identify at the outset of the litigation the facts and legal considerations material to determining whether a group of individuals is similarly situated for purposes of answering merits questions collectively.
- Authorize the preliminary discovery necessary to make the similarly situated determination. The amount of discovery necessary will vary from case to case.
- "Rigorously scrutinize" the available evidence to determine whether and to whom notice should issue.

(*Swales*, 985 F.3d at 441-43.)

Application of the Fifth Circuit's new standard, however, raises a variety of practical issues not addressed in *Swales*, including:

- How courts will handle tolling while the parties engage in more lengthy discovery before certification.
- Whether the new standard allows an opportunity for decertification motions.
- How settlement dynamics could be altered by:
  - the effective elimination of conditional certification, which is often a turning point for settlement purposes;
  - the front-loading of potentially costly discovery;
  - an early determination of the scope of the class of individuals who are similarly situated; and
  - a defendant's opportunity to revise workplace policies and limit ongoing liability if the statute of limitations continues to run against putative opt-ins during a potentially lengthy discovery period before certification and notice.

Additionally, the influence of the Fifth Circuit's standard on other circuits remains to be seen.

The Similarly Situated Analysis

The Ad Hoc or Three-Prong Test

The majority approach among federal courts to the similarly situated analysis is the so-called ad hoc test, a three-prong test that involves an evaluation of:

- The disparate factual and employment settings of the individual plaintiffs.
- The various defenses available to the employer which appear to be individual to each plaintiff.
- Fairness and procedural considerations.

(See *Campbell*, 903 F.3d at 1113-14; *Frye v. Baptist Mem'l Hosp., Inc.*, 495 F. App'x 669, 671-72 (6th Cir. 2012); *Morgan*, 551 F.3d at 1261-62; *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 953 (11th Cir. 2007).)

Courts applying the ad hoc test may consider, for example:

- Whether the complained-of conduct was part of a companywide policy or practice.

- The similarities and differences among the plaintiffs, including:
  - their positions at the company;
  - the time period during which they worked at the company; and
  - their work locations and supervisors.
- Whether all plaintiffs will rely on common evidence to prove the alleged violation.
- The extent any conflicts exist between the plaintiffs.

(See, for example, *Pierce v. Wyndham Vacation Resorts, Inc.*, 922 F.3d 741, 745 (6th Cir. 2019) (citing *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584-85 (6th Cir. 2009), abrogated on other grounds by *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016)); *Morgan*, 551 F.3d at 1261-62; *Miller v. MV Transp., Inc.*, 331 F.R.D. 104, 111 (W.D. Tex. 2019); *Clay v. New Tech Glob. Ventures, LLC*, 2019 WL 1028532, at *11 (W.D. La. Mar. 4, 2019).)

While the ad hoc test is frequently endorsed among circuit courts, the Ninth Circuit has concluded that the test is flawed because it:

- Focuses too heavily on similarities among the plaintiffs without considering whether those similarities are material to resolving the plaintiffs' claims.
- Invites courts, in its fairness and procedural considerations prong, to:
  - invoke FRCP 23 requirements, such as adequacy of representation, superiority, and predominance, when those considerations have "no application" to the FLSA; and
  - avoid collective treatment based on perceived inconvenience to the parties or the court.

(*Campbell*, 903 F.3d at 1113-16 (adopting a summary judgment standard for post-discovery decertification motions that overlap with the merits of the underlying claim).)

Similarly, in a recent panel decision, the Fifth Circuit articulated a collective action certification standard that focuses on an early determination of whether individuals are similarly situated for purposes of answering merits questions collectively (see Collective Action Certification: Fifth Circuit Approach).

FRCP 23 Analysis

The minority approach to the similarly situated analysis is by analogy to an FRCP 23 class action. Circuit courts have generally rejected the FRCP 23 analysis, but some district courts use various combinations of FRCP 23's numerosity, commonality, typicality, adequacy, predominance, and superiority requirements (see, for example, *Shushan v. Univ. of Colo.*, 132 F.R.D. 263, 265, 267-68 (D. Colo. 1990) (addressing ADEA claims)).

Courts that reject the FRCP 23 approach generally conclude that the analogy is improper because, for example:

- Section 216(b) collective action and FRCP 23 class action requirements differ in significant ways, including that the FLSA does not use the terms "adequacy" or "typicality" and does not allow for representative actions.
- Differences between Section 216(b) and FRCP 23 reflect Congress's intent to create a distinction.
- Section 216(b) specifically applies to the FLSA, while FRCP 23 has no relationship to specific substantive rights.

(*Campbell*, 903 F.3d at 1112-13; see also *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 132-33 (3d Cir. 2018) (addressing the issue of pendant appellate jurisdiction and concluding that while some factors and evidence necessary to satisfy certification requirements may overlap, certification of an FRCP 23 class is not so "inextricably intertwined" with the certification of a Section 216(b) collective action that it justifies the court's exercise of jurisdiction).)

Courts that do not explicitly adopt an FRCP 23 approach to FLSA collective action certification, however, may still incorporate FRCP 23 concepts in their analysis (see, for example, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013) (stating that no reason exists for having different certification standards and that case law has largely merged the standards); *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010) (applying FRCP 23's predominance requirement to the similarly situated analysis); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (addressing ADEA claims and noting that "little difference" exists among the various approaches for evaluating Rule 23 and FLSA certifications)).

Jurisdictional Challenge to Out-of-State Opt-Ins: Bristol-Myers Squibb Defense

Defendants have frequently relied on the US Supreme Court's 2017 *Bristol-Myers Squibb* decision to argue that

district courts lack personal jurisdiction for the claims of out-of-state opt-ins if an FLSA collective action is filed outside any district where the defendant is incorporated or has a principal place of business.

Bristol-Myers Squibb, a mass tort action filed in California, involved allegations of drug-related injuries by over 600 plaintiffs, most of whom were not California residents. The US Supreme Court rejected the California Supreme Court's view that the defendant's extensive contacts with the state and the similarity of claims supported specific personal jurisdiction. According to the Court, absent any link between the state and each individual plaintiff's claims, the court lacked personal jurisdiction for those claims regardless of their similarity. (*Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017).)

The US Supreme Court did not address whether its rationale applies to class actions where a plaintiff seeks to represent a nationwide class, not all of whom were injured in the forum state. As a result, federal district courts are divided on the applicability of *Bristol-Myers Squibb* to FLSA collective actions. Courts that decline to extend *Bristol-Myers Squibb* to FLSA collective actions typically reason that:

- When federal courts adjudicate federal question claims, the territorial limits on the power of state courts is not at issue.
- An FLSA collective action is a suit between the named plaintiffs and the defendant, brought on behalf of other individuals who are similarly situated. By contrast, in the mass tort context, each individual is a party over which the court must have jurisdiction.
- The FLSA is a federal law specifically addressing employment practices nationwide.
- The FLSA's similarly situated standard is not limited to in-state opt-ins. Denying personal jurisdiction over FLSA claims would split up most nationwide FLSA collective actions and diminish the effectiveness of collective actions as a means of adjudicating those claims.

(See, for example, *Chavez v. Stellar Management Grp. VII, LLC*, 2020 WL 4505482, at *6-8 (N.D. Cal. Aug. 5, 2020); *O'Quinn v. TransCanada USA Srvcs., Inc.*, 469 F. Supp. 3d 591, 612-614 (S.D. W. Va. 2020) (citing cases); *Waters v. Day & Zimmermann NPS, Inc.*, 464 F. Supp. 3d 455 (D. Mass. 2020); *Swamy v. Title Source, Inc.*, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017).)

Other district courts, however, have found that *Bristol-Myers Squibb* applies to FLSA collective actions. Those courts typically take the view that:

- Unlike a Rule 23 class action where a representative party brings an action on behalf of absent class members, FLSA collective action opt-ins are real parties in interest.
- The FLSA does not authorize nationwide service of process, so service can only be effective to the extent the state's long-arm statute allows a court to exercise jurisdiction.

(See, for example, *Weirbach v. Cellular Connection, LLC*, 478 F. Supp. 3d 544, 549-52 (E.D. Pa. 2020) (citing cases); *McNutt v. Swift Transp. Co. of Ariz., LLC*, 2020 WL 3819239, at *7-9 (W.D. Wash. July 7, 2020); *Camp v. Bimbo Bakeries USA, Inc.*, 2020 WL 1692532, at *5-8 (D.N.H. Apr. 7, 2020); *Maclin v. Reliable Reports of Texas, Inc.*, 314 F. Supp. 3d 845, 850 (N.D. Ohio 2018).)

The First and the Sixth Circuits are likely to be among the first to address the issue at the appellate level (see *Canaday v. Anthem Companies, Inc.*, Docket No. 20-5947 (6th Cir. Aug. 19, 2020); *Waters v. Day & Zimmermann NPS, Inc.*, 2020 (2020 WL 4754984, at *3 (D. Mass. Aug. 14, 2020) (certifying an interlocutory appeal)). Because the application of *Bristol-Myers Squibb* to FLSA collective actions often depends on whether opt-in plaintiffs are considered real parties in interest, a circuit court's characterization of opt-ins may offer some insight into how it will approach the personal jurisdiction argument.

Discovery Issues

In cases with large numbers of potential plaintiffs, plaintiffs' counsel often serve written discovery requests early in the proceedings, seeking the names and contact information of current and former employees who may be eligible for inclusion in the lawsuit (see, for example, *Mendoza v. Mo's Fisherman Exch., Inc.*, 2016 WL 3440007, at *19-20 (D. Md. June 22, 2016) (requiring the defendant to provide first and last names, residential addresses, and email addresses of potential opt-ins, but not phone numbers); *Sharma v. Burberry Ltd.*, 52 F. Supp. 3d 443, 465-67 (E.D.N.Y. 2014); *Morden v. T-Mobile USA, Inc.*, 2006 WL 1727987, at *3 (W.D. Wash. June 22, 2006) (citing cases and stating that in an FLSA case "[a]t a minimum, plaintiffs should be entitled to discover the names and addresses of potentially similarly-situated employees of the defendant"); *Hammond v. Lowe's Home Ctrs., Inc.*, 216 F.R.D. 666, 672-73 (D. Kan. 2003); see also Names and Contact Information).

However, even where precertification discovery is granted, courts have discretion to limit the information

that plaintiffs' counsel may obtain (see, for example, *Morales v. Plantworks, Inc.*, 2006 WL 278154, at *3 (S.D.N.Y. Feb. 2, 2006) (limiting discovery to names of non-managerial employees who worked for the defendant during a specific period)).

After conditional certification is granted and notice is sent to potential opt-ins, the parties engage in more extensive discovery. During this phase, the named plaintiff and the defendant may use the full range of discovery devices permitted by the FRCP, including depositions, document requests, and interrogatories (see, for example, *Wellens v. Daiichi Sankyo Inc.*, 2014 WL 7385990, at *2-3 (N.D. Cal. Dec. 29, 2014)).

The parties generally may obtain discovery on the merits as well as certification-related issues. However, courts have discretion to limit the scope of discovery in appropriate cases (FRCP 16 (permitting district courts to modify the discovery procedure); see also *Copp v. Am. Enter. Servs. Co.*, 2011 WL 13232377, at *2-3 (S.D. Iowa Nov. 17, 2011); *Larson v. Burlington N. & Santa Fe Ry. Co.*, 210 F.R.D. 663 (D. Minn. 2002) (bifurcating discovery into certification and merits stages)).

For more information on discovery in FLSA litigation, including discovery from opt-in plaintiffs, see Practice Note, Nonexpert Discovery in FLSA Litigation.

Communications with Potential Plaintiffs

Names and Contact Information

While courts regularly allow discovery of opt-in names and contact information following conditional certification, courts are split regarding the production of that information absent a certification order. Some courts hold that the production is unwarranted (see, for example, *Zheng v. Good Fortune Supermarket Grp. (USA), Inc.*, 2013 WL 5132023, at *8 (E.D.N.Y. Sept. 12, 2013); *Knutson v. Blue Cross & Blue Shield of Minn.*, 254 F.R.D. 553 (D. Minn. 2008)). Other courts have ordered defendants to provide the information even where no conditional certification order is entered (see, for example, *Boice v. M+W U.S., Inc.*, 130 F. Supp. 3d 677, 699 (N.D.N.Y. 2015)).

For more information on discovery of opt-in contact information, see Practice Note, Nonexpert Discovery in FLSA Litigation: Contact Information.

Distribution of the Notice of Collective Action

Unlike FRCP 23, the FLSA does not provide for notice to potential opt-ins in an FLSA collective action and named plaintiffs are generally not required to obtain judicial approval before soliciting them (see *West v. Mando Am. Corp.*, 2008 WL 4493422, at *2 (M.D. Ala. Oct. 2, 2008)). Courts generally also cannot ban plaintiffs' or defense counsel from communicating with potential plaintiffs without showing actual or threatened interference with the parties' rights (see *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-03 (1981); *Gerlach v. Wells Fargo & Co.*, 2006 WL 824652, at *6 (N.D. Cal. Mar. 28, 2006)).

Where appropriate, however, courts are authorized to supervise notice to potential opt-ins and, as a practical matter, courts typically do so (see *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 169-70 (1989); see also Certifying an FLSA Collective Action). Court-facilitated notice is intended to ensure that its form, content, and methods of distribution are timely, accurate, neutral, and informative (see *Hoffmann-La Roche, Inc.*, 493 U.S. at 171-72; *Mark v. Gawker Media LLC*, 2014 WL 4058417, at *8 (S.D.N.Y. Aug. 15, 2014); *Schear v. Food Scope Am., Inc.*, 297 F.R.D. 114, 127 (S.D.N.Y. 2014); *Pendlebury v. Starbucks Coffee Co.*, 2005 WL 84500, at *4 (S.D. Fla. Jan. 3, 2005)).

Parties frequently disagree about the terms of the notice, largely because those terms can determine the size of the potential opt-in class and influence how many opt-ins join the lawsuit. Typically, plaintiffs initiate the notice process by including a proposed notice with their motion for certification. Courts may rule on both certification and the proposed notice at the same time, require supplemental briefing, or require the parties to meet and confer about the terms of the notice, including, for example:

- The limitations period for notice purposes.
- The class definition.
- Treatment of potential opt-ins with arbitration agreements.
- The format and content of the notice.
- The method or methods of notice distribution.

Thus, employers and their counsel should be prepared to address these and other notice terms.

For more information on FLSA collective action notices, see Practice Note, Notice of an FLSA Collective Action: Key

Considerations and Best Practices and Notice of an FLSA Collective Action Checklist.

Other Communications with Potential Opt-Ins

Federal courts frequently hold that, prior to a decision on conditional certification, each side has the right to communicate with potential opt-ins (see, for example, *Richard v. Flowers Baking Co.*, 2016 WL 3039714, at *2 (W.D. La. May 24, 2016) (citing *Gulf Oil Co.*, 452 U.S. at 100-01 and *Kerce v. W. Telemarketing Corp.*, 575 F. Supp. 2d 1354, 1366 (S.D. Ga. 2008)); but see Local Court Rules May Limit Communication with Potential Opt-Ins). Courts also generally reject the argument that potential opt-ins should be afforded protection as parties implicitly represented by counsel because they are not party plaintiffs until they file a written consent (see, for example, *Talamantes v. PPG Indus., Inc.*, 2014 WL 4145405, at *6 (N.D. Cal. Aug. 21, 2014)).

However, courts may prohibit and correct communications that are misleading or coercive or that discourage participation in the lawsuit (see *Billingsley v. Citi Trends, Inc.*, 560 F. App'x 914, 922 (11th Cir. 2014)). Before entering a limiting order, courts generally consider both whether:

- A particular form of communication has occurred or is threatened to occur.
- The communication is abusive, misleading, confusing, coercive, or improper.

(See *Mueller v. Chesapeake Bay Seafood House Assocs., LLC*, 2018 WL 1898557, at *5 (D. Md. Apr. 20, 2018); see also *Rogers v. Webstaurant, Inc.*, 2018 WL 4620977, at *5 (W.D. Ky. Sept. 26, 2018) (distinguishing *Mueller* and denying the plaintiff's request for a remedial notice because the employer's court-ordered corrective email addressing earlier misleading and coercive communications was sent before the collective action notice was mailed).)

For example, courts have:

- Prohibited the defendant employer from future contact with potential opt-ins and invalidated all opt-out forms where the defendant encouraged some opt-ins to drop out of the lawsuit by, for example, threatening existing employees with termination, offering to rehire former employees, and paying an opt-in to encourage others to drop out (*Randolph v. PowerComm Constr., Inc.*, 309 F.R.D. 349, 355 (D. Md. 2015)).
- Sanctioned the employer and prohibited future contact with potential opt-ins where the employer unilaterally sent a misleading and coercive letter that discouraged participation in the collective action (*Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 667-70 (E.D. Tex. 2003)).
- Observed that in FLSA collective actions, district courts rely on broad case management discretion by limiting misleading pre-certification communications and ordered plaintiffs to correct false, unbalanced, and misleading statements on their website (*Maddox v. Knowledge Learning Corp.*, 499 F. Supp. 2d 1338, 1342-44 (N.D. Ga. 2007); see also *Jones v. Casey's Gen. Stores*, 517 F. Supp. 2d 1080, 1086, 1089 (S.D. Iowa 2007)).
- Invalidated an arbitration agreement imposed on the defendant's employees during the pre-certification stage and ordered corrective measures because the arbitration agreement was a "confusing and unfair communication" with the potential opt-ins (*Williams v. Securitas Sec. Servs. USA, Inc.*, 2011 WL 2713741, at *3 (E.D. Pa. July 13, 2011); see also *Degidio v. Crazy Horse Saloon & Rest. Inc.*, 880 F.3d 135, 144 (4th Cir. 2018); *Balasanyan v. Nordstrom, Inc.*, 2012 WL 760566, at *1-2, 4 (S.D. Cal. Mar. 8, 2012)).
- Denied plaintiffs' motion for sanctions where the employer's email to potential opt-ins discussing the litigation and the opt-in notice they were soon to receive did not mischaracterize or otherwise undermine the notice and did not violate the parties' stipulation prohibiting communications with potential opt-ins because it was sent before the opt-in period began (*Talamantes*, 2014 WL 4145405, at *3-5; see also *Valente v. Int'l Follies, Inc.*, 2016 WL 7494258, at *3 (N.D. Ga. Apr. 27, 2016) (denying employer's motion for sanctions where the named plaintiff's texts to potential opt-ins were not coercive, misleading, or improper and did not mention her involvement in the lawsuit)).
- Denied plaintiffs' motion to strike the defendant's affidavits and declarations from potential opt-ins because the plaintiffs did not show actual coercion, misrepresentation, or bad faith. The plaintiffs' argument that the documents were obtained in a "potentially coercive environment" was insufficient to warrant the court's intervention. The court explained that employers are generally free to communicate with unrepresented prospective class members about the lawsuit, including to solicit affidavits concerning the subject matter of the suit. While defendant employers also must be honest and fair, they need not be entirely neutral. (*Cabrera v. Stephens*, 2017 WL 4326511, at *9-11 (E.D.N.Y. Sept. 28, 2017).)
- After finding that the defendant's pre-certification interviews of potential opt-ins were misleading and

improper because, among other things, an interviewee stated that she had not been informed that she may be eligible to recover overtime pay, that her declaration may be used against the interests of the potential class (including the interviewee), that declining to be interviewed would not impact her job, or that she should seek the advice of counsel, the court:

- prohibited both parties from future precertification communications;
- required the defendant to provide the plaintiff with a list of all potential opt-ins already contacted for interviews;
- permitted the plaintiff to depose each individual to determine the content of their conversation with defense counsel and resulting declaration, if any;
- required the parties to draft a notice to potential opt-ins (at defendant's cost) summarizing the plaintiff's claims, defendant's defenses, and the potential outcome if the plaintiff prevailed; and
- required the parties to prepare and distribute a questionnaire (at defendant's cost) concerning each individual's employment, including dates, job functions, hours worked, time spent on particular tasks, and manner of compensation.

(*Mevorah v. Wells Fargo Home Mortg., Inc.*, 2005 WL 4813532, at *1, 3-6 (N.D. Cal. Nov. 17, 2005).)

For more information on discovery from members of a proposed FLSA collective action, see Practice Note, Nonexpert Discovery in FLSA Litigation: Discovery from Members of the Proposed Collective Action.

Local Court Rules May Limit Communication with Potential Opt-Ins

Some jurisdictions have enacted local rules limiting a party's ability to contact potential plaintiffs (see, for example, LR 23.1(C)(2), NDGa.; see also *Braun v. Wal-Mart Stores, Inc.*, 2003 WL 1847695 (Pa. Com. Pl. Jan. 15, 2003) (concluding that under Pennsylvania law, putative members of a state class action are parties until the court declines certification and that Pennsylvania Rule of Professional Conduct 4.2 applies, prohibiting communications with putative members about the lawsuit before a certification decision)). However, there is some debate regarding whether these local rules, which typically relate to class actions brought under FRCP 23, also apply to collective actions. For example, in *Tucker v. Labor Leasing*, a Florida federal district court observed that a (now-repealed) local rule prohibiting contact with unrepresented members in FRCP 23 class actions arguably does not apply in an FLSA collective action (*Tucker*, 872 F. Supp. 941, 949 (M.D. Fla. 1994)).

However, in the context of a conditionally certified FLSA collective action and a certified FRCP 23 class action, the Southern District of New York enforced the limitations in New York's Rule of Professional Conduct 4.2(a), which the court explained applied to class members after certification, not to putative class members not considered clients of class counsel (*Indergit v. Rite Aid Corp.*, 2016 WL 6441566, at *2-5, n.2 (S.D.N.Y. Oct. 31, 2016) (addressing N.Y. Rules of Prof'l Conduct, Rule 4.2 and observing that no statute mandates application of state rules of professional conduct but that neither side disputed their applicability); *Jackson v. Bloomberg L.P.*, 2015 WL 1822695, at *2 (S.D.N.Y. Apr. 22, 2015)).

Similarly, a federal district court in Georgia analyzed the plaintiffs' proposed notice to potential opt-ins to determine if the language was appropriate under the court's Local Rule 23.1 (*Kelsey v. DeKalb Cty., Ga.*, 2016 WL 10893749, at *3 (N.D. Ga. Mar. 9, 2016) (addressing LR 23.1(C)(2), NDGa.); see also *Mevorah*, 2005 WL 4813532, at *5 (addressing Cal. R. Prof. Conduct 3-600)).

Decertifying the Collective Action

As discussed, the general consensus among federal courts is application of the ad hoc (or three-prong) test to the similarly situated requirement (see, for example, *Morgan*, 551 F.3d at 1260-62; *Anderson*, 488 F.3d at 953; *Thiessen*, 267 F.3d at 1103; see also The Ad Hoc or Three-Prong Test). The specific factors considered when evaluating a decertification motion, however, may vary depending on the particular circumstances of the case.

For example, an Alabama federal district court denied decertification of a collective action involving general managers in retail stores who were allegedly misclassified as exempt where all the general managers:

- Had the same job description.
- Attended the same regional meetings and occasional nationwide meetings.
- Were subject to corporate directives and a detailed manual.
- Underwent the same online and in-store training.
- Were paid under the same compensation scheme without any individualized evaluation of their job duties.

(*Kuntsmann v. Aaron Rents, Inc.*, 2013 WL 245958, at *3 (N.D. Ala. Jan. 23, 2013).)

The court also explained that the employer's "single corporate decision" to uniformly treat the general managers as exempt supported a decision to try the case as a single collective action (*Kuntsmann*, 2013 WL 245958, at *3 (citing *Morgan*, 551 F.3d at 1264)).

However, in denying decertification of a collective action involving account managers for a housekeeping services provider, a Texas federal district court noted that a decision to uniformly classify all employees as exempt is not, by itself, sufficient to justify collective treatment. Instead, according to the court, the key is whether the employees performed the jobs pursuant to the employer's prescribed duties or in an otherwise uniform way. In that case, the court found sufficient uniformity in:

- A company-wide job description.
- Uniform standardized job routines.
- Consistent testimony by opt-ins about how the job was actually performed.
- A lack of evidence that person-specific or facility-specific factors caused account managers to have different work experiences.
- The fact that survey questions and declarations from account managers who did not opt in did not outweigh the "significant" evidence of uniformity presented by the opt-ins' testimony.

(*Kelly v. Healthcare Servs. Grp., Inc.*, 106 F. Supp. 3d 808, 813-30 (E.D. Tex. 2015).)

Addressing the employer's individualized defenses argument, the court concluded that special situations, such as three account managers who did not list their FLSA claim in their bankruptcy filings, could be handled without decertifying the class (*Kelly*, 106 F. Supp. 3d at 827-30).

A federal district court in Kentucky concluded that employers may apply company-wide policies, but for those policies to be a factor in determining whether the plaintiffs are similarly situated, they must cause the alleged FLSA violation. The court explained that an employer's classification of employees as exempt is a defense to a claim for unpaid overtime, not the basis for an FLSA cause of action. The cause of action under Section 216(b) accrues only when an employee is owed unpaid amounts. (*Oetinger v. First Residential Mortg. Network, Inc.*, 2009 WL 2162963, at *3 (W.D. Ky. July 16, 2009).)

The *Oetinger* court decertified a collective action involving former mortgage bankers because, for example:

- Some plaintiffs held management positions while others did not.
- General managers had broad discretion to run their teams, so a plaintiff's work could vary depending on their team.
- The court would have to engage in individualized appraisal of the plaintiffs' duties and responsibilities because of the employer's "highly individualized" administrative or executive exemption defenses.
- The disparity between the duties, responsibilities, and amount of work performed by the plaintiffs "probably" negates the benefits of a collective action.

(*Oetinger*, 2009 WL 2162963, at *3-4.)

Similarly, the Southern District of New York takes the view that simply classifying or reclassifying a group of employees as exempt under the FLSA, even if that group is large or nationwide, is not enough by itself to constitute "evidence of a common policy, plan, or practice that renders all putative class members as 'similarly situated' for § 216(b) purposes" (*Brown v. Barnes & Noble, Inc.*, 2018 WL 3105068, at *17 (S.D.N.Y. June 25, 2018) (quoting *Jenkins v. TJX Cos.*, 853 F. Supp. 2d 317, 323 (E.D.N.Y. 2012))).

Even if an employer does not succeed in decertifying a collective action in its entirety, the court may still limit the scope of the lawsuit (see *O'Brien*, 575 F.3d at 586). For example, courts commonly limit collective actions to include only the claims of individuals who work or worked at the same facility as the named plaintiff (see *Harper v. Lovett's Buffet, Inc.*, 185 F.R.D. 358, 363-65 (M.D. Ala. 1999)).

Summary Judgment

Comparison to Motions to Certify or Decertify a Collective Action

In contrast to certification and decertification motions, which focus on whether the plaintiffs are similarly situated, summary judgment motions focus on the merits of the plaintiffs' claims and the employer's defenses. For example, a court may dismiss a misclassification case on summary judgment if the facts show that the plaintiffs satisfy the requirements for a particular exemption.

Summary judgment arguments, however, are not necessarily mutually exclusive of those made for certification purposes. For example, just as an employer may move to decertify a collective action because certain plaintiffs' claims are barred by the statute of limitations, demonstrating that the plaintiffs are not all

similarly situated, an employer may also seek summary judgment dismissal against those plaintiffs whose claims are time-barred. (See, for example, *Sandoz*, 700 F. App'x at 319 (affirming decertification because the named plaintiff, whose claim was not time-barred, was not similarly situated to the four opt-ins whose claims were untimely); *Gomez v. Tyson Foods, Inc.*, 799 F.3d 1192, 1194 (8th Cir. 2015) (holding that the district court should have granted the employer's summary judgment motion against the named plaintiffs whose claims were time-barred).)

At least one federal circuit court has also held that, where a post-discovery decertification motion overlaps with the merits of the underlying claim, the appropriate standard is ordinary summary judgment (*Campbell*, 903 F.3d at 1118-19 (noting that, as with summary judgment motions, district courts may not weigh evidence going to the merits and distinguishing its ordinary summary judgment standard from the Third Circuit's preponderance of the evidence standard in *Zavala*, 691 F.3d at 537)).

Plaintiffs' Summary Judgment Motions

Summary judgment motions filed by plaintiffs' counsel seeking a pre-trial determination of the employer's liability are common in wage and hour collective actions. Plaintiffs often file these motions in misclassification cases because they typically involve a limited set of material facts. For example, if the court finds that one plaintiff was misclassified and the other plaintiffs are similarly situated, the court may dispose of the entire case without getting beyond that point.

Employers' Summary Judgment Motions

Employers typically make two types of arguments on summary judgment. The first attacks the plaintiffs' burden of proof. For example, an employer may argue in a compensable time case that summary judgment is appropriate because the plaintiffs failed to elicit sufficient evidence showing that they were not paid for all hours worked.

The second type of argument is based on affirmative defenses for which the employer has the burden of proof.

Good-Faith Defenses

Employers may seek dismissal of plaintiffs' claims using the FLSA's good-faith defenses, which are:

- An absolute defense to FLSA back pay liability where the employer can prove that the complained-of act or omission was in good faith in conformity with and in reliance on any written DOL regulation, ruling, or interpretation (29 U.S.C. § 259).
- A discretionary defense to claims for liquidated damages where the employer can prove that the complained-of act or omission was in good faith and it reasonably believed that its conduct did not violate the FLSA (29 U.S.C. § 260).

Employers should be aware, however, that asserting an "advice of counsel" defense may impliedly waive the attorney-client privilege (see *Dawson v. N.Y. Life Ins. Co.*, 901 F. Supp. 1362, 1369-70 (N.D. Ill. 1995); *Buford v. Holladay*, 133 F.R.D. 487, 494-96 (S.D. Miss. 1990); *McLaughlin v. Lunde Truck Sales*, 714 F. Supp. 916, 918-20 (N.D. Ill. 1989); but see *United States ex rel. Derrick v. Roche Diagnostics Corp.*, 2019 WL 1789883, at *2 (N.D. Ill. Apr. 24, 2019) (explaining that simply asserting a defense to which attorney-client communications are relevant does not waive attorney-client privilege, rather the party must affirmatively put the specific communication at issue)). For more information on waiver of the attorney-client privilege and the advice of counsel defense, see Practice Note, Attorney-Client Privilege: Waiver (Federal): Reliance on Legal Advice.

Statute of Limitations

Employers may also seek dismissal of plaintiffs with time-barred claims (see, for example, *Gomez*, 799 F.3d at 1194).

The FLSA's two-year statute of limitations is extended to three years if the employer's FLSA violation was willful (29 U.S.C. § 255(a)). An FLSA cause of action generally accrues for statute of limitations purposes on each regular payday immediately following the work period when services were rendered and backpay is claimed (29 C.F.R. § 790.21; see also *Higgins v. Food Lion, Inc.*, 2001 WL 77696, at *2 (D. Md. Jan. 23, 2001)).

Because the FLSA requires plaintiffs to opt in within a two- or three-year window, their claims are vulnerable to dismissal if either:

- Named plaintiffs wait too long to file the complaint and, if required in the jurisdiction, their written consent.
- Notice of the collective action is procedurally delayed, such as by:
  - the employer's offer of judgment;
  - the parties' conditional certification motion practice; and
  - the parties' disagreement over the form or distribution of the notice.

For more information, see Statute of Limitations and Tolling.

Other Defenses

The FLSA regulations provide two defenses against losing an exemption for making improper deductions, including:

- The window of correction defense.
- The safe harbor policy defense.

The so-called "window of correction" defense preserves the exemption for an employer that has made either isolated or inadvertent deductions if the employer reimburses the employees for the improper deductions (29 C.F.R. § 541.603(c); see, for example, *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1188 (10th Cir. 2015) (affirming summary judgment for employer based on an isolated improper deduction regardless of employer's intent)).

Under the safe harbor policy defense, an employer does not lose an exemption based on improper deductions if it does all of the following:

- Has a clearly communicated policy prohibiting improper salary deductions.
- Provides a complaint mechanism in the policy.
- Reimburses employees when it makes improper deductions.
- Makes a good faith commitment to comply in the future.
- Does not willfully violate the policy by continuing to make improper deductions after receiving employee complaints.

(29 C.F.R. § 541.603(d); see, for example, *Crabtree v. Volkert, Inc.*, 2012 WL 6093802, at *10 (S.D. Ala. Dec. 7, 2012); *Jordan v. GoBo, Inc.*, 2010 WL 1816361, at *7 (W.D. Va. Apr. 30, 2010).)

For more information on an employer's improper deduction defenses, see Standard Clause, FLSA Salary Basis Safe Harbor Provision: Drafting Note: Employer Defenses Preserve Exemptions Despite Improper Deductions.

Appeals from Summary Judgment

In federal cases, if the court grants summary judgment and either dismisses the case entirely or finds completely in favor of the non-moving party, the order is a final decision and the losing party may immediately appeal (28 U.S.C. § 1291; see also *E.E.O.C. v. Picture People, Inc.*, 684 F.3d 981, 983 (10th Cir. 2012); *Brenner v. Brown*, 959 F.2d 233 (6th Cir. 1992)).

However, a party generally may not appeal a summary judgment order if the order does not constitute a final decision (see, for example, *Calderon v. GEICO Gen. Ins. Co.*, 754 F.3d 201, 204 (4th Cir. 2014); *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1074-75 (9th Cir. 1994); *United States v. F.A. Baehner, Inc.*, 309 F.2d 154, 155 (2d Cir. 1962)). An immediate appeal, therefore, is generally not available where the court grants only partial summary judgment unless all the following requirements are satisfied:

- The district court certifies the order for interlocutory appeal.
- The appeal is timely filed.
- The appellate court agrees to hear the case.

(28 U.S.C. § 1292(b); see also *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1227 n.9 (10th Cir. 2008).)

In appropriate circumstances, the losing party may also move the district court under FRCP 54(b) to certify the partial summary judgment order as a final decision for purposes of appeal (see *EJS Props., LLC v. City of Toledo*, 689 F.3d 535, 537-38 (6th Cir. 2012)).

Settlement

Prohibition on Certain Compromises

Public policy prohibits employees from compromising certain claims and rights arising under the FLSA. For example, employees may not compromise claims for back pay or liquidated damages under Section 216(b) where there is no bona fide factual dispute about the amount of wages owed or number of hours worked (see *D.A. Schulte v. Gangi*, 328 U.S. 108, 114 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704, 707, 714 (1945)).

Supervision Requirement

Even in cases where a bona fide dispute over liability exists, some courts hold that purely private compromises between an employer and an employee are invalid (see *Nall v. Mal-Motels, Inc.*, 723 F.3d 1304, 1306-08 (11th Cir. 2013) (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982)); *Yue Zhou v. Wang's Rest.*, 2007 WL 172308, at *1 (N.D. Cal. Jan. 17, 2007)). These courts require either the DOL or a court to supervise any settlement (see *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227 (M.D. Fla. 2010)). Courts generally conclude that the proper procedure for obtaining court approval of an FLSA settlement is for the district court to enter a stipulated judgment after scrutinizing for fairness the parties' settlement agreement (see *Yue Zhou*, 2007 WL 172308, at *1; *D.A. Schulte*, 328 U.S. at 113 n.8).

Other courts, however, permit parties to enter into unsupervised compromises where a bona fide factual dispute regarding liability exists (see *Martin v. Spring Break '83 Prods., L.L.C.*, 688 F.3d 247, 254-55 (5th Cir. 2012) (addressing an agreement signed by representatives of the plaintiffs' union to settle a grievance alleging unpaid wages after a union representative investigated the merits of the claims and concluded that it was not possible to determine if the employees worked on the days in question and citing *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 626-32 (W.D. Tex. 2005)); see also *Bodle v. TXL Mortgage Corp.*, 788 F.3d 159, 165 (5th Cir. 2015)).

Some courts have held that judicial supervision is unnecessary where the employer agrees to pay the employee the entire amount of back wages owed, plus an equal amount in liquidated damages under Section 216(b). Where the court confirms full compensation and the absence of a compromise, no further judicial inquiry is necessary. Where the employee receives their full compensation but must forego something else, such as the right to seek liquidated damages, a compromise exists and judicial review is required. (See *Dees*, 706 F. Supp. 2d at 1239-41 n.14, 1247 (citing *Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1226-27, n.6-7 (M.D. Fla. 2009)).)

Employers that obtain a private release of an employee's FLSA claims risk being sued later for any unpaid wages or liquidated damages allegedly compromised by the private agreement (see *Dees*, 706 F. Supp. 2d at 1237-38). Employers can minimize this risk by ensuring the employee retains no uncompensated FLSA claim or that any FLSA settlement is approved by either the DOL or a court (29 U.S.C. § 216(c); *Dees*, 706 F. Supp. 2d at 1237-38; see also *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 305-07 (7th Cir. 1986) (discussing prerequisites for valid release of claims under DOL supervision)).

Release of FLSA Claims in an FRCP 23 Opt-Out Settlement

Federal courts disagree about whether FLSA claims may be released as part of the settlement of an FRCP 23 class action using an opt-out settlement procedure.

Some courts have held that an FLSA release under those circumstances is not necessarily invalid, concluding that, for example:

- The FLSA's Section 216(b) opt-in requirement does not apply to court-approved settlements releasing FLSA claims where the settlements resolve a bona fide dispute and otherwise satisfy FRCP 23 requirements.
- If the state wage and hour claims of an FRCP 23 class were adjudicated, the outcome is likely to have a preclusive effect on FLSA claims involving the same set of facts, making it nonsensical to categorically prohibit enforcement of settlement agreements that achieve the same result.

(See, for example, *Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 451-52 (5th Cir. 2016) (explaining that the FLSA's prohibition against asserting class claims using an opt-out procedure does not preclude court supervision of opt-out class action settlements that release FLSA claims); *Stephens v. Farmers Rest. Grp.*, 329 F.R.D. 476, 489-90 (D.D.C. 2019).)

Other courts have held that parties may not use an opt-out settlement procedure to release FLSA claims. Those courts take the view that FLSA claims are only released if a class member consents in writing to become a member of the settlement class. (See, for example, *Millan v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 608 (E.D. Cal. 2015); *Donatti v. Charter Commc'ns, L.L.C.*, 2012 WL 5207585, at *3-4 (W.D. Mo. Oct. 22, 2012) (concluding that, while FRCP 23 opt-out and Section 216(b) opt-in actions can proceed concurrently in the same case, they must be resolved separately); *Butler v. Am. Cable & Tel., LLC*, 2011 WL 4729789, at *12 (N.D. Ill. Oct. 6, 2011) (suggesting that the parties use an opt-in/opt-out procedure).)

Jurisdiction-Specific Settlement Approval Standards

Employers and their counsel should be familiar with any applicable jurisdiction-specific standards for judicial approval of FLSA settlements.

For example, the Second Circuit generally requires district courts to review FLSA settlements for fairness, including consideration of:

- The plaintiff's range of possible recovery.
- The extent the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their claims and defenses.
- The seriousness of the litigation risks faced by the parties.
- Whether the settlement agreement is the product of arm's-length bargaining between experienced counsel.
- The possibility of fraud or collusion.
- If provided for in the settlement, the reasonableness of attorneys' fees and costs.

(See *Fisher v. SD Prot. Inc.*, 2020 WL 550470, at *3-4 (2d Cir. Feb. 4, 2020) (citing *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015) and *Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 335-36 (S.D.N.Y. 2012)).)

A jurisdiction-specific standard for review of FLSA settlements, however, does not necessarily grant district courts authority to rewrite objectionable contract provisions. For example, in *Fisher*, the Second Circuit held that district courts did not have authority to modify the parties' contract. Instead, courts have three options when presented with a settlement for approval:

- Accept the proposed settlement.
- Reject the proposed settlement and delay proceedings to see if a different settlement can be achieved.
- Proceed with litigation.

(*Fisher*, 2020 WL 550470, at *8-9.)

Settlement Tactics

Collective actions present particularly troublesome settlement issues for employers because of the opt-in aspect of the claims. If an employer settles an FLSA collective action with a group of employees, it may be sued the next day in the same or a different jurisdiction by another group of employees with the same claims. This makes traditional settlement strategies difficult to apply and exposes employers to a plaintiffs' counsel strategy of filing a lawsuit in one state and later filing in other states once the legal and factual foundations have been properly laid by the first lawsuit. Unless the employer gets the court to dismiss a collective action on the merits, it may be difficult for the employer to obtain total closure.

The best way to minimize the risk of follow-on litigation is to change the practice at issue, preventing further back pay liability from accruing. While changing the practice may itself prompt FLSA claims, any future litigation is finite because exposure is limited and does not increase while the case is pending. For example, in response to a determination that certain employees were improperly classified, employers may choose to reclassify exempt employees as nonexempt to avoid future liability. For more information on reclassification of exempt employees to nonexempt, see Exempt to Nonexempt Employee Reclassification Based on Job Duties Under the FLSA Checklist and Exempt to Nonexempt Employee Reclassification Based on Salary Level Under the FLSA Checklist.

Employers can also attempt to include confidentiality provisions in a settlement agreement and seek representations from plaintiffs' counsel that they do not currently represent any other clients who have expressed an interest in suing the employer.

Rule 68 Offers of Judgment

Federal courts have historically disagreed about whether an unaccepted Rule 68 offer of judgment that fully satisfies a named plaintiff's individual claim is sufficient to moot that claim (FRCP 68). In 2013, the US Supreme Court, presented with an opportunity to address the issue, did not resolve the circuit split. In *Symczyk v. Genesis Healthcare Corp.*, an FLSA collective action involving an automatic meal break deduction policy, the employer moved to dismiss the named plaintiff's claims after she failed to respond to a Rule 68 offer. Though both the district court and the Third Circuit held that the unaccepted offer mooted the plaintiff's individual claims, the Court bypassed the issue because the plaintiff previously conceded that her claim was moot. (*Symczyk*, 133 S. Ct. 1523, 1524-25 (2013).)

In 2016, the Supreme Court resolved the issue in an FRCP 23 class action, holding that an unaccepted Rule 68 offer of judgment, even if for complete relief, does **not** moot a representative plaintiff's individual claim. Putative class claims also remain live because the representative plaintiff, whose claim is unaffected, is entitled to demonstrate that class certification is warranted. The Court rejected the argument that there is no longer a live case or controversy simply because a plaintiff is offered complete relief on their claims. (*Campbell-Ewald*, 136 S. Ct. at 670-71.)

Campbell-Ewald involved an FRCP 23 class action outside of the employment context. However, the case appears to have answered the question left open by *Symczyk* and may be an obstacle to using unaccepted Rule 68 offers to eliminate named plaintiffs in FLSA collective actions.

For more information on Rule 68 offers of judgment in FLSA litigation, see Practice Note, Rule 68 Offers of Judgment in Fair Labor Standards Act Collective Actions.

Remedies

Back Pay and Liquidated Damages

Prevailing plaintiffs in wage and hour collective actions may recover the amount of their unpaid minimum wages or unpaid overtime compensation, plus an additional equal amount as liquidated damages (29 U.S.C. § 216(b)).

Where time records are allegedly incomplete or do not exist, which is often the case in misclassification claims because the FLSA does not require employers to maintain time records for exempt employees, a plaintiff need only produce evidence that shows the amount of uncompensated time as a matter of "just and reasonable inference" (29 C.F.R. § 516.2; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). Absent complete time records from the employer, therefore, a court may draw inferences from oral testimony, sworn declarations, and other relevant documentary evidence the plaintiff provides (see *Serrano v. Chicken-Out Inc.*, 209 F. Supp. 3d 179, 187 (D.D.C. 2016) (citing *Anderson*, 328 U.S. at 687)).

In addition to the number of uncompensated hours, the parties (or the court) must also determine how any unpaid overtime compensation is calculated. The FLSA generally requires that nonexempt employees are paid at least 1.5 times their regular rate of pay for all hours worked over 40 in a workweek (29 U.S.C. §§ 206 and 207). The overtime pay calculation is not always straightforward, however, particularly where employees were classified as exempt and not paid on an hourly basis. For more information on the regular rate, see Practice Note, The Regular Rate of Pay Under the FLSA: Statutory Exclusions and The Regular Rate of Pay Under the FLSA: Statutory Exclusions Chart.

In some circumstances, half-time overtime pay may be appropriate for determining damages where the plaintiffs were misclassified as exempt under the FLSA. This approach is similar to the fluctuating workweek method (FWW) of calculating overtime pay and the terminology is often conflated. (29 C.F.R. § 778.114; *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942); see also *Ransom v. M. Patel Enters., Inc.*, 734 F.3d 377, 384-87 (5th Cir. 2013); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1311 (11th Cir. 2013); *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 354-57 (4th Cir. 2011); *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 672-84 (7th Cir. 2010); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230-31 (10th Cir. 2008); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 38-40 (1st Cir. 1999); *Kuntze v. Josh Enterprises, Inc.*, 365 F. Supp. 3d 630, 646 (E.D. Va. 2019) (concluding that while *Desmond* did not expressly address the issue, the case is circuit authority for applying the FWW method in any misclassification case, without regard for willfulness)).

However, some federal courts have held that the FWW method, which requires a clear mutual understanding between the parties that the employee's salary was intended to compensate them for all hours worked, cannot apply retroactively for damages purposes because, for example, the mutual understanding requirement is rarely satisfied in misclassification cases (see, for example, *Deluca v. Farmers Ins. Exch.*, 386 F. Supp. 3d 1235, 1264-65 (N.D. Cal. 2019), motion to certify appeal denied, 2019 WL 4260437 (N.D. Cal. Sept. 9, 2019); *Boyce v. Indep. Brewers United Corp.*, 223 F. Supp. 3d 942, 947-48 (N.D. Cal. 2016); see also *Banford v. Entergy Nuclear Operations, Inc.*, 649 F. App'x 89, 91 (2d Cir. 2016) (not deciding but acknowledging that several circuit courts allow it, while district courts, largely in circuits that have not addressed the issue, are divided)).

For more information on the fluctuating workweek method, see Practice Note, The Fluctuating Workweek Method of Paying Overtime Under the FLSA: Overtime Pay Damages in Misclassification Cases.

Attorneys' Fees and Costs

Prevailing plaintiffs are entitled to recover from the defendant their reasonable attorneys' fees and costs (29 U.S.C. § 216(b)). Some courts have defined "prevailing plaintiff" to mean a plaintiff who receives at least some relief on the merits of their claim (see, for example, *Fast v. Cash Depot, Ltd.*, 931 F.3d 636, 638 (7th Cir. 2019) (concluding that the plaintiff was not a prevailing party where his counsel conceded that the defendant had paid all wages due when, after preliminary discovery, it issued checks for unpaid wages); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-05 (2001) (addressing the fee-shifting provisions of two federal statutes involving non-FLSA claims); *Kenny v. Critical Intervention Servs., Inc.*, 358 F. Supp. 3d 1348, 1352 (M.D. Fla. 2019) (noting that under the FLSA, a party must either obtain a judgment on the merits or some other judicially sanctioned "alteration in the legal relationship of the parties" to be considered a prevailing party) (quoting *De Oliveira Sa v. A-Maculate Cleaning Serv., Inc.*, 2018 WL 4426084, at *1 (S.D. Fla. June 7, 2018))).

Section 216(b) is silent regarding the court's authority when the defendant is the prevailing party. However, at least one circuit court has held that the statute does not prevent prevailing defendants from seeking an award of costs under FRCP 54(d). According to the US Court of Appeals for the Eighth Circuit, Section 216(b) addresses only a prevailing plaintiff's costs and no other FLSA provision precludes an award of costs to a prevailing defendant. (*Lochridge v. Lindsey Mgmt. Co.*, 824 F.3d 780, 782-83 (8th Cir. 2016).)

Calculating the Fees

When the prevailing plaintiff seeks attorneys' fees under a fee-shifting statute like the FLSA, courts often use the lodestar method to calculate the attorneys' fees owed (see, for example, *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Std. Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973); *Jaskulski v. Blue Martini Orlando, LLC*, 2010 WL 4122207, at *2 (M.D. Fla. Oct. 7, 2010); *Garcia v. R.J.B. Props., Inc.*, 756 F. Supp. 2d 911, 915 (N.D. Ill. 2010)).

Under the lodestar method, the court multiplies the number of hours the prevailing party's attorney reasonably spent on the litigation by a reasonable hourly rate (see *Quigley v. Winter*, 598 F.3d 938, 956 (8th Cir. 2010)). Adjustments to the lodestar amount are sometimes allowed in exceptional circumstances (see *Souryavong v. Lackawanna Cty.*, 872 F.3d 122, 128 (3d Cir. 2017) (citing *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 543 (2010))). Plaintiffs' counsel must submit evidence supporting the number of hours worked and rates claimed (see *Quigley*, 598 F.3d at 956-57; *Norman v. Hous. Auth. of the City of Montgomery*, 836 F.2d 1292, 1299, 1301 (11th Cir. 1988)).

The "percentage of the common fund" approach is generally applied in cases that do not involve fee-shifting statutes, though some courts have used this method to award attorneys' fees for settlement purposes in FLSA litigation. For example, the Southern District of New York has stated that, in an FLSA collective action, a court may calculate attorneys' fees using either the lodestar method or by awarding a percentage of the settlement. The court concluded, however, that the "overwhelming trend" in the Second Circuit was to award a percentage of the fund. (*Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 435-38 (S.D.N.Y. 2014).)

The *Fujiwara* court explained that, in awarding a percentage of the fund, a court considers:

- The time and labor expended by counsel.
- The magnitude and complexities of the litigation.
- The risk of the litigation.
- The quality of the representation.
- The requested fee in relation to the settlement.
- Public policy considerations.

(*Fujiwara*, 58 F. Supp. 3d at 435-38.)

Additionally, the lodestar calculation is often used to cross check the reasonableness of the requested percentage (*In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305-06 (3d Cir. 2005); *Fujiwara*, 58 F. Supp. 3d at 435).

Further, while noting that district courts in the circuit had routinely applied a proportionality limit on attorneys' fees in FLSA cases, the Second Circuit has since rejected that approach, concluding that:

- Using proportionality to limit fees is outcome determinative.
- The FLSA's text and purpose do not support a proportionality limit.
- A proportionality limit would be inconsistent with the FLSA's goals by discouraging plaintiffs' counsel from taking on small claims involving potentially protracted litigation.

(*Fisher*, 2020 WL 550470, at *6-8.)

Punitive Damages

Punitive damages are generally not available for minimum wage or overtime claims based on violations of FLSA Sections 206 or 207 (see, for example, *Shea v. Galaxie Lumber & Constr., Co.*, 152 F.3d 729, 734 (7th Cir. 1998); *Campbell v. PricewaterhouseCoopers*, 2008 WL 3836972, at *9 (E.D. Cal. Aug. 14, 2008); *Bowman v. Builder's Cabinet Supply Co.*, 2006 WL 2460817, at *10-11 (E.D. Ky., Aug. 23, 2006)).

Courts are split on the issue of whether punitive damages are available for FLSA retaliation claims (compare *Greathouse v. JHS Sec. Inc.*, 2016 WL 4523855, at *4 (S.D.N.Y. Aug. 29, 2016) (concluding that punitive damages are available) and *Travis v. Gary Comm. Mental Health Ctr., Inc.*, 921 F.2d 108, 111-12 (7th Cir. 1990) (same), with *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933-39 (11th Cir. 2000) (concluding that punitive damages are not available)).

State Wage and Hour Class Actions

The FLSA does not substantively preempt more generous state wage and hour laws and plaintiffs may find state law claims advantageous because, for example:

- FRCP 23 class actions involve an opt-out (rather than opt-in) procedure, which typically results in greater participation by potential class members.
- A state's burden for certifying class actions may be more favorable to plaintiffs than the FRCP 23 standard (see, for example, *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 184 (3d Cir. 2019) (rejecting a more lenient pleading or initial evidence standard for class certification in favor of a preponderance of evidence standard)).

- State wage and hour law may provide greater rights and protections to employees than the FLSA (see, for example, Cal. Lab. Code § 510 (providing for a daily overtime pay requirement)).
- Some states allow parties to take immediate appeals from non-final orders (see, for example, CPLR 5701(a)).
- State law may impose a longer statute of limitations (see, for example, N.Y. Lab. Law § 198(3) (providing for a six-year limitations period)).
- Damages available under state law may be greater (see, for example, M.G.L. c. 149, § 150 (providing for treble damages)).

The FLSA may, however, preempt state law claims that merely duplicate FLSA claims (see, for example, *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007) (concluding that the plaintiffs' FLSA-based contract, negligence, and fraud claims were precluded under a theory of conflict preemption)).

Interplay Between Federal and State Jurisdiction

Both state and federal courts have jurisdiction over FLSA claims and Section 216(b) applies to FLSA collective actions whether filed in state or federal court (29 U.S.C. § 216(b)).

Although state courts have jurisdiction over state wage and hour claims, plaintiffs sometimes invoke diversity jurisdiction to litigate those claims in federal court (28 U.S.C. § 1332). Conversely, employers typically remove to federal court any state actions alleging FLSA violations (28 U.S.C. § 1441). Removing class actions to federal court became easier under the Class Action Fairness Act (CAFA), which expanded federal jurisdiction over class actions (28 U.S.C. §§ 1332 and 1453).

Certification Procedure in State Court

Where the case involves only state wage and hour claims, state courts generally do not use the two-stage or FRCP 23 analysis federal courts apply in FLSA collective actions. Instead, state courts typically follow their own rules for certifying class actions.

When deciding whether to certify state wage and hour class actions, most courts use a state analog to FRCP 23. Other states have standards that are not based on the FRCP textually, although in practice they may tend to reach similar results in similar cases.

Many states also use the opt-out model of FRCP 23, rather than the opt-in model of the FLSA. Therefore, when a court certifies the class, the case proceeds on behalf of all those individuals unless they affirmatively opt out. As a result, state wage and hour class actions may have a higher participation rate than FLSA collective actions.

Hybrid Opt-In and Opt-Out Cases

Plaintiffs often file, in a single suit, an FLSA collective action and a state wage and hour class action based on the same set of facts. In these so-called hybrid cases, Section 216(b)'s opt-in mechanism governs how potential plaintiffs join for FLSA purposes and FRCP 23 class action procedures control for the state law claims. Federal courts have generally held that plaintiffs may assert federal and state wage and hour claims in the same action because:

- The FLSA does not substantively preempt state wage and hour laws that are not less generous than federal law.
- No inherent conflict exists between the FLSA's opt-in procedure and FRCP 23's opt-out procedure.

(See *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 247-49 (2d Cir. 2011); *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 973-74, 978 (7th Cir. 2011); *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761 (9th Cir. 2010), vacated on other grounds, 565 U.S. 801 (2011); *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 424-25 (D.C. Cir. 2006).)

In *De Asencio v. Tyson Foods, Inc.*, however, the Third Circuit held that, although the district court did not abuse its discretion by ruling that the FLSA and state wage and hour actions arose from the same controversy and shared a common nucleus of operative facts, the district court should **not** have exercised supplemental jurisdiction over the state claim because that claim:

- Presented novel and complex questions of state law.
- Substantially predominated over the FLSA claim within the meaning of 28 U.S.C. § 1367(c)(1) and (c)(2).

(*De Asencio*, 342 F.3d 301, 308-12 (3d Cir. 2003).)

Circuit courts that do allow hybrid suits generally distinguish *De Asencio* on its case-specific analysis of supplemental jurisdiction rules, rather than as a prohibition against hybrid cases (see, for example, *Shahriar*, 659 F.3d at 249-50).

Appeals

In contrast to federal law, which generally limits appellate jurisdiction to appeals from final judgments, some states allow parties to take immediate appeals from non-final

orders entered by the courts of those states (see, for example, CPLR 5701(a)). Therefore, an employer may be able to obtain reversal of a state court's certification order well before trial (see, for example, *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593 (N.Y. App. Div. 1st Dept. 1998) (reversing interlocutory class certification order)).

In contrast, appeals from orders certifying collective actions in federal court generally must wait until entry of final judgment (see Interlocutory Appeals).

For more information on state wage and hour claims, see Wage and Hour Laws: State Q&A Tool and Wage and Hour Claims Toolkit: State-Specific Materials.

Limitations on Class and Collective Actions

Arbitration Agreements

Employers can minimize wage and hour defense costs and avoid class and collective action litigation by making arbitration agreements, with class and collective action waivers, a condition of employment. Employers can use mandatory arbitration agreements to compel employees to:

- Submit certain claims to arbitration.
- Proceed individually in arbitration, rather than on a class or collective basis.

The US Supreme Court has held that class and collective action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA) and are not barred by Section 7 of the National Labor Relations Act (NLRA). In doing so, the Court resolved a split between the National Labor Relations Board (NLRB), together with the US Courts of Appeals for the Sixth, Seventh, and Ninth Circuits, and the US Courts of Appeals for the Second, Fifth, Eighth, and Eleventh Circuits. (*Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (consolidated with *Nat'l Labor Relations Bd. v. Murphy Oil USA, Inc.* and *Ernst & Young LLP v. Morris*); see also Expert Q&A on Class Action Waivers in the Employment Context and Legal Update, SCOTUS: Arbitration Agreements with Class Action Waivers Must Be Enforced as Written, and NLRA Does Not Command Otherwise.)

The US Court of Appeals for the Sixth Circuit subsequently reached the same conclusion in an FLSA collective action. In *Gaffers v. Kelly Servs., Inc.*, the court held that, like the NLRA, the FLSA does not prohibit employers from using arbitration agreements with class and collective action waivers (*Gaffers*, 900 F.3d 293 (6th Cir. 2018)).

For more information on mandatory arbitration agreements, including a sample provision, see Practice Note, Employment Arbitration Agreements (US), Standard Clause, Class and Collective Action Waiver for Employee Arbitration Agreements (US), and Employment Arbitration Toolkit (US).

The absence of an arbitration provision in the employment agreement, however, may change the outcome. For example, the Sixth Circuit held in *Killion v. KeHE Distributors, LLC* that collective action waivers in separation agreements are unenforceable absent any agreement to arbitrate. The court explained that it was guided by its decision in *Boaz v. FedEx Customer Information Services, Inc.*, where it held that employees are not bound by employment contracts that shorten the time to bring FLSA claims. The court distinguished *Killion* from cases upholding agreements requiring employees to submit to arbitration on an individual basis, explaining that the strong federal policy of enforcing agreements under the FAA is not a consideration when no agreement to arbitrate exists. (*Killion*, 761 F.3d 574, 588-92 (6th Cir. 2014) (citing *Boaz*, 725 F.3d 603 (6th Cir. 2013)); but see, for example, *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014); *Benedict v. Hewlett-Packard Co.*, 2016 WL 1213985, at *4-5 (N.D. Cal. Mar. 29, 2016).)

State Law Limits

Some states limit a plaintiff's right to sue on a class basis. For example, New York law prohibits class actions seeking a penalty or statutory minimum damages unless a statute specifically allows those remedies to be recovered on a class-wide basis (CPLR 901(b); but see *Borden v. 400 E. 55th St. Assocs., L.P.*, 23 N.E.3d 997, 999 (N.Y. 2014)). However, federal courts do not necessarily need to give effect to these state laws (see *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-401 (2010) (holding that CPLR 901(b) does not preclude a federal court sitting in diversity from entertaining an FRCP 23 class action)).