206 Just How Deep Are Your Pockets? Preventing, Defending, & Resolving Wage & Hour Class Actions

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Just How Deep Are Your Pockets?
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Just How Deep Are Your Pockets?
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I. The Seven Big Hits Under FLSA in the Last Year – ½ Billion Dollars

- ★ $210 million, Farmers Insurance Exchange, misclassification of insurance claims adjusters, Sept. 2004
- ★ $135 million –State Farm Mutual Auto Ins. Co., misclassification of insurance adjusters, Jan. 2005
- ★ $48.5 million, Farmers Insurance Exchange, misclassification of insurance claims adjusters, May 2005
- ★ $37 million, Merrill Lynch, misclassification of brokers, Aug. 2005
- ★ $30 million, Countrywide Home Loans, Inc., misclassification of account executives, April 2005
- ★ $24 million, Computer Sciences Corp., misclassification of technical support employees, March 2005
- ★ $ 22.4 million, Albertsons, Inc., janitors' claims of off-the-clock work and minimum wage violations, Jan. 2005

II. Comparatively Speaking – in each of the last three years, plaintiffs' lawyers have filed more FLSA collective actions than Title VII class actions; plaintiffs' lawyers are definitely ramping up their efforts under FLSA.

III. Three Red Hot Issues

A. Legal – re salaried exempt workers – were workers properly classified as exempt from overtime requirements

B. Factual – re hourly workers – did hourly workers actually perform work "off the clock"? If so, they are entitled to overtime pay for all hours worked in excess of 40 hours per week, even if the "off the clock" work violated express company policy

C. Legal – re hourly workers – did admitted and unpaid activities of hourly workers constitute compensable time?

Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), *cert. granted*, 125 S.Ct. 1292 (Feb. 22, 2005)

Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004), *cert. granted*, 125 S.Ct. (Feb. 22, 2005)

The Supreme Court has consolidated these two cases involving time spent by employees after the employees don special protective clothing required by the employer. Both courts of appeals held that the employers had to pay for the time spent putting on and taking off the special protective clothing. The circuit courts differed, however, on the issue of whether the employer had to pay for waiting time after putting on the equipment and time walking to the workstation at the beginning of the work day and the time spent walking back to the locker room at the end of the work day. The Ninth Circuit held that all time was compensable between donning and doffing. The First Circuit held that the employer need not pay for waiting and walking time. The Supreme Court will resolve that issue.

IV. Three Dangerous Damage Elements of FLSA

A. Virtually Automatic Double Damages for Violations

The FLSA provides that an employer that fails to pay required overtime "shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S. C. § 216(b).

The FLSA provides an exceedingly narrow exception to the automatic award of liquidated damages. Thus, a court may, "in its sound discretion, award no liquidated damages or award [reduced liquidated damages where] the employer shows to the satisfaction of the court that the act or omission giving rise to [the violation] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S. C. § 260.

Wright v. Carrigg, 275 F.2d 448, 449 (4th Cir. 1960) (to avoid the payment of liquidated damages for failing to pay required overtime, the employer has the "plain and substantial burden of persuading the court by proof that his failure to obey the state was *both* in good faith *and* predicated upon such reasonable

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grounds that it would be unfair to impose upon him more than a compensatory verdict.")

Walton v. United Consumers Club, Inc., 786 F.2d 303, 310 (7th Cir. 1986) (the FLSA has a "strong presumption in favor of doubling" actual damages)

Reich v. Southern New England Telecomm. Corp., 121 F.3d 58, n.71 (2d Cir. 1997) (The employer's burden to avoid payment of liquidated damages for a violation of the FLSA's overtime requirements "is a difficult one to meet . . . and '[d]ouble damages are the norm, single damages the exception.'")

Williams v. Tri-County Growers, Inc., 747 F.2d 121, 129 (3rd Cir. 1984) (to satisfy the good faith exception and avoid the imposition of liquidated damages, the employer has an affirmative duty to "ascertain the dictates" of the FLSA and then taken appropriate steps to comply)

Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 910 (3rd Cir. 1991) (liquidated damages mandatory where employer made no affirmative effort to ascertain the FLSA's requirements but relied instead on industry practice)

Brock v. Wilamowsky, 833 F.2d 11, 19-20 (2nd Cir. 1987) (conformity to "customary and widespread" industry practices that violate the FLSA does not demonstrate the good faith needed to avoid liquidated damages)

Braswell v. City of El Dorado, Ark., 187 F.3d 954, 956 (8th Cir. 1999) (employer must pay liquidated damages even where the employer voluntarily paid full back pay before trial)

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 (1945) ("the liquidated damages provision is not penal in its nature, but constitutes compensation for the retention of a workman's pay which might be too obscure and difficult of proof for estimate other than by liquidated damages")

B. Three year Statute of Limitations for Willful Violations

The FLSA's usual two-year limitations period is extended to three years where the employer's conduct was willful. 29 U.S.C. § 255(a).

McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988) (the employer acts willfully within the meaning of the FLSA where the employer knew the conduct was unlawful or acted with reckless disregard for whether the actions violated the FLSA)

Cox v. Brookshire Grocery Co., 919 F.2d 354, 356 (5th Cir. 1990) (burden is on plaintiff to prove the employer's willfulness)

C. Inability to Settle FLSA Claims Without DOL or Court Approval

Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir. 1986) (courts "have refused to enforce wholly private settlements" of FLSA claims)

D. Difficulty in Taking Prospective Corrective Action Only

Unlike changing many employment practices, a significant change in how employees are paid is likely to signal backpay dollar signs in the eyes of at least some employees.

V. Litigating an FLSA Collective Action—Part I: Opting In and the Authority to Issue Notice

A. The Original 1938 FLSA

In 1938, Congress passed the FLSA and authorized an employee to sue on his or her on behalf and on behalf of all "similarly situated" individuals. The original statute also authorized employees to designate a third party to bring an action on their behalf and all other "similarly situated" employees. The act did not require any written consent to be filed by the "similarly situated" employees. Everyone and his or her next friend soon filed massive FLSA lawsuits

B. The 1947 Amendments in the Portal to Portal Act—Opt-In Required:

In response to the unanticipated avalanche of private lawsuits, in 1947, through the Portal to Portal Act, Congress reiterated the provision of the original FLSA that an individual may sue on his own behalf and on behalf of "other employees similarly situated" but added a significant new restriction: "no employee shall be a party plaintiff unless he gives his consent in writing and such consent is filed with the court." This new restriction created the unique opt-in structure of FLSA collective actions. Congress offered no other guidance on the process of private enforcement actions under the opt-in process. 29 U.S.C. § 216(b)

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 173-74 (1989) ("[i]n part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished [by Congress in 1947], and the requirement that an employee file a written consent was added. . . . The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims

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in their own right and freeing employers of the burden of representative actions. . . . Congress left intact the 'similarly situated' language providing for collective actions.")

Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1248-49 (11th Cir. 2003) (Congress mandated an opt-in procedure for FLSA suits "to prohibit what precisely is advanced under Rule 23—a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members;" if an employee does not opt-in to an FLSA collective action, the employee cannot "be bound by or . . . benefit from the judgment in the case."

Arrington v. Nat'l Broadcasting Co., 531 F. Supp. 498, 501 (D.D.C. 1982) (Congress added the opt-in requirement to the FLSA to "prevent large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit")

C. To Notice or Not to Notice. That Was The Question for Forty Two Years.

Almost immediately after Congress added the opt-in requirement in 1947, plaintiffs began to wonder: how will employees be able to opt-in if they don't even know that a lawsuit has been filed? Although nothing in the statute itself, the act's legislative history, or the Department of Labor's regulations provided any guidance, the solution seemed plain to plaintiffs: the district court should authorize plaintiffs to send out a notice to all individuals who were allegedly similarly situated to the named plaintiffs. Defendants hotly contested this proposition and fought hammer and tongs for forty two years over the issue of notice.

The notice issue did not plague suits initiated by the Secretary of Labor, however, because the statute plainly authorized the Secretary to sue on behalf of any aggrieved individual. But the procedural question of the authority of trial courts to approve the sending of a notice dominated private FLSA enforcement lawsuits. As the battle raged, the circuits split evenly. The Supreme Court finally resolved the matter in 1989.

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 169-170 (1989) (benefits of an collective action brought pursuant to § 216 (b) of the FLSA—including "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged" practice—depend on employees receiving accurate and timely notice about the collective action; therefore, "district courts have discretion . . . to implement" § 216(b) of the FLSA "by facilitating notice to potential plaintiffs")

D. The Limit of Supreme Court Wisdom—Notice is Discretionary

In *Hoffman-LaRoche*, the Supreme Court established a single, narrow proposition: a trial court *could*, "in appropriate cases," authorize the plaintiffs to send a notice to putatively "similarly situated" individuals in a law suit brought pursuant to § 216(b) of the FLSA. The Supreme Court did not mandate notice. Nor did the Supreme Court opine on the procedures the trial court should use in authorizing the notice or on the standards by which the trial court should exercise its discretion in determining whether to authorize notice at all.

A major share of FLSA litigation since 1989 has focused on those two issues, in large part because the *procedures* and *standards* for notice play a critical role in the tactical decisions that FLSA litigators must make. Moreover, the two issues are inextricably linked. A court cannot authorize notice without having a procedure for that notice; nor can it authorize notice without determining who should receive the notice. Trial courts have found themselves in a chicken-egg situation as they have sought to implement the FLSA's opt-in process.

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989) (while trial courts have discretion to issue notice in FLSA cases, such notices should be sent only "in appropriate cases")

Hall v. Burk, No. 01-2478, 2002 WL 413901 (N.D. Tex. March 12, 2002) (notice in FLSA cases is discretionary and "by no means mandatory")

White v. Osmose, Inc., 204 F. Supp. 2d 1309, 1312 (M.D. Ala. 2002) (notice in FLSA cases is discretionary with the court and should be sent "only in appropriate cases")

Camper v. Home Quality Mgmt., Inc., 200 F.R.D. 516, 519 (D. Md. 2000) ("the relevant inquiry then is not whether the Court has discretion to facilitate notice, but whether this is an appropriate case in which to exercise discretion")

VI. Litigating an FLSA Collective Action—Part II: What Procedure Should Courts Follow in Determining Whether to Send Notice?

A. Lack of Controlling Guidance on Notice Procedure

Inasmuch as the FLSA offers no direction on whether trial courts had the authority to issue any notice in the first place, *a fortiori* the statue provide no guidance on the proper procedure for judicial approval of such a notice. In addition, the Department of Labor has provided no regulatory guidance, and the Supreme Court's decision in *Hoffman-LaRoche* left the procedural slate blank.

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Brian R. Gates, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 Notre Dame L. Rev. 1519, 1521 (April 2005) ("the congressional record is virtually silent as to how Congress intended for section 16(b) to operate in practice")

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989) (although the Supreme Court held that a trial court had discretion to issue notice in an action brought under § 216 (), the court made it plain that its decision merely "confirm[ed] the existence of the trial court's discretion, not the details of its exercise")

B. Lack of Definitive Circuit Court Guidance on Notice Procedure

Even as we speak in 2005, not only has the Supreme Court not provided clear direction on the proper procedure for determining whether to authorize plaintiffs to issue notice to putatively "similarly situated" individuals, the circuit courts have likewise failed to provide definitive guidance to the trial courts within their respective appellate jurisdictions. The courts of appeals have repeatedly said only that a particular procedural approach was within the trial court's discretion. No appellate decision has mandated a particular procedure. Nor has any court of appeals rejected a trial's courts chosen procedure.

Despite the lack of a definitive rulings from even one appellate court mandating a particular procedure for approving notice, four firm conclusions emerge from appellate decisions on the FLSA's notice procedure: (1) trial courts have wide discretion in fashioning a notice procedure; (2) trial courts do not abuse their discretion by following the now standard two-stage notice process (described in the succeeding section); (3) trial courts need not follow the standard two-stage notice process; and (4) the procedures of Rule 23, Fed. R. Civ. Proc., do not apply to the FLSA notice process.

Mooney v. Aramco Servs. Co., 54 F. 3d 1207, 1213-14, 1216 (5th Cir. 1995) (affirming trial court's decertification of collective action; court found it "unnecessary to decide" which approach courts should use in determining whether plaintiff's proposed class constitutes a group of "similarly situated" employees; we cannot say that the district court abused its discretion in finding that the 'opt-in' plaintiffs were not similarly situated. In so holding we specifically do not endorse the methodology employed by the district court, and do not sanction any particular methodology")

Thiessen v. Gen. Elec. Cap. Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001) (district court did not abuse its discretion in applying the two-stage process of certification; court did not mandate the two-stage process, however)

Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001) (affirming trial court's certification of a collective action even though the lower court did not utilize the familiar two-stage approach; while observing that the two-stage approach "appears to be an effective tool" for determining the existence vel non of a group of "similarly situated" employees, the court merely suggested "that district courts in this circuit adopt it in the future" but simultaneously noting that "[n]othing in our circuit precedent . . . requires district courts to use this approach")

King v. Gen. Elec. Co., 960 F.2d 617, 621 (7th Cir. 1992) (the FLSA's § 216(b) opt-in procedure preempts Rule 23's class action procedure)

Grayson v. K-Mart, Corp., 79 F.3d 1086, 1096 n. 12 (11th Cir. 1996) ("it is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class certification under [Rule] 23")

C. Trial Courts to the Rescue: The Now Ubiquitous Two-Stage Collective Action Certification Procedure

Left to their own devices, district courts rose to the occasion and devised a workable scheme for sending notice and for determining who was sufficiently "similarly situated" to be included in the collective action. Although the courts have experimented with different models, one approach now occupies the field. That approach calls for a two-step process to determine if a group of "similarly situated" persons exists so as to justify a particular FLSA lawsuit proceeding to trial as a collective action on behalf of those "similarly situated" persons.

Step one occurs early in the lawsuit when little or no discovery has taken place. At stage one, the named plaintiffs must present a quantum of proof necessary for the court to *preliminarily* determine the existence of a group of persons at least arguably "similarly situated" to the named plaintiffs. If the court concludes that plaintiffs have submitted sufficient proof of such a group, the court orders the employer to produce the names and last known addresses of those persons so that plaintiffs may send them notice of the lawsuit and afford them the opportunity to opt-in as required by § 216(b). The court directs the parties to collaborate on the content on the notice and resolves any disagreements between the parties. The court then authorizes plaintiffs to send the approved notice to the group of persons preliminarily deemed to "similarly situated" to the named plaintiffs. The notice

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gives the recipients a fixed date by which they must sign special forms consenting to joining the lawsuit.

Following the sending of the notice, the parties engage in discovery typical of large cases. At the close of the discovery, the court revisits the issue of "similarly situated," typically on motion of the defendant to "decertify" the conditionally certified collective action. Because the court has a relatively complete factual record at this second stage, the court holds plaintiffs and the opt-ins to a higher threshold of proof regarding "similarly situated" than in the first stage. If the court determines that the opt-ins are "similarly situated" when measured against the higher stage two requirements, the court directs that the case proceed to trial as a collective action. If, however, the court determines that the opt-ins are not "similarly situated" to the named plaintiffs, the court dismisses the opt-ins and directs that the case proceed on behalf of the named plaintiffs only.

This two stage procedure is often referred to as the "ad hoc" procedure. With rare exceptions, district courts invariably follow the basic contours of the two stage "ad hoc" procedure when determining whether to authorize a collective action of behalf of "similarly situated" persons.

Brian R. Gates, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 Notre Dame L. Rev. 1519, 1531, 1550, 1552 (April 2005) ("courts and practitioners alike have long labored to develop a procedural framework that could inform the analysis of when potential plaintiffs were 'similarly situated' as required by the statute. Congress, having offered courts no guidance within the FLSA itself or in advisory notes on how to construct the 'similarly situated' inquiry, implicitly directed the courts to use their inherent authority and discretion to flesh out the statutory standard;" "the ad hoc, two-tiered analysis to section 16(b) class certification has taken firm hold in most districts and is now the preferred means of addressing challenges to certification;" because no court of appeals has mandated any particular procedure for determining if plaintiff's proposed class satisfies the "similarly situated" requirement, "district courts retain virtually unfettered discretion in deciding which approach to use")

Am. Bar Association, Section of Labor and Employment, Fair Labor Standards Act Subcommittee, *2003-2004 Treatise Supplement: The Fair Labor Standards Act*, Feb. 17, 2005 (E. Kearns and M. Gallagher, Eds.) ["courts continue to apply a two-step approach to certifying collective actions under the FLSA")

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170-72 (1989) (finding courts to have discretion to adopt the two stage process and encouraging early notice but not mandating it; the "facts and circumstances of this case illustrate the propriety, if not the necessity, for court intervention in the notice process. . . . Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs, where written consent is required by statue, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time. One of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of litigation. . . . A trial court can better manage a major [FLSA collective] action if it ascertains the contours of the action at the outset. The court is not limited to waiting passively for objections about the manner in which the consents were obtained. By monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative. Both the parties and the court benefit from settling disputes about the content of the notice before it is distributed. This procedure may avoid the need to cancel consents obtained in an improper manner")

Morisky v. Pub. Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 497 (D.N.J. 2000) (at the first phase of the two-phase certification process, "the court usually has only minimal evidence before it—the pleadings and any affidavits submitted by the parties" and therefore, the decision whether to grant conditional certification is usually made "using a fairly lenient standard;" the second phase of the certification process occurs "after discovery is largely complete and the case is ready for trial," at which time the "court has much more information on which to base its decision and, as a result, now employs a stricter standard" for determining whether the case should be "allowed to proceed to trial as a collective action")

Harrington v. Educ. Mgmt. Corp., 7 Wage & Hour Cas. 2d (BNA) 1720 (S.D.N.Y. 2002) ("While the defendants may argue that additional discovery may be useful prior to a determination of whether to grant an opt-in notice, courts have held otherwise")

Chase v. Aimco Properties, L.P., 374 F. Supp. 2d 196, 200 (D.D.C. 2005) (the decision to conditionally certify a collective action under the FLSA "is ordinarily based mostly on the parties' pleadings and affidavits. . . . Putative members then have the opportunity to opt in to the representative action for a certain period, during which period the plaintiffs may engage in discovery to buttress their case that putative class members are similarly situated, and to gather the evidence necessary to meet their burden of proof on the merits when discovery is complete. Later, and typically upon a defense motion for class decertification, the court proceeds to step two and determines whether the class members are indeed similarly situated")

Bosley v. Chubb Corp., 2005 WL 1334565 at *2 (E.D. Pa. June 3, 2005) ("[i]n the absence of guidance from the Supreme Court . . . courts have developed a two-

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tiered test to determine whether FLSA claimants are 'similarly situated' for purposes of § 216(b). The first step in this test is conducted early in the litigation process, when the court has minimal evidence. This step is a preliminary inquiry into whether the plaintiff's proposed class is constituted of similarly-situated employees. At this stage, the court grants only conditional certification of the class for the purpose of notice and discovery, and this is done under a comparatively liberal standard. The second step is usually conducted after the completion of class-related discovery. During the second step, the court conducts a specific factual analysis of each employee's claim to ensure that each claimant is an appropriate party. Plaintiffs bear the burden of showing they are similarly situated to the remainder of the proposed class")

Clarke v. Convergys Customer Mgmt. Group, Inc., 370 F. Supp. 2d 601, 605 (S.D. Tex. 2005) ("it is clear that the two-step approach is 'the prevailing test among federal courts.' In particular, the two-step process has the advantage of informing the original parties and the court of the number and identify of persons desiring to participate in the suit. With that information, analysis may be performed on the viability of the class and its representatives")

VII. Litigating an FLSA Collective Action—Part III: What Factors and Quantum of Proof Regarding "Similarly Situated" Should the Court Use in Stage One?

A. Chaos and the Lack of Appellate Court Guidance on Factors for "Similarly Situated"

Even though the FLSA established the "similarly situated" requirement without further elaboration in 1938, no appellate court has spelled out the factors that a district court should use when determining if a particular group of employees is "similarly situated" to each other and to the named plaintiffs. The absence of guidance applies equally to stage-one and stage-two determinations. No consistent pattern has emerged on the factors to be considered. Factors that appear to be controlling in one case appear to be irrelevant in another.

Brian R. Gates, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 Notre Dame L. Rev. 1519, 1521 (April 2005) (Congressional "clues that might guide courts in interpreting the 'similarly situated' standard in section 16(b) are few and far between")

Brian R. Gates, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 Notre Dame L. Rev. 1519, 1551, 1552 (April 2005) ("To date, the circuit courts have refused to define the 'similarly situated' standard precisely or even to mandate the lower courts in the circuits adopt one particular approach to section 16(b) group certification. In fact, only three circuits have formally considered the issue of how best to define the 'similarly situated' standard;" "No one set of factors has emerged as definitive considerations in the ad hoc approach. Courts have reached no clear consensus" on the factors that render a particular group of employees "similarly situated")

Kane v. Gage Merch. Servs., Inc., 138 F. Supp. 2d 212, 214 (D. Mass. 2001) (noting that the First Circuit "has not yet addressed the issue" of "similarly situated")

Mike v. Safeco Ins. Co. of America, Inc., 274 F. Supp. 2d 216, 220 n.6 (D. Conn. 2003) (noting that there "is no decision by the Court of Appeals for the Second Circuit" on how to approach the "similarly situated" determination)

Goldman v. RadioShack Corp., No. 03-0032, 2003 WL 21250571, at *6 (E.D. Pa. April 16, 2003) (noting the "absence of Third Circuit or Supreme Court guidance" on determining who is "similarly situated")

Bernard v. Household Int'l, Inc., 231 F. Supp. 2d 433, 435 (E.D. Va. 2002) (noting that "the Fourth Circuit has not ruled on the matter" of the contours of who is "similarly situated")

Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213-16 (5th Cir. 1995) finding it "unnecessary to decide which . . . of the competing methodologies should be employed" when deciding whether to conditionally certify an FLSA collective action)

Pritchard v. Dent Wizard Int'l Corp., 210 F.R.D. 591, 595 (S.D. Ohio 2002) (observing that the Sixth Circuit "has not addressed the issue" of who is "similarly situated")

Champneys v. Ferguson Enters., Inc., 2003 WL 1562219 at *5 (S.D. Ind. March 11, 2003) (noting that the "Seventh Circuit has not specifically addressed the standard to be used in determining whether potential plaintiffs are similarly situated")

Pfohl v. Farmers Ins. Group, No. 03-3080, 2004 WL 554834, at *2 (C.D. Cal. March 1, 2004) (observing that "the Ninth Circuit has not defined" the term "similarly situated")

Theissen v. Gen. Elec. Cap. Corp., 267 F.3d 1095, 1101-05 (10th Cir. 2001) (after reviewing various approaches to determine who is "similarly situated, declining to identify one approach as superior over any of the others, but declaring that "there is little difference" among them)

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Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1216-19 (11th Cir. 2001) (after examining possible approaches to determining who is "similarly situated," declaring that "[n]othing in our circuit precedent . . . requires district courts to utilize [any particular] approach,")

McNeil v. Dist. of Columbia, No. 98-3142, 1999 WL 571004 at *2 (D.D.C. Aug. 5, 1999) (noting that the D.C. Circuit "has not addressed [the] precise issue" of how to determine who is "similarly situated")

B. Chaos Regarding the Quantum of Proof Concerning "Similarly Situated" During Stage One

District courts have articulated two different standards regarding the quantum of proof that the plaintiffs must present at stage one regarding "similarly situated." Led by the Tenth Circuit, some courts *say* that detailed allegations are sufficient. In practice, however, most decisions that articulate the mere-allegation standard in fact utilize some factual evidence in determining if plaintiffs have met the stage-one quantum of proof on the "similarly situated" standard. Most courts, however, expressly say that mere allegations, no matter how detailed, are insufficient and that plaintiffs must present some factual evidence of the existence of "similarly situated" individuals. However, the courts that require at least some evidence cannot agree on how to articulate the quantum of factual evidence needed and cannot agree on the factors for which the plaintiff must submit evidence.

Thus, between the "allegations only" cases, which rarely involve only allegations, and the differing standards of proof imposed by courts that explicitly require some factual evidence, one is left with the impression that the decisions truly are "ad hoc." That conclusion is reinforced because of the lack of agreement about what factors must be alleged or shown by evidence. Because the choice of factors to evaluate and the quantum of proof needed to satisfy those factors can, and do, vary almost infinitely, no clear pattern emerges from the cases.

Thus, both plaintiffs and employers have found it exceedingly difficult to predict the outcome of stage-one or stage-two determinations on "similarly situated." Because employers appear to value certainty more than plaintiffs, the current chaotic state of the law creates substantial anxiety among defendants faced with an FLSA complaint alleging a broad group of "similarly situated" persons. The employers' fear of uncertainty and the unusually unpredictable nature of FLSA collective actions have contributed to a high rate of settlement.

C. Allegations of Some Factors Are Sufficient at Stage One

Thiessen v. Gen. Elec. Cap. Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001) (for conditional certification at the notice stage, the courts "require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan"; court reviews defendant's arguments as to disparate factual and legal differences among the individuals allegedly similarly situated only at the second stage of the analysis, after discovery has closed)

Pivonka v. Board of County Commissioners of Robinson County, Kansas, 2005 WL 1799208 at *2-*4 (D. Kan. July 27, 2005) (conditional certification granted to a class of employees that included non-supervisors, supervisors, and managers because "all that is required for conditional certification at the notice stage is a showing that the putative class members were together the victims of a single policy, decision, or plan." The fact that class members were employed in "markedly different circumstances and positions" was no reason for not conditionally certifying a class). "For conditional certification at the notice stage, a court 'require[s] nothing more than substantial allegations that the putative class members were together the victims were together the victims of a single decision, policy, or plan.' The standard for certification at this notice stage, then, is a lenient one that typically results in class certification. . . At the conclusion of discovery, the court then revisits the certification issue and makes a second determination (often prompted by a motion to de certify) of whether the plaintiffs are similarly situated using a stricter standard. . . . During this 'second stage' analysis, a court reviews several factors, including the disparate factual and employment settings of the individual plaintiffs; the various defenses available to defendant which appear to be individual to each plaintiff; fairness and procedural considerations") (citation omitted)

D. Some Factual Showing Regarding Some Factors Necessary at Stage One

De Asencio v. Tyson Foods Inc., 342 F.3d 301, 306 (3d Cir. 2003) ("similarly situated" opt-in language was designed to limit the number and type of plaintiffs who could join collective actions in an effort "to strike a balance to maintain employees' rights but curb the number of lawsuits" brought as putative collective actions).

Haynes v. Singer Co., 696 F.2d 884, 887 (11th Cir. 1983) ("plaintiffs have the burden of demonstrating a reasonable basis for crediting their assertions that aggrieved individuals existed in the broad class that they proposed;" denying conditional certification and notice where plaintiff presented only "counsel's unsupported assertions")

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Dybach v. Fla. Dep't of Corr., 942 F.2d 1562, 1567-78 (11th Cir. 1991) (plaintiffs must make a "modest factual showing" in order to demonstrate the existence of a class of similarly situated employees; the "district court should satisfy itself that there are other employees who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions")

Grayson v. K-Mart, Corp., 79 F.3d 1086, 1095-97 (11th Cir. 1996) (the standard for demonstrating "similarly situated" at the conditional certification stage of an FLSA collective action "is considerably less stringent" than the proof required to obtain class certification under Rule 23; moreover, "a unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement" of § 16(b); plaintiffs claims need not be identical to others, only similar, and plaintiff need demonstrate only a "reasonable basis" for allegations of similarity with potential opt-ins)

Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218-19 (11th Cir. 2001) (the "decision to create an opt-in class under [§ 16(b)] remains soundly within the discretion of the district court;" "the similarly situated requirement is not very stringent;" plaintiff's burden to meet the "similarly situated" standard is "not heavy")

Tucker v. Labor Leasing, Inc., 872 F. Supp. 941, 943 (M.D. Fla. 1994) (conditionally certifying collective action based on affidavits of plaintiff and two opt-ins; but, exercising its inherent power to "limit notification to a particular geographic area," court limited notice to a single location)

Baum v. Shoney's, Inc., No. 98-423, 1998 WL 968390 (M.D. Fla. Dec. 3, 1998) (in order to obtain conditional certification of an FLSA collective action, plaintiffs "must provide evidence to support their allegations;" plaintiffs' assertion that "the allegations in their Complaint are sufficient to demonstrate the existence of other potential class members who are similarly situate [is] a misstatement and misunderstanding of the law [and] calls into question whether Plaintiffs and their counsel are suitable representatives for their potential class;" plaintiffs must make "substantial detailed allegations of class-wide violations of the FLSA supported by affidavits")

Mackenzie v. Kindred Hosps. East, L.L.C., 276 F. Supp. 2d 1211, 1220 (M.D. Fla. 2003) (refusing to conditionally certify a collective action where plaintiff "failed to present evidence of any individual's interest in joining this lawsuit")

Smith v. Tradesmen Int'l, Inc., 289 F. Supp. 2d 1369, 1372 (S.D. Fla. 2003) (denying, at least temporarily, conditional certification of a nationwide class of employees in various job titles after considering the following factors: "1) whether the plaintiffs all held the same job title; 2) whether they worked in the same geographic location; 3) whether the alleged violations occurred during the same time period; 4) whether the plaintiffs were subjected to the same policies and practices, and whether these policies and practices were established in the same manner and by the same decision maker; and 5) the extent to which the actions which constitute the violations claimed by Plaintiffs are similar;" concluding that "an insufficient amount of discovery has taken place to enable it to make an informed decision on the issue of whether similarly situated employees exist. At this time, the sole evidence of similarly situated employees submitted by Plaintiff consists of three (3) identical affidavits by employee with different job title, different job responsibilities, and who work in different geographic locations than Plaintiff. Therefore, the Court finds it would be more prudent to allow Plaintiff to conduct additional discovery and gather further evidence to enable him to meet his burden of proof, if possible, on the similarly situated question before authorizing nationwide notice to the requested class")

Moss v. Crawford & Co., 201 F.R.D. 398, 409 (W.D. Pa. 2000) (although class members must be "similarly situated," "courts generally do not require prospective class members to be identical;" putative class of 70 employees would not "make the opt-in class unmanageable")

Bunnion v. Consol. Rail Corp., 1998 WL 372644 at *17-*18 (E.D. Pa. May 14, 1998) (conditionally certifying nationwide class where plaintiff established that all potential opt-ins were victims of a single, centralized policy and rejecting, at least at stage one, defendant's claims that the decisions were decentralized and the opt-ins' claims were subject to individualized defenses; recognizing that decertification was a possibility at stage two, following "further discovery")

Goldman v. RadioShack Corp., No. 03-0032, 2003, WL 21250571, at *7 (E.D. Pa. April 16, 2003) ("During this first-tier inquiry [in a misclassification case], we ask only whether the plaintiff and the proposed representative class members allegedly suffered from the same scheme;" declining to "delve into a fact-specific similarly situated inquiry" of the differences, if any, between the named plaintiffs' job duties and others with the same job title)

Smith v. Sovereign Bancorp, No. 03-2420, 2003 WL 22701017 (E.D. Pa. Nov. 13, 2003) (rejecting the mere allegation of a single-scheme standard for conditional certification of FLSA cases for notice purposes because, under that standard, "any plaintiff who is denied overtime p[ay may file suit under FLSA and, as long as her complaint is well-pled, receive preliminary class certification;" such automatic conditional certification is "inefficient and overbroad . . . and places a substantial and expensive burden on defendants. . . . More importantly, automatic preliminary class certification is at odds with the Supreme Court's recommendation to

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'ascertain the contours of the [§ 216] action at the outset;" plaintiffs failed to satisfy the "modest factual showing" needed to justify conditional certification)

Lawrence v. City of Philadelphia, No. 03-4009, 2004 WL 945139 at *1-*2 (E.D. Pa. April 29, 2004) (rejecting an off-the-clock putative collective action because the "circumstances of those individual claims vary too widely to conclude that . . . the Plaintiffs are similarly situated")

Bosley v. Chubb Corp., 2005 WL 1334565 at *2-*4 (E.D. Pa. June 3, 2005) (while it appears that all "courts apply the two-tier framework in determining whether potential class members are 'similarly situated,' courts differ in the level of proof necessary in the first step of the inquiry. Some courts have determined that plaintiffs need merely allege that the putative class members were injured as a result of a single policy of a defendant employer. . . . Other courts have applied a stricter, although still lenient, test that requires plaintiff to make a 'modest factual showing that the similarly situated requirement is satisfied;" rejecting the standard of mere allegations regarding a single scheme and holding that plaintiffs "are required to provide some factual showing that the proposed recipients of opt-in notices are similarly situated to the named plaintiffs, [although] this standard is still an 'extremely lenient standard;'" plaintiffs' initial request for conditional notification denied "without prejudice because, even considering the lenient standard, Plaintiffs did not provide a sufficient factual showing that the proposed opt-in recipients are similarly situated. In their original motion, Plaintiffs merely provided a Declaration from one of the three named Plaintiffs." After "limited discovery," plaintiffs submitted sufficient factual basis to warrant conditional certification of a class for notice purposes)

Krieg v. Pell's, Inc., No. 00-1230, 2001 WL 548394 at *1 (S.D. Ind. March 29, 2001) (conditionally certifying a nationwide collective action; affidavit of employer's former payroll manager indicating a centralize policy of not paying overtime to store managers was sufficient to satisfy plaintiff's obligation "to establish a colorable basis that a class of similarly situated employees does exist")

Clausman v. Nortel Networks, Inc., No. 02-0400, 2003 WL 21314065, at *4 (S.D. Ind. May 1, 2003) ("[e]ven those individuals with the same job title as [the plaintiff] may or may not be exempt;" because "liability to each plaintiff will depend on whether the plaintiff was correctly classified" as exempt, the court will be "required to make a fact-intensive inquiry into each potential plaintiff's employment situation;" therefore, "certification of a collective action is inappropriate")

Reich v. Homier Dist. Co., 362 F. Supp. 2d 1009 (N.D. Ind. 2005) (conditional certification in FLSA misclassification case denied because of the individualized job duty determinations needed for each person)

Frank v. Capital Cities Communications, Inc. 88 F.R.D. 674, 678-679 (S.D.N.Y. 1981) (plaintiff seeking conditional certification of a collective action has the burden to show who is "similarly situated;" in addition, a plaintiff seeking certification of a collective action that includes employees of more than one company has the burden to establish sufficient evidence of joint employer status to warrant the sending of notice to employees of entities other than the one at which plaintiffs worked; finding that plaintiffs produced sufficient evidence of "similarly situated" individuals at the company for which they actually work, the court authorized notice to that company; denying conditional certification extending to employees of other entitles because plaintiffs failed to present sufficient evidence of joint-employer status, but leaving open the possibility for plaintiffs to renew their motion if they discover such evidence)

Jackson v. New York. Tel. Co., 163 F.R.D. 429, 431-32 (S.D.N.Y. 1995) ("plaintiffs may meet [their "similarly situated"] burden by making 'substantial allegations that the putative class members were together the victims of a single decision, policy or plan.' . . . Because this litigation is in its early stages, plaintiffs need merely provide 'some factual basis from which the court can determine if similarly situated potential plaintiffs exist.' The inquiry at the inception of the lawsuit is less stringent than the ultimate determination that the class is properly constituted. . . . Therefore, at this preliminary notice stage, plaintiffs are only required to demonstrate a factual nexus that supports a finding that potential plaintiffs were subjected to a common" scheme; conditionally certifying a collective action because plaintiff had presented a "solid factual basis" for the "similarly situated" determination)

Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261-262 (S.D.N.Y. 1997) (holding that the "question, there fore, is not whether the Court has the power to authorize the notice, but whether the 'appropriate' circumstances exist for the Court to exercise its discretion in this matter;" to obtain conditional certification of a class, plaintiff need make at least a "modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law; . . . The burden on plaintiffs is not a stringent one, and the Court need only reach a preliminary determination that the potential plaintiffs are similarly situated.' . . . Nor must this court wait for defendant to complete its discovery before authorizing class notice")

Realite v. Ark Rests. Corp., 7 F. Supp. 2d 303, 307-08 (S.D.N.Y. 1998) (allegations in complaint amply supported by plaintiffs' ten affidavits enough for

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court to conditionally certify a collective action for all hourly employees at defendants' 15 restaurants in New York City; "the Court underscores that it is certifying the proposed class only for notice and discovery purposes [and is] not holding at this time that all members of the proposed class who will be sent notices are, in fact, similarly situated to plaintiffs. Far too little discovery has been taken for this Court to make such a determination now. Furthermore, should discovery reveal that plaintiffs in fact are not similarly situated, [the Court] may later decertify the class, or divide the class into subgroups, if appropriate")

Foster v. Food Emporium, 2000 WL 1737858 at *1 (S.D.N.Y. April 26, 2000) (to obtain conditional certification of an FLSA collective action plaintiff need make only a "modest factual showing" "sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law")

Zhao v. Benihana, 6 Wage & Hour Cas. 2 (BNA) 1881 (S.D.N.Y. May 7, 2001) (granting conditional certification of an FLSA collective action alleging violations of regulations regarding the sharing of tips by restaurant employees at a single restaurant, based on "as preliminary determination that potential plaintiffs are similarly situated; the inquiry is 'less stringent than the ultimate determination that the class is properly constituted," finding that the plaintiffs met "this light standard"))

Levinson v. Primedia, Inc., No. 02-2222, 2003 WL 22533428, at *1 (S.D.N.Y. Nov. 6, 2003) (while "plaintiffs have provided factual assertions in support of the claim that *they* were deprived of minimum wage and overtime rates, they have failed to make a sufficient showing that the same was true for other potential plaintiffs;" denying conditional certification because plaintiffs failed to meet even the "modest" showing needed at stage one of the certification process)

Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 101, 104 (S.D.N.Y. 2003) (conditionally certifying collective action for all management employees based on plaintiff's affidavit which "identified by name a number of other current or former . . . employees who held the same or similar positions as Plaintiff . . . and who may not have received overtime compensation")

Pfohl v. Farmers Ins. Group, 2004 WL 554834, at *8-*9 (C.D. Cal. March 1, 2004) (refusing to conditionally certify a collective action challenging the employer's designation of jobs as exempt where employer produced evidence that members of the putative class performed varying duties and plaintiff "offered no details of what the individuals in the putative collective action actually do on the job")

Lusardi v. Xerox Corp. 118 F.R.D. 351, 372 (D.N.J. 1987) (court should certify and FLSA collective action "only where employees are similarly situated in order that a defendant be afforded an opportunity to effectively defend. Requiring less would . . . amount to a deprivation of a property right in violation of the Due Process Clause"), *vacated n part on other grounds*, 122 F.R.D. 463 (D.N.J. 1988)

Sperling v. Hoffman-LaRoche, Inc., 118 F.R.D. 392, 405, 406-07 (D.N.J. 1988) (the "determination as to whether class members are similarly situated is always fact-specific;" a court should not conditional certify an FLSA collective action unless the evidence of similarly situated individuals is "sufficiently developed"), *aff'd* 862 F.2d 439 (3d Cir. 1988), *aff'd* 493 U.S. 165 (1989)

Zavala v. Wal-Mart Stores, Inc., No. 03-5309 (D.N.J. Dec. 29, 2004) (allegations in complaint and the affidavits of contract janitors who worked in nineteen stores sufficient for court to grant conditional certification of minimum wage and overtime claims involving contract janitors at one thousand Wal-Mart stores; granting nationwide certification with no discussion, despite massive briefing, voluminous affidavits and documents, and intense arguments by both sides)

Harper v. Lovett's Buffett, Inc., 185 F.R.D. 358, 361-362 (M.D. Ala. 1999) ("Automatic preliminary class certification is at odds . . . with the congressional intent behind FLSA's opt-in requirement, which was designed to limit the potentially enormous size of FLSA representative actions;" plaintiffs "bear the burden" to show that they are similarly situated to putative class members; denying conditional certification of a class covering restaurants in six states and limiting notice to a single restaurant because plaintiffs failed to show the existence of a uniform policy adversely affecting at any location beyond the one where they worked; adjudicating plaintiffs overtime claims would "require proof of the exact amount due to each individual plaintiff, [making] individual issues . . . predominate over class issues")

Barron v. Henry County Sch. Sys., 242 F. Supp. 2d 1096 (M.D. Ala. 2003) (plaintiff must make a showing of commonality beyond mere facts of job duties and pay provisions to satisfy the "similarly situated" requirement of § 216(b), otherwise too great an opportunity for abuse exists; conditionally certifying class where plaintiff presented expert testimony that the alleged violations were systematic, not individual)

Marsh v. Butler County Sch. Sys., 242 F. Supp. 2d 1086, 1093 (M.D. Ala. 2003) ("a plaintiff must make some rudimentary showing of commonality . . . beyond the mere facts of job duties and pay provisions;" denying certification because putative class included employees at different pay levels working under different conditions at different locations) [is this at the notice stage?]

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Horne v. United Servs. Auto. Ass'n, 79 F. Supp. 2d 1231 (M.D. Ala. 2003) (denying notice to location beyond where plaintiff worked because plaintiff failed to "demonstrate that employees outside of [plaintiff's] work location . . . were similarly affected by alleged work policies")

Holt v. Rite Aid Corp., 333 F. Supp. 2d 1265, 1274 (M.D. Ala. 2004) (after extensive discovery, conditional certification of store managers' and assistant store managers' FLSA misclassification case denied; although the court would not "weigh[] evidence" at the conditional certification stage, the court would determine whether plaintiffs' claim "would ultimately turn on evidence related to day-to-day tasks;" "because the application of the executive exemption for merits purposes will require a fact-intensive determination, . . . the similarly situated inquiry requires an examination of day-to-day tasks," thus precluding a collective action)

Mertz v. Treetop Enters., No. 96-1208, 1999 U.S. Dist. LEXIS 18386, at *5-*6, *9 (N.D. Ala. March 2, 1999) (denying conditional certification where approximately 800 plaintiffs worked in different positions, "were supervised by numerous different unit managers," and worked at different locations)

Brooks v. BellSouth Telecommunications, Inc., 164 F.R.D. 561, 566 (N.D. Ala. 1995) (conditional certification denied where plaintiff failed to put forth substantial evidence that the proposed class members were victims of a single decision, policy, or plan infected by discrimination)

Morgan v. Family Dollar Stores, Inc., No. 01-0303 (N.D. Ala. Nov. 7, 2002) (conditionally certifying nationwide class of store managers; the Eleventh Circuit's "requirement in *Dybach* is that Plaintiffs be similarly situated; *Dybach* does not require that they be identically situated")

Brown v. Dologencorp, Inc., No. 02-0673 (N.D. Ala. Jan. 12, 2004) (conditionally certifying nationwide class of managers at 6,000 stores based on affidavits of 17 plaintiffs; nationwide certification granted with no discussion, despite massive briefing, extensive documents and affidavits, and intense arguments by both sides)

Bernard v. Household Int'l, Inc., 231 F. Supp. 2d 433, 435-36 (E.D. Va. 2002) (at the conditional certification phase of an FLSA lawsuit, unsubstantiated allegations "will not suffice;" plaintiff must provide "factual evidence" and "first-hand knowledge" showing that others are similarly situated; to obtain company-wide conditional certification and notice, plaintiff must present "factual evidence [of a] company-wide policy resulting in potential FLSA violations;" denying conditional certification of a class of employees at twenty different offices in fifteen states)

Pfaahler v. Consultants for Architects, Inc., No. 99-6700, 2000 WL 198888, at *2 (N.D. Ill. Feb. 8, 2000) (denying conditional certification where plaintiff challenged his classification as an independent contractor because "the court would be required to make a fact-intensive, individual determination as to the nature of each potential claimant's employment relationship" with each client employer; an "'inquiry in the employee's specific job duties . . . is not appropriate in a class lawsuit under Section 216(b).' A collective action under the FLSA is only appropriate where those in the pool of potential claimants perform the same duties as the Plaintiffs;" plaintiffs' mere *belief* that other employees are "similarly situated" is not enough) (citations omitted)

Garza v. Chicago Transit Auth., 2001 WL 503036, at *2-*3 (N.D. Ill. May 11, 2001) (to obtain conditional certification of a collective action at stage one, plaintiffs need make only "'a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law. . . ; [they must show] only a factual nexus which binds them together as victims of an alleged policy or practice;" conditionally certifying a class of all hourly employees who may have been denied overtime for time spent in training, recognizing, however, that conditional certification "does not indicate that all of the employees who are given notice are similarly situated, as future discovery may demonstrate that they are not") (citation omitted)

Vazquez v. Tri-State Mgmt. Co., No. 01-5926, 2002 WL 58718 at *2-*3 (N.D. Ill. Jan. 14, 2002) (at stage one of an FLSA case, plaintiff must make "'a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law;'" "plaintiffs are similarly situated if they 'were victims of a common policy or plan that violated the law;'" approving conditional certification of a collective action where the affidavits of three named plaintiffs "state that they, and other painters who worked for Defendants, were routinely denied overtime compensation") (citations omitted)

Flores v. Lifeway Foods, Inc., 289 F. Supp. 2d 1042 (N.D. Ill. 2003) (denying conditional certification where plaintiffs' two affidavits merely averred that "other employees" were similarly denied overtime; such unsupported allegations do not satisfy even the "modest factual showing" needed at stage one of the certification process)

Taillon v. Kohler Rental Power, Inc., No. 02-8882, 2003 WL 2006593, at *2-*3 (N.D. Ill. April 29, 2003) (granting company wide conditional certification of

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collective action for persons in plaintiff's job title where company admitted that it did not pay overtime to any employee in that job title)

Ray v. Motel 6 Operating L.P., No. 95-828, 1996 WL 938231, at *4-*5 (D. Minn. March 18, 1996) (denying conditional certification of alleged overtime violations involving 1000-1500 current and former employees at approximately 775 motels where employees at different geographic locations, and were subject various decisions by different supervisors made on a decentralized employee-by-employee basis; thus, the 15 named plaintiffs failed to show a common or centralized scheme which led to the alleged FLSA violations; "if an illegal scheme exits at all, it is implemented on a decentralized level . . . . [T]he discrepancies between Plaintiffs' employment circumstances and the significant manageability problems inherent in a trial of 10000 plus individuals demonstrate that it is inappropriate to pursue this case as a class action").

Severtson v. Phillips Beverage Co., 137 F.R.D. 264, 266-267 (D. Minn. 1991) (In "seeking court-authorized notice, plaintiffs are in effect asking this court to assist in their efforts to locate potential plaintiffs and thereby expand the scope of this litigation. As a mater of sound case management, a court should, before offering such assistance, make a preliminary inquiry as to whether a manageable class exists." "To obtain court authorization to send the proposed notice, plaintiffs must submit evidence establishing at least a colorable basis for their claim that a class of 'similarly situated' plaintiffs exists;" "conclusory" allegations in plaintiffs' complaint, standing alone, were "an insufficient basis for determining whether sending court-authorized notice is appropriate;" trial court has a "responsibility" to assure that any determination of the scope of those similarly situated has a "factual basis;" court has obligation to avoid "stirring up" litigation through unwarranted solicitation)

Cintron v. Hershey Puerto Rico, 363 F. Supp. 2d 10 (D.P.R. 2005) (opt-in forms could not support conditional certification where the forms did not make any "reference to the facts in the Complaint" and contain no "factual allegations of 'similarity' to the facts of the Complaint;" such blanket forms "lack factual background and are purely conclusory;" thus, plaintiff provided no nexus "between the complaint and the consent forms based on averred facts;" the "mere listing of names, without anything more, is insufficient to authorize notice)

Dean v. Priceline.com, Inc., No. 00-1273, 2001 U.S. Dist. LEXIS 24982, at *7-*8 (D. Conn. June 5, 2001) (collective action treatment inappropriate in view of the "extremely individual and fact-intensive" determination required by the administrative exemption) [is this at the notice stage?]

Mike v. Safeco Ins. Co. of America, Inc., 274 F. Supp. 2d 216, 220-21 (D. Conn. 2003) (to obtain a conditional certification of an FLSA collective action, plaintiff must make a "'modest factual showing'" that the named plaintiffs and the putative class members were "'victims of a common policy or plan that violated the law'" and must demonstrate "that questions common to a potential group of plaintiffs would predominate determination of the merits of the case;" plaintiff also has the "burden of demonstrating that there are other similarly situated individuals who should be invited to join this action." moreover, because plaintiff alleges that the employer misclassified his as an exempt administrative employee, "the central question in determining [defendant's] liability will be whether [most of plaintiff's tasked] performed on a day-to-day basis were administrative or non-administrative;" to resolve even the claim of the named plaintiff would require and "extremely individual and fact-intensive" analysis; similarly, every opt-in would need to "present specific evidence of his or her daily tasks;" "there is no way for the court to conclude that resolution of the claims of many plaintiffs at the same time would be sensible")

Stubbs v. McDonald's Corp., 227 F.R.D. 661, 665, 666 (D. Kan. 2005) (although acknowledging controlling Tenth Circuit authority that "nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan," rejecting conditional certification where plaintiff, resting on his well-pled allegations, failed to present evidence to counter defendant's detailed evidence that others were not "similarly situated;" in the face of such evidence plaintiff must "provide more than his own speculative allegations, standing alone")

D'Anna v. M/A-Com, Inc., 903 F. Supp. 889, 894 (D. Md. 1995) (the requirement in FLSA cases for plaintiff to make a preliminary *evidentiary* showing that others are similarly situated is premised on principles of "sound case management . . . to avoid the 'stirring up' of litigation through unwarranted solicitation,' [and because] an employer should not be unduly burdened [and prejudiced] by a frivolous fishing expedition conducted by plaintiff; the "mere listing of names" of individuals allegedly similarly situated, "without more, is insufficient" to justify conditional certification, "absent a showing that potential plaintiffs are" similarly situated)

Camper v. Home Quality Mgmt., Inc., 200 F.R.D. 516, 519 (D. Md. 2000) ("Mere allegations in the complaint are not sufficient" to obtain conditional certification; "some factual showing by affidavit or other means must be made;" rejecting plaintiff's request for notice to all forty seven of defendant's facilities and limiting an "off-the-clock" case to one facility)

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Freeman v. Wal-Mart Stores, Inc., 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003) ("it would be a waste of the Court's time and the litigants' time and resources to notify a large and diverse class only to later determine that the matter should not proceed as a collective action because the class members are not similarly situated. . . . [U]nsupported assertions of widespread violations are not sufficient to meet Plaintiff's burden")

Ballaris v. Wacker Silttronic Corp., 2001 WL 1335809 at *2-*3 (D. Or. Aug. 24, 2001) (conditionally certifying an "off-the-clock" case at one location in which plaintiff alleges that the employer failed to pay "clean room" employees for time spent putting on and taking off their specialized "bunny suits;" allegations in complaint and two affidavits sufficient to show how the employer's alleged policy operated; "the 'similarly situated' standard under Section 216(b) is less stringent than the requirement under Fed.R.Civ.P. 23(b)(3) that common questions of law or fact predominate over questions affecting only individual members. . . [T]he similarly situated requirement is more flexible than the requirements of Fed.R.Civ.P. 20 (joinder) and 42 (severance). As such, the claims and positions of employees need not be identical in order to meet the lower standards of § 216(b);" at stage one of an FLSA collective action, "'[a]ll that need be shown by the plaintiff is that some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA'")

Sheffield v. Orius Corp., 211 F.R.D. 411, 413 (D. Or. 2002) (denying conditional certification where alleged FLSA violations resulted from individual decisions by various managers an nine different locations and where plaintiffs failed to show that putative class members were "related as victims of a uniform, Nat'l policy;" factual differences relating to each potential opt-in "would require extensive consideration of individualized issues of liability and damages" and would not "lead to efficiency gains and uniform fact determinations that § 216(b) was designed to create. Rather, a collective action certified on the facts presented thus far would be mired in particularized determinations of liability and damages, rather than collective consideration of common questions of law and fact")

McElmurry v. US Bank Nat'l Ass'n, No. No. 04-642, 2004 WL 1675925 (D. Or. July 27, 2004) (denying conditional certification of a nationwide collective action in which plaintiffs sought to send notice to approximately 70,000 current and former hourly employees of defendant allegedly harmed by the employer's policy "rounding down" fractional hours worked. "The 'similarly situated' standard is less stringent that the requirement under Rule 23(b)(3) that common questions of law or fact predominate over questions affecting only individual members. . . . Nonetheless, plaintiffs are required to show through admissible evidence a 'reasonable basis' for their claim that the employer acted on a class-wide basis. Plaintiffs' claims 'must contain questions of both law and fact which are common to all employees engaged in the same character of work.' . . . The burden is on plaintiffs to show they are similarly situated. . . . Unsupported allegations of widespread violations are insufficient. . . . [Here], determining the putative class requires an exceptionally individualized inquiry [and] 'each claim would require extensive consideration of individualized issues of liability and . . . [any collective action would be] mired in particularized determinations of liability . . . rather than collective consideration of common questions of law and fact. . . . [T]he similarly situated determination in terms of actual wage loss requires individual employee-by-employee, time sheet-by-time sheet inquiries which are inconsistent with a collective action's goal of promoting judicial efficiency") (citations omitted), *aff'd*, (D. Or. Oct. 1, 2004) (slip op., at 5-6) ("In the context of a FLSA suit, 'similarly situated' persons must raise a similar legal issue as to coverage, exemption, or nonpayment of minimum wages or overtime arising from at least a manageably similar factual setting with respect to their job requirements and pay provisions;" affirming denial of conditional certification where the ultimate determination on the merits "would require extensive consideration of individualized issues of liability and damages")

In re Masonite Corp. Hardboard Siding Prod. Liab. Litig., 170 F.R.D. 417, 425 (E.D. La. 1997) (defendants' right to a fair trial requires "a process which permits a thorough and discrete presentation of [their] defenses")

England v. New Century Fin. Corp., 370 F. Supp. 2d 504 (M.D. La. 2005) (denial of conditional certification of a nationwide FLSA collective action because plaintiffs "failed to provide sufficient evidence of a nationwide illegal policy involving the alleged claims")

Chase v. Aimco Properties, L.P., 374 F. Supp. 2d 196, 200 (D.D.C. 2005) (it "is difficult to tease any standard for decision out of" the cases determining who is similarly situated; "it may simply be that what is 'similarly situated' enough for collective action treatment under the FLSA is a matter for the sound discretion of trial courts, guided mostly by Rule 23(b)(3)-like considerations of manageability and efficiency")

H & R Block, Ltd. v. Housden, 186 F.R.D. 399, 400 (E.D. Tex. 1999) (denying conditional certification of an FLSA collective action where plaintiffs "have failed to identify potential plaintiffs, submit affidavits of potential plaintiffs or submit any other evidence that might show a widespread plan of discrimination existed. All movant's have done is submit affidavits making conclusory allegations. . . . "[U]nsupported assertions of wide-spread FLSA violations, such as the ones made here, did not satisfy the movant's 216(b) burden")

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Donihoo v. Dallas Airmotive, Inc., No. 97-0109, 1998 U.S. Dist. LEXIS 2318, at *1 (N.D. Tex. Feb. 24, 1998) ("In deciding whether an employee fits into one of the many exempt categories delineated by the FLSA, the Court must conduct an inquiry into the employee's specific job duties;" "an inquiry into the employee's specific job duties . . . is not appropriate in a class lawsuit under Section 216(b)"; denying conditional certification of a class of all employees classified by defendant as exempt because of the need to make an employee-by-employee determination of actual job duties)

Clarke v. Convergys Customer Mgmt. Group, Inc., 370 F. Supp. 2d 601, 606-607 (S.D. Tex. 2005) (conditionally certifying an "off the clock" overtime case over defendant's objections that such cases "are so inherently individualized that they are all unfit for collective judgment. Moreover, the issues raised by [defendant] are of the sort that are appropriate for consideration during the second-stage analysis, and not during the initial 'notice stage. The Court will take up those issues in due time")

Torres v. CSK Auto, Inc., No. 03-113, 2003 U.S. Dist. LEXIS 25092 (W.D. Tex. Dec. 17, 2003) (denying plaintiffs' request for nation-wide conditional certification in an "off-the-clock" case and limiting notice to the single store for which plaintiffs submitted affidavits; "A review of the procedures employed in cases addressing whether to certify a collective action reveals that a two-tiered approach tends to be the method of choice. Under this approach, a court applies a fairly lenient standard, conditionally certifying a class based only on the pleadings and affidavits submitted, providing plaintiff can meet the substantive requirements. . . . Once conditionally certified, putative class members are afforded notice and an opportunity to 'opt-in.' Lager, a final decision is made on proceeding as a collective action based on all evidence gathered through discovery. . . . [P]laintiffs can meet [their initial] burden by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law. . . . [P]laintiffs are only required to demonstrate a factual nexus that supports a finding that potential plaintiffs were subjected to a common discriminatory schemed. In other words, the court must be satisfied that there is a basis to conclude that questions common to a potential group of plaintiffs would predominate a determination of the merits in this case;" denying nationwide certification because plaintiffs' affidavits recounting the practices at locations other than their own were based on hearsay and not personal knowledge) (citations omitted))

Dudley v. Texas Waste Syss., Inc., No. 05-CA-0078, 2005 WL 1140605, *3-*8 (W.D. Tex. May 16, 2005) (conditional certification of FLSA collective action denied where plaintiff's "complaint and affidavits in support thereof contain unsupported assertions" of overtime violations)

Wertheim v. State of Arizona, No. 92-0453, 1992 WL 566321 (D. Ariz. Aug. 4, 1992) (rejecting plaintiff's argument that "the court should authorize notice to the broadest possible class of plaintiffs, based solely on plaintiff's unsupported allegations, and decline to make even a preliminary determination of whether the potentially huge number of opt-in plaintiffs that may result actually are or may be similarly situated to the plaintiff' as inconsistent with the "orderly management of the litigation, the recognized purpose for allowing early court-approved notice to potential plaintiffs")

Belcher v. Shoney's, 927 F. Supp. 249, 252 (M.D. Tenn. 1996) (conditionally certifying a nationwide "off-the-clock" collective action of hourly restaurant workers based on 24 affidavits of employees who worked at defendant's restaurants in 10 states and the consent forms of over 200 opt-ins who worked in over 200 cities in 22 states; certification denied, however, for those restaurant chains operated by defendant by at which none of the named plaintiffs worked and at which only affiant worked)

Clark v. Dollar Gen. Corp., 2001 WL 878887 at *4-*5 (M.D. Tenn. May 23, 2001) (declining to conditionally certify a nationwide "off-the-clock" collective action of hourly assistant store managers and limiting certification to the districts in which the named plaintiffs worked because evidence of alleged violations at seven stores would not support certification covering 4,800 stores nationwide; because the employer's stated policy was to pay for all overtime, "if an illegal scheme exists at all, it appears to be implemented on a decentralized level")

Kane v. Gage Merchandising Services, Inc., 138 F. Supp. 2d 212, 215 (D. Mass. 2001) (conditionally certifying a misclassification class of Crew Coordinators where plaintiff submitted admissible evidence that the employer treated the putative class of 50 Crew Coordinators as nonexempt because the worked on a contract for which the customer refused to pay for overtime)

White v. Osmose, Inc., 204 F. Supp. 2d 1309, 1318 (M.D. Ala. 2002) (denying conditional certification of a nationwide class and limiting notice to one category of workers, in one division, within one state, because of concerns about judicial economy and manageability)

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E. A Minor Diversion—Requiring Plaintiffs to Satisfy the Substantive Standards of Rule 23

In 1990, a trial court judge in Colorado gave careful consideration to the standards that ought to govern the FLSA's "similarly situated" requirement and concluded that to the extent that it was consistent with § 216(b), the provisions of Rule 23 ought to control. *Shushan v. University of Colorado at Bolder*, 132 F.R.D. 263 (D. Colo. 1990). Despite the compelling logic of the court's opinion, it was not widely followed and was ultimately rejected by the Tenth Circuit. *Theissen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) ("Congress clearly chose not to have the Rule 23 standards apply . . . and instead adopted the 'similarly situated' standard").. Nevertheless, trial courts still often advert to the *Shushan* decision and then reject it in favor of the two-stage, "ad hoc" procedure."

Shushan v. University of Colorado at Bolder, 132 F.R.D. 263 (D. Colo. 1990) (following a very thoughtful review of relevant authorities and of the policy considerations impacting collective actions under the FLSA, the court concluded that plaintiffs seeking conditional certification of a collective action had to satisfy the commonality, typicality, and adequacy of representation of Rule 23).

Brian R. Gates, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 Notre Dame L. Rev. 1519, 1522, 1543, 1547 (April 2005) ("the Shushan argument has not won the support of a majority of district courts, which instead have developed an ad hoc, two-tiered method of section 16(b) class certification;" the "FLSA contains no references to Rule 23;" "The court's decision in Shushan to apply Rule 23's requirements to section 16(b) has not been widely embraced by the district courts. Nevertheless, there has been a small but very respectful following").

Bayles v. Am. Med. Response of Colo., Inc., 950 F. Supp. 1053, 1063 (D. Colo. 1996) ("Shushan represents a Herculean effort to provide structure to the nebulous 'similarly situated' standard by turning to the time-tested notions of Rule 23")

LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288-89 (5th Cir. 1975) (there "is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b). Rule 23(c) provides for 'opt out' class actions. FLSA § 16(b) allows as class members only those who 'opt in.' These two types of class actions are mutually exclusive and irreconcilable")

VIII. Litigating an FLSA Collective Action—Part IV: Stage Two's Stricter Standards Regarding "Similarly Situated"

Although the stage-one process of conditional certification of collective actions has spawned an enormous number of decisions, remarkable for their lack of clarity and inconsistency, stage-two decisions are relatively few. Those few decisions provide no bright line tests or even consistent factors for evaluation. They yield only one common thread: stage-two standards are stricter than at stage one.

Lusardi v. Xerox Corp., 122 F.R.D. 463, 465-66 (D.N.J. 1988) (decertifying a conditionally certified FLSA class because of disparate factual and employment settings, the defendant's individualized defenses, and other fairness and procedural considerations; "individualized defenses" and circumstances of employment "for each of more than [1,300] plaintiffs will . . . destroy any . . . commonality")

Morisky v. Pub. Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 498-99 (D.N.J. 2000) (denying certification after close of discover in a misclassification case involving a putative class of approximately 100 employees working in various jobs across several salary grades at a single location because determining whether an employee is exempt under the administrative exemption "is extremely individual and fact intensive, requiring a detailed analysis of the time spent performing administrative duties and a careful factual analysis of the full range of the employee's job duties and responsibilities; . . . [e]ven employees who hold the same job title do not necessarily perform the same work;" to "determine which employees are entitled to overtime compensation under the FLSA depends on an individual, fact-specific analysis of each employee's job responsibilities under the relevant statutory criteria. Therefore, 'similarly situated' in this case must be analyzed in terms of the nature of the job duties performed by each class member, as the ultimate issue to be determined is whether each employee was properly exempt. . . . T]he scope of the class is dependent upon the heart of this case—which employees are properly classified as exempt" and "litigating this case as a collective action would be anything but efficient. The exempt or non-exempt status of potentially hundred of employees would need to be determined on a job-by-job, or more likely, an employee-by-employee basis. . . . The individual nature of the inquiry required makes collective treatment improper in this case") (citations omitted)

Bayles v. Am. Med. Response of Colorado, Inc., 950 F. Supp. 1053, 1065-1067 (D. Colo. 1996) (surveying the various approaches for determining whether employees are similarly situated for purposes of the FLSA; using stage two standards, denying conditional certification because individual liability questions render a collective action inefficient and prejudicial; "this case is fraught with questions requiring distinct proof as to individual plaintiffs")

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Bradford v. Bed Bath & Beyond, Inc., 184 F. Supp. 2d 1342, 1345 (N.D. Ga. 2002) (the "similarly situated standard is less stringent that Rule 20(a)'s 'same transaction or occurrence' requirement for joinder and than Rule 23(b)(3)'s requirement that a class may only be certified if 'common questions predominate'"; denying employer's motion to decertify department manager misclassification collective action where evidence indicated that plaintiff's "job duties, while not identical, were very similar" to other department managers and evidence indicated little store-to-store variation; subclasses could be created to accommodate differences, if needed)

Scott v. Aetna Servs., Inc., 210 F.R.D. 261, 264-66 (D. Conn. 2002) (denying decertification of misclassification collective action and rejecting employer's argument that fact specific nature of exemption determinations precluded a collective action, finding that the evidence "suggests that the actual job duties of the [opt-ins] are quite similar")

Basco v. Wal-Mart Stores, Inc., No. 00-3184, 2004 WL 1497709 (E.D. La. July 2, 2004) (after extensive discovery, denying certification under stage two standards in an 'off-the-clock" case involving up to 100,000 current and former Louisiana employees because the proposed class consisted of employees from different jobs, departments, groups, units and working under different managers at various stores and because plaintiffs had not identified a "single decision, policy, or plan" that resulted in the alleged violations; plaintiffs' claims would require individualized proof and would be subject to individualized defenses)

Mielke v. Laidlaw Transit, Inc., 313 F. Supp. 2d 759, 764 (N.D. Ill. 2004) (at stage two, revoking nationwide class previously conditionally certified because of "the absence of a uniform policy, the disparate factual and employment settings, and the likelihood that the case will not be resolved summarily")

IX. Litigating an FLSA Collective Action—Part V: The Notice

A. Court's Discretionary Power to Establish Contours of Notice:

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989) (trial court has broad discretion to formulate the notice in order to insure that the litigation is conducted in an "orderly and sensible" manner and to insure that putative class members do not receive "misleading communications")

B. Possible Impropriety of Plaintiff's Unsupervised Solicitation of Opt-Ins:

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 172 (1989) ("By monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative. Both the parties and the court benefit from settling disputes about the content of the notice before it is distributed. This procedure may avoid the need to cancel consents obtained in an improper manner")

Heitmann v. City of Chicago, No. 04-3304, 2004 WL 1718420 (N.D. Ill. July 30, 2004) (requiring plaintiff to notify employer prior to distributing to potential opt-ins a notice and consent form that had not yet been approved by the court)

C. Neutral Notice Required

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 174 (1989) (court must "take care to avoid even the appearance of judicial endorsement of the merits of the action" and "must be scrupulous to respect judicial neutrality")

Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 101, 108 (S.D.N.Y. 2003) (modifying plaintiff's proposed notice to include a paragraph, in bold at the end of the notice, explaining that the court had not made any determination about the merits of the case)

D. Content of Notice:

Sperling v. Hoffman-LaRoche, Inc., 118 F.R.D. 392, 409 (D.N.J. 1988) (notice need not alert opt-ins that they night be subject to discovery, finding defendant's objections to omission "too insubstantial to discuss at length"), *aff'd on other grounds*, 862 F.2d 439 (3d Cir. 1988), *aff'd* 493 U.S. 165 (1989),

Belcher v. Shoney's, 927 F. Supp. 249, 254 (M.D. Tenn. 1996) (approving notice that warned class members that their "continued right to participate in this suit may depend on a later decision by the District Court that [opt-ins] and the Plaintiffs are 'similarly situated' in accordance with federal law" and that contained contact information for defense counsel)

Libront v. Columbus McKinnon Corp., No. 83-858, 1984 U.S. Dist. LEXIS 21259, at *4-*5 (W.D.N.Y. Dec. 13, 1984) (requiring notice to inform potential opt-ins of their right to retain own counsel and to list contact information for defense counsel)

Hoffman v. Sbarro, 982 F. Supp. 249, 264 (S.D.N.Y. 1997) (requiring notice to be specific enough to describe circumstances that would give rise to a valid claim)

Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 101, 107-108 (S.D.N.Y. 2003) (requiring plaintiff to insert language advising potential opt-ins of their right to obtain their own counsel and contact information for defense counsel)

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Johnson v. HH3 Trucking, Inc., No. 03-50342, 2003 U.S. Dist. LEXIS 23115 (N.D. Ill. Dec. 23, 2003) (rejecting as potentially intimidating and unnecessary the employer's request that the notice inform potential opt-ins that they might be liable for costs and rejecting the employer's claim that it would be misleading and imply court approval if the notice were sent out under the caption of the case)

Heitmann v. City of Chicago, No. 04-3304, 2004 WL 1718420 (N.D. Ill. July 30, 2004) (requiring notice to inform opt-ins of their right to have separate counsel, their right to bring a separate action, and their right not to sue at all; consent form should specifically allow for the election to have separate counsel)

Frank v. Capital Cities Communications, Inc. 88 F.R.D. 674, 679 (S.D.N.Y. 1981) (requiring employer to post the notice on company bulletin boards as well as to mail notice)

Garza v. Chicago Transit Auth., 8 Wage & Hour Cas. 2d (BNA) 1917 (N.D. Ill. 2001) (denying plaintiff's request that defendant insert notice in paychecks of all eligible current employees, but requiring defendant to place notice on company bulletin boards was well as to mail notice)

E. Length of Opt-in Period:

Sperling v. Hoffman-LaRoche, Inc., 118 F.R.D. 392, 417 (D.N.J. 1988) (45 days), *aff'd on other grounds*, 862 F.2d 439 (3d Cir. 1988), *aff'd* 493 U.S. 165 (1989)

Belcher v. Shoney's, 927 F. Supp. 249, 254 (M.D. Tenn. 1996) (approximately 75 days)

White v. Osmose, Inc., 204 F. Supp. 2d 1309, 1318 (M.D. Ala. 2002) (45 days)

Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 101, 107 (S.D.N.Y. 2003) (60 days)

Zavala v. Wal-Mart Stores, Inc., No. 03-5309 (D.N.J. May 16, 2005) (6 months, mailed and posted in stores) (nine languages)

Torres v. CSK Auto, Inc., No. 03-113, 2003 U.S. Dist. LEXIS 25092 (W.D. Tex. Dec. 17, 2003) (45 days)

Hipp v. Liberty Nat'l Life Ins. Co., 164 F.R.D. 574 (M.D. Fla. 1996) (120 days), *aff'd on other grounds, Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001)

F. Defense Counsel's Contact with Potential Opt-Ins:

Zavala v. Wal-Mart Stores, Inc., No. 03-5309 (D.N.J. Dec. 29, 2004) (denying plaintiffs' request to prohibit employer from contacting potential opt-ins during the notice period in the absence of plaintiffs' counsel)

Belt v. Emcare, Inc,, 299 F. Supp. 2d 664 (E.D. Tex. 2003) (restricting employer's *ex parte* contacts with putative class members where employer had sent coercive and misleading letter to class members; employer ordered to send a corrective letter to the class)

X. Ounce of Prevention

A. Conduct Exempt Classification Audit

Conduct, under privilege (unlikely to be sustained), a rigorous, thorough, written audit of the correctness of every exempt category determination, beginning with the most heavily populated jobs. Research Labor Department opinion letters and court decisions for jobs with large numbers of employees.

B. Flag New Jobs for Rigorous Classification Review

Establish rigorous, thorough written system for approving the exempt status of any new salaried position proposed to be classified as exempt

C. Establish Safe Harbor Policy

Develop and publicize ("clearly communicate") a written safe harbor policy for improper deductions from pay of exempt worke**rs**

1. Prohibit all partial day deductions from pay

2. Authorize full-day deductions from pay only in explicitly stated circumstances

(a) Absence for personal reasons other than sickness or disability

(b) Sickness or disability when the deduction is made in accordance with a bona fide plan providing compensation for loss of salary occasioned by both sickness and disability

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(c) Offset for amounts received for jury duty, witness fess, or military duty

(d) Imposition of disciplinary penalty for violation of major safety rule

(e) Imposition of disciplinary penalty for serious violation of company policy applicable to all employees

3. Provide a readily available mechanism for complaints and corrective action

4. Prompt reimbursement for improper deductions and promise to refrain from future improper deductions

5. Instruct managers and payroll staff on the strict limitation on deductions from pay of salaried exempt employees

D. Develop and Publicize a Comprehensive Ban on Working "Off-the-Clock

1. Pay non-exempt employees for all hours worked—no exceptions, even if overtime work was not authorized

2. Non-exempt employees must receive prior approval for overtime

3. Non-exempt employees should not work during lunch or other breaks

4. Require non-exempt employees to report any pressure to work off-the-clock

5. Discipline managers who encourage or allow off-the-clock work by non-exempt employees

6. Issue annual written reminders of off-the-clock policy

7. Obtain annual signed acknowledgments from non-exempt employees that they have not worked off-the-clock

8. Obtain signed acknowledgments from non-exempt employees at exit interviews that they have not worked off-the-clock

9. Rigorously review hourly jobs to see if they present compensable preliminary or postliminary issues, beginning with the most heavily populated jobs

E. Adopt a Mandatory Arbitration Program

A carefully crafted mandatory arbitration program can prohibit all court litigation and can limit the ability of employees to file collective (and class) action arbitrations

Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306,313 (6th Cir. 2000) (FLSA claims subject to mandatory arbitration, although arbitration agreement at issue in instant case was invalid for vagueness)

Horenstein v. Mortgage Market, Inc., No. 98-1104, 2001 WL 502010 (9th Cir. May 10, 2001) ("Appellants' contention that the arbitration clause in the Employment Agreements may not be enforced because it eliminates their statutory right to a collective action [under the FLSA] is insufficient to render an arbitration clause unenforceable")

Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002) (compelling arbitration of FLSA claim despite inability to bring collective action under arbitration agreement)

Bailey v. Ameriquest Mortgage Co., 346 F.3d 821 (8th Cir. 2003) (enforcing arbitration of FLSA claim)

Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004) (mandatory arbitration agreement enforced, requiring plaintiff to arbitrate FLSA misclassification claim, despite inability to arbitrate claim as a collective action)

Discover Bank v. Superior Court of Los Angeles, 36 Cal. 4th 148 (2005) ("We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, . . . such waivers are unconscionable under California law and should not be enforced")

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Walker v. Countrywide Credit Indus., Inc., No. 03-0684, 2004 WL 246406 (N.D. Tex. Jan. 15, 2004) (FLSA claims subject to mandatory arbitration pursuant to agreement signed by employees)

Johnson v. Long John Silver's Rests., 320 F. Supp. 2d 656 (M.D. Tenn. 2004) (compelling arbitration of FLSA claim)

Perry v. New York Law Sch., No. 03-9221, 2004 WL 1698622 (S.D.N.Y. July 28, 2004) (requiring plaintiff to arbitrate FLSA claim)

Martin v. SCI Mgmt., L.P., 296 F. Supp. 2d 462 (S.D.N.Y. 2003) (arbitration agreement signed at the commencement of employment barred plaintiff from litigating her FLSA claim)

Sinnett v. Friendly Ice Cream Corp., 319 F. Supp. 2d 439 (S.D.N.Y. 2004) (enforcing arbitration of FLSA claim)

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