

**Current Trends In Pursuit and Defense of Hybrid FLSA and
State Wage and Hour Litigation**

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The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (“FLSA”) is the nation’s most basic labor law providing employees with wage and hour protections, setting a minimum wage, and requiring compensation of one and one-half an employee’s regular rate of pay for hours worked in excess of forty per week (*i.e.*, “overtime”). Most states supplement the basic protections afforded by the FLSA with their own, additional protections for employees under state wage and hour laws. Even where state statutes do not directly address issues under state wage and hour statutes, employees may be protected by state common law or tort law.¹

Wage and hour litigation, brought under the FLSA and/or state laws, continue to outpace most other types of employment-related litigation. The clear trend, however, is for wage actions to be pursued as class actions under state laws. For example, a recent *Business Week* article, explored the impact of large wage judgments.² Although the article primarily discussed the FLSA, the large judgments and settlements referenced in the article were pursued under state laws, not the FLSA. Thus, in decrying the larger wage judgments and settlements as some alleged aspect of the FLSA, commentators seem to ignore that the clear trend in wage and hour litigation of which these judgments and settlements are a reflection is to pursue class actions based on state wage and hour laws.

Many actions now, however, involve large employers in multiple states. In these actions some workers may be protected by state law, but others residing in states without state wage laws may only find protection under the FLSA. As a result, many employees find themselves in “hybrid” actions asserting state law and FLSA claims in the same action.

This article discusses the substantive and procedural issues facing employees and employers involved in “hybrid” wage and hour litigation, along with strategies for making those decisions. We review the emerging trends in wage and hour lawsuits, specifically courts’ recent efforts to ensure that the largest possible groups of employees are permitted to present their claims against their employers. As a result, workers are more likely than ever to file state law class actions, in some cases jettisoning entirely their federal law claims. There are a variety of reasons for this trend, but some of the most important include longer statutes of limitations under state law, simpler class certification requirements, broader coverage, and the ability to litigate the rights of more employees under an “opt-out” scheme.

¹ If an applicable state law provides for additional coverage, state law standards, rather than the FLSA standards, must be met – the employer must follow whichever statute is more favorable to its individual employees. 29 U.S.C. § 218(a). *See, e.g., Cranford v. City of Slidell*, 25 F.Supp.2d 727, 729 (E.D. La. 1998).

² *See* Michael Orey, *Wage Wars*, *Bus. Week* (Oct. 1, 2007).

Similarly, the federal courts continue to broaden their reach over wage and hour claims, increasingly exercising supplemental jurisdiction over state law claims, and relaxing the collective action initial “certification” standard, requiring only a minimal factual showing before determining that notice of the pending litigation can be sent to “similarly situated” employees. Whether this trend is as a result of Congress’ mandate that more plaintiffs have access to the federal court system in the Class Action Fairness Act of 2005 remains to be seen, but the courts seem to be more open to plaintiffs presenting their claims than ever before.

Significantly, participation is one of the most important reasons to pursue state class actions instead of FLSA collective actions. Anecdotally, practitioners generally estimate that five to twenty percent of eligible plaintiffs will opt-in to a traditional opt-in FLSA case, while nearly all of the eligible employees will remain in an opt-out suit. There are many reasons why a plaintiff might choose not to opt-in to FLSA litigation. Often the employees involved are members of an itinerant workforce, with no forwarding information from job-to-job, who never receive the opt-in notice. Some workers may not be able to read the notice – it is common for opt-in notices to be translated into languages other than English.³ Other employees, especially current ones, may be intimidated by their employer, or be afraid that their employer will retaliate against them if they participate.⁴ Still others will not respond because they do not understand it, are intimidated by the judicial system, believe it is mail from creditors, or because they simply ignore it as “junk mail.”⁵ Although some defense counsel attempt to rely on the low opt-in rates to bolster their substantive arguments against liability –in actual practice, courts’ analyses of the reasons employees do not opt-in to FLSA litigation emphasize that most reasons have nothing to do with the substantive merits of the case.

Notably, the low opt-in rate is not true, however, when FLSA claims are brought on behalf of a unionized workforce. For example, in two recent cases involving unionized workplaces, over ninety percent of eligible employees opted into one case,⁶ and another in which over seventy percent of eligible employees opted in.⁷

³ For example, in a recent case in which this author was involved, at a meat-packing plant, the opt-in notice was translated into approximately twenty languages other than English.

⁴ See, e.g., *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, 2000 U.S. Dist. LEXIS 17832, *14 (N.D. Ill. Dec. 1, 2000).

⁵ *Id.* at 7; *Mueke v. A-Reliable Auto Parts & Wreckers, Inc.*, 2002 U.S. Dist. LEXIS 11917, n.3 (N.D. Ill. June 21, 2002).

⁶ *Mullins v. City of New York*, Civil Action No. 1:04-cv-2979 (SAS) (currently pending in the District Court for the Southern District of New York).

⁷ *Abbey v. United States*, Civil Action No. 07-272C (currently pending in the Court of Federal Claims).

I. Differences Between the Requirements of Rule 23 and FLSA, Section 16(b) and the Standards Under Each for Workers Seeking to Assert Their Claims Collectively.

An action under the FLSA can be brought in any federal or state court of competent jurisdiction, by an individual employee or group of employees.⁸ An individual litigant, or group of employees, can also sue on behalf of other employees who are “similarly situated.” FLSA group actions, called “collective actions,” are governed by 29 U.S.C. § 216,⁹ not Federal Rule of Civil Procedure 23 (“Rule 23”). F.R.C.P. 23 *does* govern state law wage and hour class actions brought in federal court.

Procedurally, Section 16(b) differs from Rule 23 in two important ways. First, to participate in an FLSA collective action, an employee who is not a named plaintiff must “opt-in” or affirmatively consent to litigation of his or her claims in the named court.¹⁰ Second, there is no requirement in Section 16(b) that an FLSA collective action be “certified” or that court-authorized notice of the pending action be sent to potential

⁸ 29 U.S.C. § 216(b). As a result of the Court’s decision in *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), most FLSA actions filed in state courts are removed to federal court.

⁹ FLSA Section 16(b), 29 U.S.C. § 216(b), provides, in relevant part:

An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

¹⁰ See, e.g., *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 466 (N.D. Cal. 2004). See also *Gjurovich v. Emmanuel’s Marketplace, Inc.*, 282 F.Supp.2d 101, 103-04 (S.D.N.Y. 2003); *DaMassia v. Duane Reade, Inc.*, 2006 U.S. Dist. LEXIS 73090, *7 (S.D.N.Y. Oct. 5, 2006) (“In a collective action under FLSA – unlike in a class action under Federal Rule of Civil Procedure 23 – only plaintiffs who affirmatively opt in can benefit from the judgment or be bound by it.”). Indeed, FLSA plaintiffs are barred from bringing Rule 23 class actions, in actions pursued *only under the FLSA*, *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1997).

plaintiffs, but it is well-settled that district courts have the power to authorize such notice.¹¹

Most class actions for state wage claims, on the other hand, are governed by Rule 23 when filed in the federal courts.¹² In addition to the requirements of Rule 23(a), there must be a showing that: (1) the prosecution of separate actions would prejudice nonparties or create incompatible adjudications, (2) the defendant has taken action in

¹¹ See, e.g., *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989); *Braunstein v. E. Photographic Labs., Inc.*, 600 F.2d 335, 336 (2d Cir. 1979); *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249, 261 (S.D.N.Y. 1997) (“It is well settled that district courts have the discretionary power to authorize the sending of notice to potential class members in a collective action brought pursuant to § 216(b) of the FLSA.”). “Although the FLSA does not contain a class certification requirement, . . . [orders authorizing notice to potential plaintiffs] are often referred to in terms of ‘certifying a class.’” *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 387 (W.D.N.Y. 2005). See *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 197 (S.D.N.Y. 2006).

One interesting aspect when employees seek “certification” of a collective action, and court-authorized notice to all “similarly situated” employees is that the court will require the employer to disclose the names and addresses of potential plaintiffs. *Patton v. Thomson Corp.*, 364 F.Supp.2d 263, 267-68 (E.D.N.Y. 2005); *Aguilar v. Complete Landsculpture, Inc.*, 2004 U.S. Dist. LEXIS 20265, *17 (N.D. Tex. Oct. 7, 2004).

Parties should note that at least one court has held that a court order conditionally “certifying” a collective action and authorizing notice to potential plaintiffs is not a final and appealable decision. *Baldrige v. SBC Commc’ns, Inc.*, 404 F.3d 930 (5th Cir. 2005).

¹² Rule 23(a) provides that:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defense of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Obviously, state wage claims filed in the state courts are subject to those jurisdictions’ rules and requirements regarding class actions.

some way generally applicable to the class as a whole, or (3) common questions of law or fact predominate. Rule 23(b).¹³

II. The Opt-In and Opt-Out Provisions Create “Hybrid” Actions Presenting Both FLSA Collective Actions and State Law Wage and Hour Law Rule 23 Class Actions.

As discussed, *supra*, a plaintiff cannot participate in an FLSA action unless he or she opts-in to the collective action by filing a written consent in court. Conversely, a putative Rule 23 class member must “opt-out” of the class action. The opt-in/opt-out requirements have been the basis of many challenges to courts’ jurisdiction, although the courts appear to be trending to allowing the claims to proceed together.

A. State Statutory Wage and Hour Claims.

As noted in Section I, many states have enacted statutes regulating employee wages and hours, many of which may grant different rights of action, or greater compensation, than the FLSA, either to a larger group of employees, or in a larger amount. Counsel for employees should familiarize themselves with the wage and hour provisions in the jurisdictions in which they practice, including:

- Overtime pay, which may require premium compensation after a certain number of hours worked *per day*,¹⁴ or for work on a specific day of the week;¹⁵

¹³ Generally, class certification pursuant to Rule 23(b)(2) is only available in cases where plaintiffs seek injunctive or other equitable relief. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998). Most wage and hour plaintiffs seek certification pursuant to Rule 23(b)(3).

¹⁴ California requires daily overtime for hours worked in excess of eight by non-exempt employees, as well as mandatory overtime for work on the seventh day in any workweek. Lab. Code § 551. *See also* Alaska (Stat. § 23.10.60(c), overtime pay for hours in excess of forty per week or eight hours in a single work day); Colorado (Rev. Stat. Ann., § 8-13-102, Code of Regs. § 1103-1, Wage Order 22(4); overtime pay for hours in excess of forty per week or twelve hours in a single workday, or twelve consecutive hours worked by a non-exempt employees even if it spans two workdays); Connecticut (Gen. Stat. Ann. § 31-51, overtime pay in most instances where an employee works in excess of nine hours in a single workday, with exceptions); Nevada (Rev. Stat. § 608.018, overtime pay in most instances where an employee works in excess of eight hours per workday with certain exceptions); Kentucky (Rev. Stat. § 337.050, 803 Admin. Regs. 1:060 § 1); overtime pay for employees who work seven days in a single workweek).

¹⁵ For example, some states, including California, Illinois, Maryland, New York, North Dakota, and Rhode Island, mandate that employees be given one day off per week.

- Minimum wages (which are higher than the federal minimum wage);¹⁶
- Meal and/or rest breaks;¹⁷
- Limitations on permissible deductions from employee wages;
- Payment of wages in a timely fashion (*e.g.*, wage payment and collection laws); and
- Record-keeping requirements.¹⁸

B. State Common Law Wage & Hour Claims.

In many states, the protections afforded by states are broader than the FLSA. Yet, some states rely exclusively on the FLSA,¹⁹ or litigation under state law is unattractive

¹⁶ Due primarily to long time federal inaction on the minimum wage, many states increased their minimum wages in the past year. Thirty states and the District of Columbia now have adopted statutes which require certain employers to pay their employees more than the federal minimum wage. These states include: Alaska, Arizona, Arkansas, Colorado, California, Connecticut, Delaware, D.C., Florida, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin.

¹⁷ State which have adopted laws permitting employees to take meal and/or rest breaks during work hours include: California, Colorado, Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Minnesota, Nebraska, Nevada, New Hampshire, New York, Nebraska Oregon, and Tennessee. The FLSA does not require that employees be given rest or meal breaks, but does govern whether breaks constitute compensable work hours.

¹⁸ This list of state statutory claims is not exhaustive. For instance, employees can bring claims under California's Unfair Competition Law. *See Bahramipour v. CitiGroup Global Markets, Inc.*, 2006 U.S. Dist. LEXIS 9010 (N.D. Ca. Feb. 22, 2006). In *Bahramipour*, the court found that the FLSA does not pre-empt similar state law claims because pre-emption only occurs if the state statute at issue would limit execution of Congress' goal which, in the case of the FLSA, was protection of workers. *See also Sav-On Drug Stores, Inc. v. Sup. Ct. of Los Angeles*, 34 Cal. 4th 319, 324 (2004). A similar cause of action may be available under other state unfair competition laws.

¹⁹ These states either have no separate overtime statute, like Alabama, Arizona, Delaware, Georgia, Indiana, Iowa, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia; or the state overtime statute is inapplicable to employees subject to the FLSA, like Kansas (Stat. Ann. § 44-1204(c)(1)); Missouri (Rev. Stat. § 290.507); and New Hampshire (Rev. Stat. Ann. § 279:21).

because overtime statutes apply only to state employees,²⁰ or rely on the FLSA definition for exempt employees.²¹ In these states, plaintiffs may institute common law tort actions to recover unpaid wages.²² Another situation in which common law actions may be brought is if employees are compelled to work off the clock, but their total work hours in a week do not exceed the statutory threshold of forty hours per week for overtime pay. For example, if an employee works thirty hours per week as his or her scheduled hours and works five hours per week off the clock, the FLSA is not implicated, but the employee may have a common law action under tort or contract to recover unpaid wages.

The torts available to employees will vary based upon the state in which the action arose. For instance, employees have brought claims for unjust enrichment,²³ conversion,²⁴ quantum merit,²⁵ breach of contract (or breach of implied contract),²⁶ tortious interference with contractual relations,²⁷ promissory estoppel,²⁸ and fraud.²⁹

²⁰ These states include Florida, Idaho, and Wyoming.

²¹ See, e.g., Maine (Title 6, § 664), Massachusetts (Gen. Laws Ann. Ch. 149, § 48), New York (Lab. Law § 161), North Carolina (Gen. Stat. § 95-25.14(b)), Rhode Island (Gen. Laws §§ 28-12.4.3, 4.4), Washington, D.C. (7 D.C.M.R. § 999.1).

²² State laws may also limit the form a wage and hour suit can take or the damages that can be claimed. Some states, like the District of Columbia, do not provide for class wage and hour actions. A comprehensive chart detailing the individual states' requirements for class actions in wage and hour litigation will be provided during the presentation. In other states, liquidated damages are unavailable to class action plaintiffs, which may impact wage and hour litigants. See, e.g., *Lewis v. Nat'l Fin. Sys., Inc.*, 2007 U.S. Dist. LEXIS 62320 (E.D.N.Y. Aug. 23, 2007). Likewise, state litigants may be faced with different statutes of limitation than under the FLSA. These different state rules present challenges for employees' counsel, who must determine how to pursue the most successful claims for the largest groups of employees while navigating the differing applicable statutes.

²³ See, e.g., *Sorensen v. CHT Corp.*, 2004 U.S. Dist. LEXIS 3729, *16 (Mar. 10, 2004); *Brasco v. Wal-Mart Stores, Inc.*, 2004 U.S. Dist. LEXIS 4655, *6 (E.D. La. Mar. 22, 2004); *In re Wal-Mart Employee Litigation*, 271 F.Supp.2d 1080, 1082 (E.D. Wis. 2003).

²⁴ See, e.g., *Sav-On Drug Stores*, 34 Cal. 4th at 324, *Brasco*, 2004 U.S. Dist. LEXIS 4655, *6 n.1.

²⁵ See *Marquez v. PartyLite Worldwide, Inc.*, 2007 U.S. Dist. LEXIS 63301, *1 (N.D. Ill. Aug. 27, 2007).

²⁶ See, e.g., *Hyman*, 2007 U.S. Dist. LEXIS 41433, *3, *Wal-Mart Employee Litigation*, 271 F.Supp.2d at 1082.

Employees should be aware that, while most courts permit employees to bring overlapping state and federal wage and hour claims, others may dismiss those claims where a viable FLSA claim covers the same damages.³⁰

Further, some courts have held that, unlike FLSA claims, relief based in equity, like unjust enrichment, requires an individual assessment of an employee's intentions.³¹ Many of these courts will not permit employees to recover on equitable claims unless they are able to make the individualized showing that they were forced or required to work extra hours.

The different causes of action, available damages, statutes of limitation, and availability of class action remedies can make the determination of which claims to assert on behalf of a large group of employees complex.

²⁷ See *Brasco*, 2004 U.S. Dist. LEXIS 4655, *6.

²⁸ See *Wal-Mart Employee Litigation*, 271 F.Supp.2d at 1082.

²⁹ See *Torres v. Gristede's Operating Corp.*, 2006 U.S. Dist. LEXIS 74036, *5-*6 (S.D.N.Y. Sept. 29, 2006).

³⁰ See, e.g., *Paukstis v. Kenwood Golf & Country Club, Inc.*, 241 F.Supp.2d 551, 559-60 (D. Md. 2003) (state law claims of negligent failure to comply with the FLSA are not pre-empted by FLSA claims, but employee was encouraged to "streamline" his complaint).

But see Sorensen, 2004 U.S. Dist. LEXIS 3729, *16 (where unjust enrichment claims were made on same factual assertions as FLSA plaintiffs were not entitled to bring state common law claims seeking relief identical to that under the FLSA); *Cichon v. Exelon Generation Co.*, 2002 U.S. Dist. LEXIS 21228, *8 (N.D. Ill. Nov. 1, 2002) (based on Illinois common law); *Tombrello v. USX Corp.*, 763 F.Supp. 541, 545 (N.D. Ala. 1991) (claiming invasion of privacy based on Alabama common law); *Nettles v. Techplan Corp.*, 704 F.Supp. 95, 100 (D.S.C. 1988) (negligence action based on South Carolina tort law). See also *Johnson v. Davis Security, Inc.*, 217 F.Supp.2d 1224, 1227-28 (D. Utah 2002).

³¹ See, e.g., *Basco v. Wal-Mart Stores, Inc.*, 216 F.Supp.2d 592 (E.D. La. 2002); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.2d 1228 (11th Cir. 2000); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004).

C. *Arguments for Dismissal of State Law Claims on the Grounds that Opt-In and Opt-Out Procedures are Inconsistent Either with Congressional Intent or the Rules Enabling Act are Frequently Rejected, Although Some Courts Have Declined to Exercise Supplemental Jurisdiction on This Basis.*

Some employers argue that the opt-in procedures for joining an FLSA collective action and the opt-out procedures for leaving a Rule 23 class are inconsistent; either with the intentions of Congress,³² or the Rules Enabling Act,³³ and those cases seeking both types of relief should be dismissed, in whole or in part. Although employers continue to argue that the courts should decline to exercise supplemental jurisdiction over state law claims, the trend is toward permitting both types of claims to proceed.³⁴ A small number

³² See, e.g., *Goldman v. RadioShack Corp.*, 2003 U.S. Dist. LEXIS 7611, *6-*7 (E.D. Pa. Apr. 16, 2003); *Robinson v. Sizes Unlimited, Inc.*, 685 F.Supp. 442 (D.N.J. 1988) (court denied employer's motion to dismiss state law claims, but limited "opt-out" class to those who opted-in to ADEA claims); *Sperling v. Hoffman-LaRoche, Inc.*, 118 F.R.D. 392 (D.N.J. 1988) (court rejected argument), *aff'd in pertinent part*, 862 F.3d 439 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 165 (1989); *Bartleson v. Winnebago Indus. Inc.*, 2003 U.S. Dist. LEXIS 19058, *2-*3 (N.D. Ia. Oct. 24, 2003); *Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207 (S.D.W.Va. 1985); *Garner v. G.D. Searle & Co.*, 802 F.Supp. 418, 421 (M.D. Ala. 1991); *Moeck v. Gray Supply Corp.*, 2006 U.S. Dist. LEXIS 511, *15-*16 (D.N.J. Jan. 5, 2006) ("Allowing [plaintiffs] to circumvent the opt-in requirement and bring unnamed parties into federal court by calling upon state statutes similar to the FLSA would undermine Congress's intent to limit these types of collective actions.").

³³ *Westerfield v. Washington Mutual Bank*, 2007 U.S. Dist. LEXIS 54830 (E.D.N.Y. July 26, 2007). The Rules Enabling Act ("REA") prohibits abridgment of a substantive right by the Federal Rules of Civil Procedure. 28 U.S.C. § 2071 *et seq.* Employers typically argue that the opt-in procedures described in Section 16(b) create a "substantive right" for an employee not to be involved with wage-related litigation, and so the REA would not allow employee to bring both an opt-in action and an opt-out action.

This argument has been squarely rejected on the grounds that "section 216(b) by its terms governs procedural rights." *Westerfield*, 2007 U.S. Dist. LEXIS 54830, *4.

³⁴ These cases do not find that class action state law claims are prohibited, unless under state law, but that it would be inappropriate to exercise jurisdiction over them in the federal courts. See, e.g., *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 312 (3d Cir. 2003); *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574, 577 (N.D. Ill. 2004) (allowing both opt-in and opt-out wage claims would "circumvent" Congress' intent); *Jackson v. City of San Antonio*, 220 F.R.D. 55, 60 (W.D. Tex. 2003) (allowing both opt-in and opt-

of courts have declined to exercise jurisdiction over pendant state law claims on one or more of these bases,³⁵ although most have found that state and federal wage and hour claims can proceed in the same action.³⁶

Most courts that dismiss state law claims from FLSA collective actions do so by declining to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367.³⁷ At least one commentator maintains that “substantial reliance on § 1367 as ... for a *per se* limitation on Rule 23 classes ... effectively came to an end,” with the District of Columbia Court of Appeals’ decision in *Lindsay v. Gov’t Employees Ins. Co.*³⁸

In *Lindsay*, automobile damage adjusters asserted that their employer improperly classified them as administrative employees, depriving them of overtime pay under both the FLSA and New York’s parallel overtime compensation law. They sought to maintain an FLSA collective action and a state law class action. The district court held that the FLSA opt-in procedures precluded exercise of supplemental jurisdiction over the state

out wage claims would “flaunt” Congress’ intent). *Compare with McLaughlin v. Liberty Mutual Ins. Co.*, 224 F.R.D. 304 (D. Mass. 2004).

³⁵ *Otto v. Pocono Health Sys.*, 457 F.Supp.2d 522 (M.D. Pa. Oct. 27, 2006); *Herring v. Hewitt Assoc., Inc.*, 2006 U.S. Dist. LEXIS 56189 (D.N.J. Aug. 11, 2006); *McClain*, 222 F.R.D. at 577.

³⁶ *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261 (D. Conn. 2002); *Brzychnalski v. UNESCO, Inc.*, 35 F.Supp.2d 351 (S.D.N.Y. 1999); *Goldman v. RadioShack*, 2003 WL 21250571 (E.D. Pa. 2003); *O’Brien v. Encotech Constr. Servs., Inc.*, 203 F.R.D. 346 (N.D. Ill. 2001); *Leyva v. Buley*, 125 F.R.D. 512 (E.D. Wash. 1989); *Beltran-Benitez v. Se -Safari Ltd.*, 180 F.Supp.2d 772, 774 (E.D.N.C. 2001); *Zelaya v. J.M. Marcias, Inc.*, 999 F.Supp. 778, 781-82 (E.D.N.C. 1997); *Bamonte v. City of Mesa*, 2007 U.S. Dist. LEXIS 50101, *11-*12 (D. Ariz. July 10, 2007); *Barleson v. Winnebago Indus., Inc.*, 219 F.R.D. 629, 639 (N.D. Ia. 2003) (limiting Rule 23 class to those plaintiffs who had opted in to the FLSA action on the grounds that the court’s supplemental jurisdiction extended no further).

Although employers may attempt to raise issues of incompatibility of FLSA and state wage and hour claims early on, courts have determined that decision on those issues is inappropriate until a class certification motion is actually pending. *See, e.g., Oetringer v. First Residential Mortgage Network, Inc.*, 2007 U.S. Dist. LEXIS 16365, *6 (W.D. Ky. Mar. 6, 2007). *See also Rodriguez v. The Texan, Inc.*, 2001 U.S. Dist. LEXIS 24652, *1 (N.D. Ill. Mar. 7, 2001) (*sua sponte* ordering dismissal of state law claims).

³⁷ *Hyman v. WM Financial Servs. Inc.*, 2007 U.S. Dist. LEXIS 41433 (D.N.J. June 7, 2007).

³⁸ 448 F.3d 416 (D.C. Cir. 2006).

law claims of any persons, other than the named plaintiffs and those who had opted-in on the FLSA claims.

The D.C. Circuit Court unanimously reversed the district court's decision. The court found that an exercise of supplemental jurisdiction was factually appropriate, because the FLSA and state law claims formed the same Article III case or controversy, were derived from a common nucleus of operative facts,³⁹ and also that: "not only does section 216(b) not expressly prohibit the exercise of supplemental jurisdiction over the state law claims of opt-out class members, it includes no mention of supplemental jurisdiction at all."⁴⁰

The court remanded so that the district court could consider whether, in its discretion, supplemental jurisdiction should be declined pursuant to Section 1367(c), but the court's discussion made clear that the opt-in/opt-out difference, without more, would not satisfy the requirements of subsection (c)(4), requiring "other compelling reasons for declining jurisdiction" as a result of "exceptional circumstances."⁴¹

The *Lindsay* court suggested that it *might* consider whether a substantial disparity between the numbers of employees opting-in to an FLSA collective action and the number of employees not opting-out of a state law wage and hour claim might require denial of Rule 23 certification under Section 1367(c)(2). Other courts have considered this argument and determined that a substantial disparity alone was not grounds to deny supplemental jurisdiction.⁴²

To exercise supplemental jurisdiction, three requirements must be satisfied. First, the federal claim must have substance sufficient to confer subject matter jurisdiction on the court; second, the state and federal claims must derive from a common nucleus of operative facts; and third, the claims must be such that they would ordinarily be expected to be tried in one judicial proceeding.⁴³

³⁹ *Id.* at 423-24.

⁴⁰ *Id.* at 422.

⁴¹ *Id.* at 425.

⁴² *See, e.g., Chavez v. IBP, Inc.*, 2002 U.S. Dist. LEXIS 24598, *5-*6 (E.D. Wash. 2002).

⁴³ *See, e.g., United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966); *MCI Telecoms. Corp. v. Teleconcepts*, 71 F.3d 1086, 1102 (3d Cir. 1995).

In *Lyon v. Whisman*, 45 F.3d 758 (3d Cir. 1995), and *Hales v. Winn-Dixie Stores, Inc.*, 500 F.3d 836 (4th Cir. 1974), the Third and Fourth Circuits determined that the general employer-employee relationship alone did not give rise to a nucleus of common fact sufficient to exercise supplemental jurisdiction over state law claims.

Pursuant to Section 1367, a court may decline to exercise supplemental jurisdiction if:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.^[44]

In *De Asencio v. Tyson Foods, Inc.*,⁴⁵ the Third Circuit found that the district court abused its discretion by exercising supplemental jurisdiction over the class action overtime claim, premised on Pennsylvania's Wage Payment and Collection Law. The Third Circuit relied on both subsections (c)(1) and (c)(2) to determine that the district court had erred in its decision. The court explained that no state class actions had previously been brought or certified under Pennsylvania's wage law and, further, that plaintiffs had not sought to assert their state law claims until all discovery on the FLSA claims had been completed.

Subsequently, employers arguing that a court should not exercise supplemental jurisdiction over state wage and hour law claims have focused on whether the claims arise from a common nucleus of operative facts,⁴⁶ and that the state law claims substantially predominate. It seems that this argument will not be available to employers for long, though, with enactment of the Class Action Fairness Act of 2005 ("CAFA"), which expands federal court jurisdiction over class actions, and amends, among other sections of the United States Code, 28 U.S.C. § 1332, to include a new subsection (d). The new subsection grants original jurisdiction to federal district courts in any civil action in which: (1) the matter in controversy exceeds the sum or value of \$5,000,000; (2) is a class action with "minimal diversity," that is, any member of the class of plaintiffs is a citizen of a different state from any defendant.⁴⁷ Importantly, CAFA permits individual plaintiffs to aggregate the value of their claims to reach the \$5,000,000 threshold.⁴⁸

⁴⁴ 28 U.S.C. § 1367(c).

⁴⁵ 342 F.3d 301, 311-12 (3d Cir. 2003).

⁴⁶ *Hyman*, 2007 U.S. Dist. LEXIS 41433, *10-*11.

⁴⁷ 28 U.S.C. § 1332(d)(2).

CAFA also expands a defendant's removal rights. Specifically, the act provides that the one-year limitations period for removals does not apply.⁴⁹ The "local defendant" rule (*i.e.*, the requirement that no defendant can be a citizen of the state in which the action was filed) also does not apply.⁵⁰ Finally, removing defendants need not obtain the approval of all other defendants before removal may be effected.⁵¹

CAFA's enactment will eventually force the courts to confront, substantively, the issue of whether FLSA and state wage and hour law claims can exist in the same proceeding. To date, however, CAFA litigation has focused primarily on determining when an action "commences" under CAFA, as the Act only applies to cases commenced on or after the date of enactment,⁵² and on issues concerning which party bears the burden of proof in jurisdictional disputes under the Act.⁵³

CAFA grants broad discretion to the district courts, and sections authorize the courts to decline, or mandate that the courts decline, jurisdiction under certain circumstances. For instance, in a class action where more than one-third but less than two-thirds of the proposed plaintiff class and the "primary defendants" are citizens of the state in which the action was originally filed, the courts will have to perform a balancing test to determine whether to decline jurisdiction. *Id.* at § 1332(d)(3). The district courts will be required to decline jurisdiction if more than two-thirds of the proposed plaintiff class and at least one defendant against whom significant relief is sought are citizens of the state in which the action was originally filed. *Id.* at § 1332(d)(4).

⁴⁸ 28 U.S.C. § 1332(d)(6).

⁴⁹ 28 U.S.C. § 1453(b).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See, e.g.*, Senate Bill 5, Section 9 (enrolled Feb. 18, 2005; Public Law 109-002).

⁵³ The primary jurisdictional dispute to be litigated concerns which party bears the burden of proving the existence of subject matter jurisdiction. *See, e.g., Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).

Traditionally, the party seeking to maintain federal jurisdiction bears the burden of proof. Based on language in CAFA's legislative history, however, parties have argued that CAFA shifts the traditional burden. Specifically, part of the final Senate Judiciary Committee report states: "If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident[.]" S. Rep. No. 109-14 at 42 (2005). Those courts finding that CAFA shifts the traditional burden of proof have relied on this language. *See, e.g., Natale v. Pfizer*, 379 F.Supp.2d 161, 168 (D. Mass. 2005); *Harvey v.*

III. Challenges Facing Employees When Seeking “Certification” of Collective Actions Involving “Similarly Situated” Employees Resulting in Court-Authorized Notice to Potential Employees Who May Opt-In to the Litigation And Who Also Have Viable Claims Under State Law

FLSA collective actions may be brought on behalf of other employees who are “similarly situated.”⁵⁴ Once the named employees demonstrate that there are other “similarly situated” employees, the district court will order that those employees be notified of pending litigation that might impact their rights, and of their option to “opt-in” to the litigation. Employees often make this request early in the litigation because most courts have ruled that the statute of limitations in an FLSA action runs until a putative plaintiff consents to participate in the action.⁵⁵

A. Some Initial Strategy Issues

Strategic issues regarding where to file may arise for plaintiffs’ counsel when plaintiffs opt in to the litigation from states which provide for different substantive state law claims that are in addition to the FLSA and those states provide for Rule 23 class actions. Conversely, strategic issues arise for defense counsel on how to respond to state class actions filed in federal court – should the federal court’s jurisdiction be challenged or should certification itself be challenged in federal court.

From the plaintiffs’ perspective, strategy issues arise as to whether to file joint FLSA/State law claims in the federal court or to pursue these claims separately in state or federal court in the jurisdictional state whose laws give rise to the claim. Some considerations in making this decision are the number of potential plaintiffs involved in

Blockbuster, Inc., 384 F.Supp.2d 749, 752 (D.N.J. 2005); *Berry v. Am. Express Publ’g Group*, 381 F.Supp.2d 1118, 1122-23 (C.D. Cal. 2005). Despite the legislative history language, many courts have declined to alter the traditional burden of proof. *Brill*, 427 F.3d at 448; *Plummer v. Farms Group, Inc.*, 388 F.Supp.2d 1310 (E.D. Okla. 2005); *In re Expedia Hotel Taxes & Fees Litig.*, 377 F.Supp.2d 904, 905 (W.D. Wash. 2005).

⁵⁴ An in-depth discussion of the certification and de-certification standards is beyond the scope of this article. For such an exhaustive discussion of the standards, See E. Kearns, THE FAIR LABOR STANDARDS ACT, Chapter 18 (BNA, 2004 with 2006 Supp.).

⁵⁵ See, e.g., *Hoffman*, 982 F.Supp. at 260. In an FLSA action, the statute of limitations is two years from the date of injury, but can be extended to three years if the employee demonstrates that the employer acted willfully in depriving him or her of wages and/or overtime. 29 U.S.C. § 255(a).

the state action, how different the state claims are from the federal action,⁵⁶ and the degree to which courts in each jurisdiction are receptive to class claims and hybrid actions. A recent trend is for defense counsel to seek to decertify an FLSA action or to seek to have the court decline supplemental jurisdiction and then to move for an MDL panel. Whether this trend will affect courts' decisions as to whether to retain supplemental jurisdiction or jurisdiction over FLSA claims remains to be seen.

B. Collective Action Certification Standard

Although a minority of district courts, described as “rogue” by one commentator,⁵⁷ require that FLSA plaintiffs meet the requirements of Rule 23,⁵⁸ most courts employ a two-tiered or two-step analysis for initial certification.⁵⁹ Then, if an employer moves for decertification at the end of discovery, a more stringent analysis is employed.⁶⁰

When the request is made early in litigation, most courts employ a relatively lenient standard in determining which employees are “similarly situated” to be notified of the pending action.⁶¹ The exact standard required, however, varies by Circuit.⁶² The

⁵⁶ For example, in New York, the only difference from the FLSA may be the length of the statute of limitations, which is 6 years rather than 2, and the underlying substantive overtime claims are the same.

⁵⁷ Noah A. Finkel and Richard L. Alfred, *Defending Hybrid FLSA Collective and State Wage and Hour Class Actions*, Employment Rights and Responsibilities Committee 2007 Mid-Winter Meeting, at 4 n.2.

⁵⁸ *Shushan v. Univ. of Colo.*, 132 F.R.D. 263, 265 (D. Colo. 1990). See also *Thiessen v. Gen'l Elec. Capital Corp.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001) (discussion of standards). These requirements have been almost universally rejected. *Vogel v. Am. Kiosk Mgmt.*, 371 F.Rupp.2d 122, 127 (D.Conn. 2005).

⁵⁹ See, e.g., *Lowrey v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998); *Morden v. T-Mobile United States, Inc.*, 2006 U.S. Dist. LEXIS 68696, *6-7 (W.D. Wash. Sept. 12, 2006) (“In resolving [a motion for decertification of a collective action] motion, the Court will utilize a stricter standard for determining whether the conditionally certified plaintiffs are indeed ‘similarly situated.’” (citing to *Thiessen*, 267 F.3d at 1102)). See also *Wilks v. Pep Boys*, 2006 U.S. Dist. LEXIS 69537, *9 (M.D. Tenn. Sept. 26, 2006).

⁶⁰ *Trezvant v. Fidelity Employer Servs. Corp.*, 434 F.Supp.2d 40, 43 (D.Mass. 2006); *Patton*, 364 F.Supp.2d at 267.

⁶¹ See, e.g., *Moss v. Crawford & Co.*, 201 F.R.D. 398, 409 (W.D. Pa. 2000). *Harrison v. McDonald's, Inc.*, 411 F.Supp.2d 862, 870 (S.D. Ohio 2002); *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996); *Rodolico v. Unisys Corp.*, 199 F.R.D.

courts are moving toward a more universal standard, requiring only a modest factual showing in addition to the contents of plaintiffs' well-pleaded complaint.⁶³

468, 481 (E.D.N.Y. 2001); *Dietrich v. Liberty Square, LLC*, 230 F.R.D. 574, 578-79 (N.D. Iowa 2005).

⁶² For a more detailed analysis of the applicable standards, *see generally* Scott E. Cole and Matthew B. Bainer, *To Certify or Not to Certify: A Circuit-by-Circuit Primer on the Varying Standards for Class Certification in Actions Under the Federal Labor Standards Act*, 13 B.U. Pub. Int. L. J. 167 (Spr. 2004).

⁶³ The First and Second Circuits apply the most lenient standards. *See, e.g., Reeves v. Alliant Techsys., Inc.*, 77 F.Supp.2d 242 (D.R.I. 1999); *Kane v. Gage Merchandising Servs., Inc.*, 138 F.Supp.2d 212 (D. Mass. 2001); *Jackson v. New York Telephone Co.*, 163 F.R.D. 429 (S.D.N.Y. 1995).

Some courts in the Third Circuit follow the lenient standard, while others require a more rigorous factual showing. *See, e.g., Smith v. Sovereign Bancorp, Inc.*, 2003 WL 22701017 (E.D. Pa. 2003). The same is true in the Tenth Circuit. *See, e.g., Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623, 627 (D. Colo. 2002).

The Sixth Circuit, like the Third Circuit, has applied varying evidentiary burdens to employees, but has refrained from stating a bright-line standard. *See, e.g., White v. MPW Industrial Services, Inc.*, 2006 U.S. Dist. LEXIS 17388 (E.D. Tenn. 2006).

The Seventh, Eighth, and Ninth Circuits require some factual showing, mainly through affidavits produced by employees. *See, e.g., Campbell v. Amana Co., L.C.*, 125 F.Supp.2d 1129 (N.D. Iowa 2001); *Smith v. Heartland Automotive Servs., Inc.*, 404 F.Supp.2d 1144, 1149 (D. Minn. 2005); *Freeman v. Wal-Mart Stores, Inc.*, 256 F.Supp.2d 941 (W.D. Ark. 2003); *Bonilla v. Las Vegas Cigar Co.*, 61 F.Supp.2d 1129 (D. Nev. 1999)

Notably, the Seventh Circuit employs the "demonstration" standard, which requires review of the pleadings, affidavits, and *other evidence* (like statistical data) produced by the parties. *Clausman v. Nortel Networks*, 2003 WL 21314065 (S.D. Ind. 2003); *Garza v. Chicago Transit Auth.*, 2001 WL 503036 (N.D. Ill. 2001); *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982).

Although the Fourth and Eleventh Circuits require employees to present more facts than mere allegations contained in their complaints, in both Circuits, it appears that affidavits or other evidence that shows the putative employees are similar to the named employees is satisfactory. *D'Anna v. m/a-com, Inc.*, 903 F. Supp. 889 (D.Md. 1995); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001).

The Fifth Circuit standard is perhaps the most rigorous – courts require employees to make a clear factual showing of similarity between the putative collective action

On a motion for decertification of the collective action, the courts use a more stringent standard, considering a variety of factors, although employees are still only required to prove that they were “similarly situated,” not that they were *identically* situated.⁶⁴ In this inquiry, the court will review the factual record to determine whether the named employees are “similarly situated” to the additional plaintiffs.⁶⁵ Most courts will consider a variety of factors at the decertification stage, including:

a) job duties; b) geographic location; c) supervision; and d) salary; (2) the various defenses available to the defendant that appear to be individual to each plaintiff; and (3) fairness and procedural considerations.^[66]

If the plaintiffs’ counsel decides to pursue the state wage claims as a class action – as an effort to remedy an employer’s wage and hour violations to the fullest extent would require – defense counsel may challenge this effort thereby slowing down the action. Defense counsel have challenged every aspect of the Rule 23 class certification requirements. Some arguments are made, however, time and again and deserve special consideration.

As a preliminary matter, related to the requirements of Rule 23, employees’ counsel must determine the scope of the class it will request. Some courts have demonstrated their willingness to certify nation-wide classes, where employees can demonstrate that policies are applied uniformly throughout the country.⁶⁷ Other courts have determined that the employees only presented evidence supporting certification of a geographically-limited class.⁶⁸ As a result, employees’ counsel should carefully consider

members, and to demonstrate that there is a factual nexus that binds the putative collective action members to the named employees. *See, e.g., Villatoro v. Kim Son Rest.*, 286 F.Supp. 2d 807 (S.D. Tex. 2003).

⁶⁴ *See, e.g., Wilks v. Pep Boys*, 2006 U.S. Dist. LEXIS 69537, *9. In cases where collective action certification has not been requested until *after* discovery was complete, some courts have skipped the preliminary determination. *See, e.g., Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 482 (E.D. Cal. 2006); *Schwed v. Gen’l Elec. Co.*, 159 F.R.D. 373 (N.D.N.Y. 1995)

⁶⁵ *See, e.g., Lee*, 236 F.R.D. at 197; *Scholtisek*, 229 F.R.D. at 387.

⁶⁶ *Wilks*, 2006 U.S. Dist. LEXIS 69537, *9. *See also Moss*, 201 F.R.D. at 409.

⁶⁷ *See, e.g., Pendlebury v. Starbucks Coffee Co.*, 2005 WL 84500 (S.D. Fla. Jan. 3, 2005); *Perez v. Radio Shack Corp.*, 2003 WL 21372467 (N.D. Ill. 2003).

⁶⁸ *See, e.g., White v. Osmose, Inc.*, 204 F.Supp.2d 1309 (M.D. Ala. 2002).

the scope of the class it seeks to certify, and the available evidence to support its position.⁶⁹

C. Class Certification Issues

I. Numerosity

Rule 23(a)'s numerosity requirement focuses on whether "the class is so numerous that joinder of all members is impracticable." Rule 23(a). Most courts have held, however, that the number of employees involved is not the only consideration in determining whether this requirement is met.⁷⁰ The courts will also consider such factors

⁶⁹ Some courts have been convinced by employers' arguments to postpone class certification in cases presenting both FLSA and state wage and hour claims until the opt-in period is closed and discovery is complete. *See, e.g., Marquez*, 2007 U.S. Dist. LEXIS 63301, *16-*17; *Frank v. Gold'n Plump Poultry, Inc.*, 2005 U.S. Dist. LEXIS 20441, *16 (D. Minn. Sept. 14, 2005). The *Marquez* court declined to certify the state law class until the opt-in period had ended because it could not consider factors such as numerosity without knowing how many employees would opt-in. The *Frank* court indicated that it would not be possible to determine whether common questions of law and fact would predominate over individual issues until the record was more complete. Neither decision discussed the impact their decisions had on the employees' statute of limitations. It would seem a good argument could be made to toll the statute for the putative class.

⁷⁰ In many courts, a sort of "minimum threshold" has been set, above which the number of employees will be deemed so large that joinder is impracticable. *See, e.g., Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 307 (N.D. Ill. 1995). *See also Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). *See also Klemme*, 2007 U.S. Dist. LEXIS 55631, *11-*14.

In *Klemme*, the district court rejected the employers' argument that the numerosity requirement could not be met because the employees had not shown that any putative class members beyond the named employees had an interest in the proceeding. The district court found such a showing was not required by Rule 23, and further found that "the purported lack of interest in this matter mist likely is explained by the fact that a substantial number of the individual claimants have relatively small claims that would not be worth pursuing in individual lawsuits." *Id.* at *13-*14.

But see Knudsvig v. Espresso Stop, Inc., 2007 U.S. Dist. LEXIS 56394, *4 (W.D. Wa. Aug. 1, 2007).

The courts will not rely on cursory allegations or speculation about the size of the class. *Yon v. Positive Connections, Inc.*, 2005 U.S. Dist. LEXIS 3396, *4 (N.D. Ill. Feb. 2, 2005).

as: judicial economy; ability of class members to initiate individual suits; geographic disbursement of potential class members; whether the individual class members were likely to pursue their claims absent the class action (including whether they are native English speakers who are familiar with the court system and their financial resources); the type of relief sought by the class; practicability of re-litigating common core of issues, especially where the proposed class size is small.⁷¹

2. *Typicality.*

The court's typicality analysis will consider the claims of the named plaintiffs in comparison to the class as a whole. The purpose of the typicality requirement is "to assure that the interests of the named representatives align with the interests of the class."⁷² Although the named employees' claims need not be *identical* to the class members' claims, they must be co-extensive, or have the same essential characteristics as the claims of the class.⁷³

To contest typicality, employers may assert counterclaims against the named plaintiffs, or assert defenses unique to them, and subsequently argue that those employees will be too distracted defending the counterclaims, or responding to specific defenses, to fully and fairly represent the class.⁷⁴ Employers may also argue that some aspect of the named plaintiffs' case requires an individualized analysis, for instance whether the named employee(s) was really an independent contractor, thereby making their claims not typical of the class.⁷⁵

⁷¹ See, e.g., *Radamanovich v. Combined Ins. Co. of Am.*, 216 F.R.D. 424, 431 (N.D. Ill. 2003), *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986); *Hernandez v. Alexander*, 152 F.R.D. 192, 194 (D. Nev. 1993); *Saur v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281, 286-87 (W.D. Mich. 2001); *Mascol v. E&L Transp., Inc.*, 2005 U.S. Dist. LEXIS 32634, *14 (E.D.N.Y. June 30, 2005).

⁷² See, e.g., *Kudsvig*, 2007 U.S. Dist. LEXIS 56394, *6; *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *Dieter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006); *Sauer*, 203 F.R.D. at 287.

⁷³ See, e.g., *Westfall v. Kendle Int'l, CPU, LLC*, 2007 U.S. Dist. LEXIS 11304 (D. W.Va. Feb. 15, 2007).

⁷⁴ See, e.g., *Kudsvig*, 2007 U.S. Dist. LEXIS 56394, *6-*7.

⁷⁵ See, e.g., *Westfall*, 2007 U.S. Dist. LEXIS 11304, *39-*40. As the *Westfall* court noted, considerations like whether an employee is really an independent contractor, can figure into the commonality, typicality, and representation categories. See, e.g., *Saur*, 203 F.R.D. at 287 (analyzing individualized considerations under the commonality factor).

3. *Commonality – Where Employers Applied Policies Across the Board, Common Facts Will Dominate.*

To be certified as a class, common questions of fact or law must exist. The class need not share in common *all* questions of fact and law, but common legal issues with divergent facts or common facts with disparate legal remedies may satisfy the commonality requirement.⁷⁶ Generally, differences in damages sustained by the class members are *not* enough to defeat commonality.⁷⁷

Employers may argue that an individual analysis is required for each employee. Where the employer has conceded that its business practices were the same with respect to all members of the employee class, such an inquiry will not be required.⁷⁸

4. *Representation.*

Questions of representation concern not just the named plaintiffs, but counsel. The courts will consider not just whether the named plaintiffs are able to understand their claims, but whether counsel has the experience and resources required to fully and vigorously protect the plaintiffs' rights.⁷⁹

Finally, some employers have argued against Rule 23 certification for wage and hour claimants, who also present FLSA claims, on the grounds that the relevant state law would not permit class actions for liquidated damages unless authorized by statute. This argument has been "repeatedly rejected," especially in New York.⁸⁰

5. *Finding Pursuant to Rule 23(b)(3) That Common Questions Predominate and a Class Action is the Superior Method to Litigate Employees' Claims.*

Some employers use the second-tier Rule 23(b)(3) considerations to argue that, even though all of the Rule 23(a) requirements are met, and employees are unlikely to obtain relief absent a class action, class action is inappropriate. As in the Rule 23(a) considerations, employers place as much focus on the differences between the class

⁷⁶ See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214, 1225 (9th Cir. 2007); *Yon*, 2005 U.S. Dist. LEXIS 3396, *5.

⁷⁷ *Saur*, 203 F.R.D. at 287.

⁷⁸ *DaMassia*, 2006 U.S. Dist. LEXIS 73090, *18.

⁷⁹ See, e.g., *Saur*, 203 F.R.D. at 288. The courts will often look to counsel's representational experience with both large plaintiff groups and wage and hour claims. *Id.* See also *Mascol*, 2005 U.S. Dist. LEXIS 32634, *18-*19.

⁸⁰ See, e.g., *Brzychnaiski v. Unesco, Inc.*, 35 F.Supp.2d 351 (S.D.N.Y. 1999).

members, and the fact that some class members have not affirmatively decided to participate in the proceedings.

The courts however, consider the “cohesiveness” of the class.⁸¹ As a result, many of the factors that mitigated in favor of class certification under the considerations of Rule 23(a) will also mitigate in favor of class certification under the considerations of Rule 23(b)(3). For instance, because “predominance” is a concern under Rule 23(b)(3), there too will the court consider how similar the factual and legal questions presented by the employees are.⁸²

The courts should also consider, however, issues of judicial integrity, convenience, and economy.⁸³ In cases where an employee is otherwise unlikely to recover for damages caused by his or her employer, class action should be favored.

IV. Conclusion.

The substantive and procedural issues facing employees and employers involved in “hybrid” wage and hour litigation will continue to develop and change, especially as courts confront the impact of the CAFA. Nonetheless, the clear trend is toward employees’ seeking relief under state wage and hour laws, simplifying conditional class certification requirements, and increasing exercise of supplemental jurisdiction over state law claims.

⁸¹ *Goldman v. RadioShack Corp.*, 2005 U.S. Dist. LEXIS 8742, *11-*12 (E.D. Pa. May 10, 2005)

⁸² *Id.*

⁸³ *Saur*, 203 F.R.D. at 288.