

***INVESTIGATING AND LITIGATING WAGE AND HOUR
COLLECTIVE AND CLASS ACTIONS
FROM PLAINTIFFS' COUNSEL'S PERSPECTIVE***

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I. INTRODUCTION

- Wage and hour collective and class actions brought by private plaintiffs have played an increasingly significant role in the enforcement of the federal and state wage and hour laws. Litigating these actions can be daunting due both to the complexity of the legal and factual issues and costs involved. It is not an endeavor to be undertaken lightly. In deciding whether to bring a collective or class action, the plaintiffs' attorney should carefully weigh the advantages and disadvantages of this type of litigation.
- Wage and hour collective and class actions can be vehicles to address company wide violations of the wage and hour laws. They can provide monetary damages to large numbers of employees with claims not large enough to warrant the filing of an individual lawsuit. These cases also can provide the impetus for early dispute resolution. Meritorious collective or class actions often prompt a company to carefully analyze its potential liability and litigation risks, and can prompt early settlement to avoid negative publicity and expensive protracted litigation. On the other hand, collective and class actions can be expensive and time consuming to prosecute. They also involve many individuals and therefore require management, coordination and communication with and among multiple class representatives and numerous class members.
- This paper describes how to investigate and evaluate collective and class claims, prepare to file a collective or class action complaint and prepare for the certification motion.

II. PROCEDURAL FRAMEWORK

A. The Fair Labor Standards Act

- The Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 216(b), authorizes private enforcement of the statute in the form of collective actions brought by one or more representative plaintiffs on behalf of a class of "similarly situated" individuals. The members of the class must individually opt in to be included in the collective action. See Grayson v. K-mart Corp., 79 F.3d 1086 (11th Cir. 1996).

1. Two Step Certification Procedure

- Courts commonly follow the two step approach first articulated by the Fifth Circuit in 1995 for certification of collective actions. See Mooney v. Aramco, 54 F.3d 1207 (5th Cir. 1995), overruled in part on other grounds by Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); see also Thiessen v. General Electric Capital Corp., 267 F.3d 1095 (10th Cir. 2001); Hipp v. Liberty National Life Ins. Co., 252 F.3d 1208 (11th Cir. 2001). Under this two step procedure, the court (1) preliminarily or conditionally certifies a collective action, orders notice to the potential opt ins based on a modest evidentiary showing, and sets an opt in period; and (2) after discovery, reviews the preliminary certification decision, and determines whether the case should proceed on the merits as a collective action. Although both stages require the

court to assess whether plaintiffs and the potential opt ins are “similarly situated,” the court’s scrutiny is more exacting at the second stage after discovery has been taken.

a. **Notice Stage**

- In the first stage of the collective action proceeding, the so-called “notice stage”, plaintiffs must persuade the court to initially or conditionally certify the action so that notice will be sent to other similarly situated employees to give them an opportunity to opt into the lawsuit. The court has discretion to order notice to potential class members. See Hoffman-LaRoche v. Sperling, 493 U.S. 165 (1989).
- Because the statute of limitations is not tolled by the filing of a collective action complaint, plaintiffs’ counsel should press for early notice to the class members in order to preserve their individual claims. See e.g. Cahill v. City of New Brunswick, 99 F. Supp. 2d 464, 479 (D.N.J. 2000); Cash v Conn Appliances, 2 F. Supp. 2d 884, 897 (E.D. Tex. 1997).
- The standard for notice to the potential opt ins in a collective action is a “lenient one,” requiring only a modest factual showing. See Mooney, 54 F.3d at 1213-14. It is “considerably ‘less stringent’ than the proof required pursuant to Fed. R. Civ. P. 20(a) for joinder or Fed. R. Civ. P. 23 for class certification.” Grayson, 79 F.3d at 1096.
- Plaintiffs should resist arguments by defense counsel that Rule 23 is the proper standard in a FLSA collective action. It is not. A large majority of courts have held that Rule 23 does not apply to FLSA claims. See e.g. Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977), abrogated on other grounds, Hoffman-LaRoche v. Sperling, 493 U.S. 165 (1989); LaChappelle v. Owens-Illinois, Inc., 513 F.2d 386, 288 (5th Cir. 1975); Schmidt v. Fuller Brush Co., 527 F.2d 532, 536 (8th Cir. 1975); Garza v. Chicago Transit Authority, 2001 WL 503036 (N.D. Ill. 2001).
- Plaintiffs bear the burden of establishing that they are pursuing their claims both for themselves and on behalf of other “similarly situated” employees to warrant collective action treatment under FLSA. See Grayson, 79 F.3d at 1096. Even though the notice standard is lenient, plaintiffs must make some evidentiary showing at this stage to convince the court that there are other similarly situated employees available and willing to opt in.
- After the court determines that plaintiffs are similarly situated, the case proceeds through discovery as a collective action. See e.g. Mooney, 54 F.3d at 1213; Hoffman v. Sbarro, 982 F. Supp. 249, 261-62 (S.D.N.Y. 1997).

b. **Decertification Stage**

- In the second stage, called the “decertification stage,” a second and more stringent review of the “similarly situated” standard is undertaken to ensure that having the

case proceed to trial as a representative collective action, as opposed to individual actions, is appropriate. See e.g. Mooney, 54 F.3d at 1214; Hipp, 252 F.3d at 1218.

- The decertification stage occurs after the notice, opt in and discovery phases of the litigation have been completed and defendant has filed a motion for decertification prior to trial. If the claimants are found to be similarly situated, the action proceeds to trial as a representative action. If they are found not to be similarly situated, the class is decertified; the opt-in plaintiffs are dismissed without prejudice; and the original plaintiffs, who filed the complaint, proceed to trial on their individual claims. See e.g. Mooney, 54 F.3d at 1214; Hipp, 252 F.3d at 1218.

2. Recent Cases Regarding Conditional Certification

a. **Conditional Certification Granted Based on Common Policy or Scheme**

- **Declarations from workers in nine offices constituted a representative sample sufficient to certify a collective action as to all 19 company offices.** Levy v. Verizon Information Systems, 2007 WL 1747104 (E.D.N.Y. 2007). Telephone sales representatives brought this misclassification case for failure to pay overtime and not having a system to record hours worked. Plaintiffs' declarations covered nine of the 19 offices where the workers were employed. The court certified the case as to all offices, stating that "the representative sample provided by plaintiffs is sufficient to permit an inference that the policy governs all 19 offices."
- **Three affidavits from plaintiffs were sufficient to show that the defendant had a common policy that violated the FLSA.** Ashley v. Lake County, 2007 WL 1549926 (N.D. Ind. 2007). Corrections officers brought suit for failure to pay wages for time spent during "roll call" 15 minutes before a scheduled shift. The court granted conditional certification, finding the existence of a common policy based on three affidavits from plaintiffs attesting that: (1) they attended roll call for each of their shifts; (2) they were not paid for roll call; and (3) other corrections officers told plaintiffs that they also were not being paid for roll call time.
- **School district employees covered by common pay plan policies specified in memorandum of understanding ("MOU") between district and union were similarly situated.** Agdipa v. Grant Joint Union High School Dist., 2007 WL 1106099 (E.D. Cal. 2007). Plaintiffs argued that they and other current and former school district employees all were covered by the MOU's compensation provisions and entitled to pay for overtime according to the MOU scale. Defendant's arguments that different payroll procedures may have existed for different potential opt ins were rejected by the court. The court relied on the MOU and found that it established a common pay system. The court further found that to require the plaintiffs to go beyond the MOU to describe specific payroll systems was inappropriate at the lenient first stage.

- **Workers hired by different subcontractors were not paid overtime pursuant to common pay plans warranting notice.** Lima v. Int’l Catastrophe Solutions, Inc., 493 F. Supp. 2d 793 (E.D. La. 2007). Plaintiffs, predominantly immigrants, who were recruited by multiple defendants to work as manual laborers in the clean-up and restoration of various businesses along the Gulf Coast in the aftermath of Hurricane Katrina, alleged that they were not paid overtime. The plaintiffs relied on the allegations in their complaint and affidavits (which contained near identical language) from the seven plaintiffs and three opt ins, who worked for only one of the defendants, to establish that there were similarly situated individuals entitled to notice. The court found that even though the workers were hired to work by various subcontractors, they were “similarly situated” with respect to defendants’ pay plan provisions, so as to justify conditional certification.
- **Off-the-clock claims were suitable for collective action certification. Plaintiffs were not required to provide equal amounts of evidence for every facility.** Adams v. Inter-Con Security Systems, Inc., 242 F.R.D. 530 (N.D. Cal. 2007). Five security officers brought suit based on defendant’s policy of requiring attendance at uncompensated pre-shift briefings, uncompensated pre-employment orientation sessions and other claims. In finding that off-the-clock allegations were suitable for collective action certification, the court relied on the detailed declarations from the five plaintiffs, as well as 13 declarations from other employees. The court also noted that 383 plaintiffs in 50 cities under six different contracts had already opted in. The court rejected the defendant’s argument that individual considerations such as a different amount of damages for each plaintiff precluded conditional certification. In defining the class, the court rejected defendants’ arguments to limit the scope to facilities for which plaintiffs had provided evidence. The court stated that plaintiffs were not required to provide equal amounts of evidence for every facility. The court also rejected defendant’s arguments to limit the class to facilities where plaintiffs made a showing of the alleged policy. In doing so, the court noted that the defendant had refused to allow discovery of documents to support the existence of a nationwide policy. The court, however, excluded officers covered by a CBA, although it noted that it may consider creating a subclass if an officer covered by a CBA became a named plaintiff.

b. **Conditional Certification Granted Based on Similar Job Duties**

- **Court granted certification finding that similarly situated class members need not be identically situated.** Fast v. Applebees, 243 F.R.D. 360 (W.D. Mo. 2007). The court found conditional certification proper based on common plan or practice to utilize servers and bartenders in a non-tipped capacity without paying them the required minimum wage, as established by affidavits, corporate memos regarding best practices for utilization of tipped employees and a Department of Labor investigative report. The court rejected defendants’ arguments that bartenders and servers were not similarly situated because each restaurant

developed its own list of tipped employees' duties to be performed throughout the day and work schedules varied depending on expected needs. Despite each restaurant's freedom to schedule employees' job duties, a company wide document entitled "Labor Management Best Demonstrated Practices," specified non-tipped duties for tipped employees. The court also declined to hear the merits of the case, rejecting defendants' arguments that certification should be denied because plaintiffs' claims were not valid and the class would be unmanageable.

- **Although there were variations in duties, all employees maintained point-of-sale equipment and therefore were similarly situated.** Renfro v. Spartan Computer Services, Inc., 243 F.R.D. 431 (D. Kan. 2007). Plaintiffs worked in various positions installing and maintaining restaurant point-of-sale systems. Plaintiffs brought claims for unpaid overtime on behalf of various titled employees arguing that they were similarly situated because they all performed work on point-of-sale systems and were subject to the employer's same policy of not requiring maintenance of accurate time records and refusing to pay overtime. The court found that although there was some variation in the specific duties of putative class members, the fact that they all maintained point-of-sale systems was sufficient at the first stage to find that the employees were similarly situated. The court noted that if there were variations in the duties of employees, subclasses could be considered at the second stage. The court rejected defendants' arguments to combine the first and second steps of the certification analysis.
- **Court refused to evaluate merits and rejected argument that certain putative class members may be exempt from the FLSA at certification stage.** Stanfield v. First NLC Financial Services, 2006 WL 3190527 (N.D. Cal. 2006). Loan officers sued for unpaid overtime and produced declarations from employees who worked in different offices at different times but performed similar job duties, worked more than 40 hours per week and were not paid overtime. The court noted that at the time of the filing of their notice motion, 164 current and former employees had filed opt ins. The court granted conditional certification, stating that any differences in job duties were not material and a fact intensive inquiry was not required at this juncture. Defendant argued that plaintiffs' declarations were unreliable and should be stricken because they were all substantially the same. The court disagreed, finding that it was "entirely logical" that employees in the same job title performed very similar tasks.
- **Omnibus class not appropriate for certification but the court allows a managers class. Foundation and hearsay objections to declarations were not relevant at the certification stage.** Beauperthuy v. 24 Hour Fitness USA, Inc., 2007 WL 707475 (N.D. Cal. 2007). Plaintiffs filed a collective action for an omnibus class consisting of three categories of employees: managers, commission-based employees and personal trainer-hourly based employees who worked for 24 Hour Fitness in states other than California [California employees had their own separate action]. The court denied certification of the omnibus class noting that plaintiff failed to provide a factual nexus binding the members as victims of a common policy or practice. The court went on to grant conditional

certification of a managers class, relying on affidavits from 11 former managers that uniformly stated, pursuant to company policy, they and other managers were designated as exempt, denied overtime, and denied real management authority in a number of ways. The court also found defendant's more than 300 foundation and hearsay objections to plaintiffs' declarations were not relevant to the court's determination at the first stage of certification.

c. **Conditional Certification Denied**

- **While the certification requirement is not onerous, plaintiffs must show more than mere existence of other similarly situated persons. Plaintiffs must show that similarly situated persons actually desire to opt in to the lawsuit. Otherwise, certification would be automatic.** Parker v. Rowland Express, Inc., 492 F. Supp. 2d 1159 (D. Minn. 2007). Two drivers brought suit alleging in their complaints and affidavits that they were "informed and believed" that other potential plaintiffs may have existed. Defendant argued that this was not an appropriate case for collective action status because plaintiffs had not proffered evidence that other similarly situated individuals desired to opt in. The court agreed, stating that plaintiffs must do more than show the mere existence of other similarly situated person, because there is no guarantee that they will actually seek to join the lawsuit. If plaintiffs were required only to show that other potential plaintiffs exist rather than showing they would actually seek to join, it would render first stage notice certification automatic as long as the complaint contained the magic words: "other employees similarly situated." The court thus denied notice certification in the absence of some evidence indicating that others would opt in to this lawsuit. The court further stated that a FLSA plaintiff was not entitled to conditional certification simply to seek out others who might wish to join the action. The court further noted that, given the five year tenure of one of the plaintiffs, it was not an insurmountable hurdle for him to contact drivers he knows about opting in. The court made clear, however, that it was conceivable in certain circumstances, such as when an employee worked for an employer for only a short period of time, to permit some discovery as to the identity of other similarly situated employees. The court further limited its analysis to those cases where there are one or two named plaintiffs. It noted, for example, that if eight plaintiffs commenced a FLSA action, it might not be necessary to show that others desired to opt in, since the sheer number of plaintiffs, standing alone, could render the action appropriate for collective action status. The court declined, however, to draw a precise numerical line regarding the number of plaintiffs required to render conditional certification proper without evidence of additional opt ins.
- **Single plaintiff declaration, absent other declarations or evidence attesting to victims of a "single decision, policy or plan," not enough to satisfy similarly situated test.** Benson v. West Coast Const., 2007 WL 445456 (W.D. Wash. 2007). Plaintiff, a former hourly construction laborer, sought payment of back overtime for himself and all current and former employees. Defendants presented evidence that plaintiff agreed to be paid straight time for overtime hours worked. This agreement was in place until defendants realized that the agreement was

illegal. At that point, defendants made a full and unconditional tender of back overtime wages to plaintiff. The court agreed with defendant that plaintiff's situation was so unique that he could not satisfy the "similarly situated" standard. The court noted that in order to grant conditional certification, it required little more than substantial allegations, supported by declarations or discovery, that "the putative class members were together the victims of a single decision, policy, or plan." The court found that even under this lenient standard, plaintiff produced no evidence that other employees were subject to a similar agreement. He only produced his own self serving declaration that was rife with hearsay statements that other employees worked overtime and were not paid. In contrast, defendants produced a declaration stating that employees rarely worked overtime hours, and that when they did work such hours, they received proper overtime pay.

d. **Conditional Certification Discovery and Jurisdiction**

- **Court rejected argument that when discovery on the issue of collective action certification has occurred, the "two step" method collapsed into one.** Herring v. Hewitt Associates, Inc., 2007 WL 2121693 (D.N.J. 2007). Benefits analysts, who provided human resources outsourcing services to various businesses, filed suit for unpaid overtime. The defendant argued that substantial discovery on the certification issue had been completed and the court should collapse the two stages of the certification analysis, proceed directly to the second stage and make a conclusive factual determination regarding whether plaintiffs are similarly situated. The court disagreed, stating that to engage in a more substantial, factual determination at stage two requires discovery to be largely complete and the case ready for trial. The court found that the case was not "ready for trial" and that it was premature to make factual findings regarding certification. The court conditionally certified the class for notice purposes, rejecting defendant's arguments that employees' tasks were inherently diverse and varied.
- **Even though the parties had engaged in extensive discovery, the stricter standard for determining "similarly situated" only applies at the conclusion of discovery.** Gerlach v. Wells Fargo & Co., 2006 WL 824652 (N.D. Cal. 2006). Plaintiffs were business systems employees who sought back overtime pay under the FLSA. The court held that plaintiffs met their burden of establishing that they and a potential class of opt ins were similarly situated to permit conditional certification by showing that the employees shared a common job description, were classified as exempt from overtime pay by defendants and performed similar job duties. Although discovery had been extensive, the court rejected defendants' argument to apply the stricter second stage analysis that is applied when decertifying a collective action. The court stated that once discovery was completed, defendants could move for decertification and the court would apply the heightened second-tier review. Because the court found that plaintiffs met their burden for conditional certification, it did not consider the 39 declarations submitted by defendants.

- **An order granting conditional certification and approving notice is not appealable.** Comer v. Wal-Mart Stores, Inc., 454 F.3d 544 (6th Cir. 2006). Former assistant store managers brought case seeking back overtime pay. The district court held that the plaintiffs made a preliminary showing that they and potential opt ins were similarly situated under the lenient standard applicable at the first stage of certification. Defendants appealed the district court’s ruling on conditional certification. The Sixth Circuit applied the Supreme Court’s analysis in Cohen v. Beneficial Indus. Loan Corp. to determine whether the district court’s ruling was final and irrevocable. In holding that it did not have jurisdiction, the Sixth Circuit found that the district court order was specifically defined as “conditional and temporary.”

3. Recent Cases Regarding Decertification

a. **Decertification Granted**

- **Similarly situated must extend beyond mere facts of job duties and pay provisions.** Anderson v. Cagles, 488 F.3d 945 (11th Cir. 2007). Current and former employees of chicken processing facilities appealed the district court’s order decertifying the class. The district court found that the named plaintiffs could not fairly and adequately represent the wide variety of work assignments and varied compensation structures affecting the purported class. In reaching this conclusion, the district court contrasted the employers’ independent identities, locations and work forces; various methods used to compensate the putative class members; and the protective clothing the putative class members were required to wear. The appellate court affirmed the district court based on the numerous distinctions between the named plaintiffs and many of the opt in plaintiffs in the record. In particular, the appellate court noted that a key defense in this case related to a collective bargaining agreement and many of the opt in plaintiffs were not unionized. The court stated that while the FLSA does not require potential class members to hold identical positions, similarities must extend beyond the mere facts of job duties and pay provisions.
- **Decertification granted where opt ins were not subject to policy that forms the basis of the complaint.** Sharer v. Tandberg, Inc., 2007 WL 676220 (E.D. Va. 2007). Two plaintiffs were salaried employees who brought suit claiming they were subjected to defendant’s practice of partial-day pay docking. Following conditional certification and notice, eight additional plaintiffs opted in to the lawsuit, six of whom later voluntarily dismissed their claims. On a motion for decertification, the court found that the two remaining opt in plaintiffs were situated differently than the two original plaintiffs because both left employment over one year prior to the implementation of the partial-day pay docking system at issue, and were thus never subjected to the alleged policy that formed the basis of the complaint. The court also found that the opt ins were situated differently with respect to job titles and responsibilities.

b. Decertification Denied

- **Decertification denied but court divided the plaintiffs into four classes based on the facilities where they performed their services.** Rawls v. Augustine Home Health Care, Inc., ___ F.R.D. ___, 2007 WL 1952988 (D. Md. 2007). Plaintiffs were certified nursing assistants who cared for elderly and disabled clients at their homes. The dwellings of the individual clients varied and included private homes, apartment complexes, senior living facilities, and assisted living and nursing homes. Defendants argued that plaintiffs' disparate employment settings and job requirements rendered them sufficiently dissimilar, requiring decertification of the collective action. The court considered three factors to determine whether to decertify the action: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations. The court did not decertify, but instead found that the independent defense factor (potential defenses pertaining to the plaintiff class or whether the potential defenses require proof of individualized facts at trial) weighed in favor of dividing the plaintiff class according to the individual residence facility at which the plaintiffs performed their services.
- **In denying a motion for decertification, the Magistrate correctly applied factors to make a determination of similarly situated.** Hayes v. Laroy Thomas, Inc., 2007 WL 1174313 (E.D. Tex. 2007). Four construction workers brought a collective action on behalf of all current and former construction workers for back overtime pay. Following conditional certification, the defendant filed a motion to decertify the class. The magistrate judge denied defendant's motion and defendant filed objections with the district court. The court found that the defendant's objections were without merit and the magistrate correctly used three applicable factors to determine whether the plaintiffs were similarly situated: (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations. In doing so, the court summarily rejected defendant's arguments regarding judicial efficiency and disparate factual and employment settings of the individual plaintiffs.

B. Hybrid FLSA Collective/State Law Class Actions

- Both federal and state law wage and hour claims can be brought together in a single lawsuit, as a "hybrid" or "dual filed" action, in federal court, pursuing the FLSA claims as an opt in collective action under Section 216(b) and the pendent state law claims as an opt out class action under Fed. R. Civ. P. 23. Such cases are being brought by plaintiffs with increasing frequency. District courts that have allowed cases to proceed under both federal and state law have exercised supplemental jurisdiction over the state law claims, finding that proceeding under both statutes does not create any manageability issues.

- This hybrid procedure has been accepted by some courts. See e.g. Beltran-Benitez v. Sea Safari, Ltd., 180 F. Supp. 2d 772 (E.D.N.C. 2001) (denying motion to dismiss state law claims); Ansoumana v. Gristede’s Operating Co., 201 F.R.D. 81 (S.D.N.Y. 2001) (finding that the tasks required to manage a collective action with 350 opt ins were not very different from those needed to manage a state law class action).
- Other courts have refused to certify both the collective action and class action in a single case. See e.g. DeAsencio v. Tyson Foods, Inc., 342 F.3d 301, 308-09 (3rd Cir. 2003) (refusing to exercise supplemental jurisdiction over state law claims because, given novelty and number, would predominate over FLSA claims); Jackson v. City of San Antonio, 220 F.R.D. 55 (W.D. Texas 2003) (declining to exercise jurisdiction over state law claims, which were remanded to state court).
- Still others have allowed the case to proceed as both a collective and class action, but limited certification of the state law claims to those individuals who had opted in to the FLSA action. See e.g. Bartleson v. Winnebago Ind., Inc., 219 F.R.D. 629 (N.D. Iowa 2003).

1. **Rule 23 Class Action Procedures**

- To certify the state law claims, Plaintiffs must demonstrate that they meet the four prerequisites of Federal Rule of Civil Procedure 23(a) and one of the requirements of Rule 23(b) to proceed as a class action. See Visa Check/Mastermoney Antitrust Litigation, 280 F.3d 124, 132-33 (2nd Cir. 2001).

a. **Rule 23(a)**

- Plaintiffs must demonstrate that they meet the four prerequisites of Rule 23(a) known as numerosity, commonality, typicality, and adequacy of representation.¹
- Numerosity. There is no bright line rule or magic number regarding numerosity. See Gen. Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980) (“The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.”). Courts have certified classes with as few as 18 members and refused to certify classes with as many as 67 members. See Rodger v. Electric Data Sys. Corp., 160 F.R.D. 532, 535-37 (E.D.N.C. 1995); Kelley v. Norfolk & W.Ry., 584 F.2d 34, 35-36 (4th Cir. 1978); see also Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2nd Cir. 1995) (stating that “numerosity is presumed at a level of 40 [class] members”), citing 1 Newberg On

¹ Rule 23(a) provides for certification when: (1) the class is so numerous the joinder of all members is impracticable (“numerosity”); (2) there are questions of law or fact common to the class (“commonality”); (3) the claims or defense of the representative parties are typical of the claims or defense of the class (“typicality”), and (4) the representative parties will fairly and adequately protect the interests of the class (“adequacy of representation”).

Class Actions 2d, (1985 ed.) § 3.05.

- **Commonality:** Questions of law or fact that are common to the class must exist. The commonality test is to be liberally applied and is satisfied if there is at least one common issue of fact or law that affects all class members. See Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 198 (S.D.N.Y. 1992).
- **Typicality:** Typicality requires that disputed issues of law or fact “occupy essentially the same degree of centrality to the named plaintiff’s claims as to that of the other members of the proposed class.” Caridad, 191 F.3d at 293, citing, Krueger v. New York Tel. Co., 163 F.R.D. 433, 442 (S.D.N.Y. 1995). The commonality and typicality requirements “tend to merge” and “both serve as guideposts for determining whether . . . the named plaintiff’s claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence.” Caridad, 191 F.3d at 291, citing, Gen. Tel. Co. v. Falcon, 477 U.S. 147, 157 n.13 (1982).
- **Adequacy of Representation:** Plaintiffs and their counsel must demonstrate they will adequately protect the interests of the class members. This requirement is satisfied if: (1) plaintiffs’ interests are not antagonistic to the interests of the class members; and (2) plaintiffs’ attorneys are qualified, experienced and able to conduct the litigation. See Baffa v. Donaldson, Lufkin & Jenrette Securities Corp., 222 F.3d 52, 60 (2d Cir. 2000).

b. Rule 23(b)

- Plaintiffs also must satisfy one of the subparts of Rule 23(b) to proceed as a class action.
- Rule 23(b)(2),² which does not provide notice to the absent class members or the right to opt out, applies in those cases where plaintiffs are primarily seeking injunctive relief, although monetary damages that are incidental and flow from the injunctive relief may also be sought.
- Rule 23(b)(3),³ which does provide notice to absent class members and the right to opt out, requires that the class questions predominate over individual issues and that the class action is superior to other methods for resolving the claims.

² Rule 23(b)(2) provides for certification of a class when “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”

³ Rule 23(b)(3) provides for certification when “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” The court should consider the following factors in making this determination “(A) the interest of members of the class

2. Recent Cases Certifying Both Collective/Class Action Claims

- **Reversing district court’s denial of class certification to those state law claimants who did not opt in to collective action.** Lindsay v. Gov’t Employees Ins. Co., 448 F.3d 416 (D.C. Cir. 2006). Auto insurance claims adjusters alleged that they were misclassified as exempt employees and not paid overtime. District court found that adjusters nationwide were similarly situated and ordered notice. It then exercised supplemental jurisdiction over the New York state law claims of only those individuals from New York who had opted in to the FLSA action by filing a consent to join form. The appellate court reversed the district court’s denial of class certification of the state law claimants who did not also opt in to the FLSA action and remanded with instructions to determine whether it may decline to exercise supplemental jurisdiction over the state law claims. The appeals court stated, however, that the district court’s ability to decline to exercise supplemental jurisdiction over those class members with state law claims only is circumscribed. It further stated that it “did not view the difference between the opt-in procedure provided by section 216(b) for FLSA claims and the opt-out procedure for state law claims provided by Rule 23 as fitting the ‘exceptional circumstances/other compelling reasons’ language” that would allow it to decline jurisdiction under the supplemental jurisdiction statute.
- **Court refused to dismiss action dual filed under FLSA and Pennsylvania state law.** Lehman v. Legg Mason, Inc., 2007 WL 2768519 (M.D. Pa. 2007). Securities brokers sued alleging that they were not paid overtime and wrongful deductions were made from compensation. Defendants filed a motion to dismiss, arguing that the plaintiff may not join in a single action in federal court a FLSA opt in collective action with a state opt out class action because so doing creates an impermissible conflict with Congressional intent in drafting the FLSA and the Rules Enabling Act. The court disagreed. The court found that in enacting the FLSA Congress acted with respect to federal claims and did not intend to limit the substantive remedies available under state law or the procedural mechanism under which such remedies may be pursued. The court further held that the Rules Enabling Act did not preclude dual filed suits such as this.
- **FLSA cause of action certified as collective action and New York Labor Law claims certified pursuant to Rule 23.** Iglesias-Mendoza v. LaBelle Farm, Inc., 239 F.R.D. 363 (S.D.N.Y. 2007). Workers at poultry processing plant sought damages for failure to pay minimum wage and overtime under the FLSA and New York Labor Law. The court found that plaintiffs met their minimal burden of showing they are similarly situated to proposed class members under FLSA at the preliminary certification stage based on their declarations. The court also

in individually controlling the prosecution or defense of separate action; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”

exercised supplemental jurisdiction over the state law claims and certified a Rule 23 class. The court noted that it and other courts in this district had no difficulty in administering previously dual filed actions.

- **FLSA cause of action certified as collective action and California Labor Code violations certified pursuant to Rule 23.** Morton v. Valley Farm Transport, Inc., 2007 WL 1113999 (N.D. Cal. 2007). Two former milk truck drivers sought damages for failure to pay overtime and missed meal and rest periods under the FLSA and California Labor and Business and Professions Codes. Plaintiffs submitted their own declarations, as well as declarations of two former drivers who had opted in to the action. All four drivers stated that they regularly worked more than 40 hours and were not paid overtime and were told by managers and the owner that the company would not pay overtime. In certifying the collective action, the court rejected defendants' arguments that there were over 30 different routes that drivers could be assigned, that drivers earned different hourly rates, that some drivers had additional responsibilities and that the drivers had different work schedules which would be relevant to determining each class members' damages. The court found persuasive plaintiffs' evidence of a common policy of not paying overtime pay, standardized job qualifications for the driver position, and descriptions of the duties of the driver position. The court also certified a class, pursuant to Fed.R.Civ.P. 23, based on the California overtime and meal and rest period claims. The court found that common questions included whether drivers received overtime pay and drivers were provided meal and rest breaks. Additionally, the court noted that declarations submitted by plaintiffs stated that no class members expressed an interest in pursuing a separate independent action and that numerous putative class members expressed an interest in participating in the case.
- **Court certified a FLSA opt in collective action and a class action based on California state law claims.** Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474 (E.D. Cal. 2006). Plaintiffs were route sales drivers for dairy producer who sued for overtime pay violations under the FLSA and California Labor and Business and Professions Codes. The court found that the allegations in the complaint were sufficiently detailed to establish the basis for a collective action. The court also reviewed declarations of two employees and found that they were sufficient to establish that the "outside sales" exemption did not preclude conditional certification. The court thus certified a collective action, but declined to include "equivalent delivery positions" in the definition of the collective action because the term was non-specific. The court also certified a class action, pursuant to Fed.R.Civ.P. 23, based on the California state law claims.

3. Recent Cases Certifying Collective Action, But Not Class Action

- **Court certified FLSA collective action, but refused to certify Pennsylvania state law claims.** Evans v. Lowe's Home Centers, Inc., 2006 WL 1371073 (M.D. Pa. 2006). Department managers and assistant department managers at 36

Lowe's stores in Pennsylvania brought suit seeking unpaid overtime. The court granted conditional certification and 499 employees had opted in to the FLSA action after notice. The court then granted final collective action certification. It refused, however, to exercise supplemental jurisdiction over the state law claims and certify a Rule 23 class, because the "disparity in numbers between the FLSA opt in plaintiffs [499] and the state law Fed.R.Civ.P. 23 plaintiffs [1,317] would flaunt the Congressional intention that FLSA claims proceed as an opt in scheme."

- **Conditional certification of a 216(b) collective action is appropriate, but class certification of California state law claims under Rule 23 is not. Analysis of differences in job duties is better done at the decertification stage and not the certification stage regarding the FLSA claims.** Edwards v. City of Long Beach, 467 F. Supp. 2d 986 (C.D. Cal. 2006). Police officers brought claims against the city for failure to provide meal and rest periods and reimbursement of costs of maintaining and cleaning safety equipment. Under the lenient conditional certification standard, the court certified the action after reviewing the complaint, affidavits and supporting exhibits and finding that the members of the class were similarly situated. Although defendant focused on the differences in job duties between the named plaintiff and other potential class members, the court found that these arguments were better decided in a motion to decertify the class. The court denied plaintiffs' motion for Rule 23 class certification, stating that the Rule 23 class was based solely on state law claims and raised jurisdictional concerns. The court questioned its exercise of supplemental jurisdiction if only a few plaintiffs opted into the FLSA class after it certified a Rule 23 state law class, because the court would then be faced with the peculiar situation of a large number of plaintiffs in the state law class who have chosen not to prosecute their federal law claims. The court further noted that allowing a Rule 23 class action would frustrate the purpose of requiring plaintiffs to opt in to 216(b) collective actions. The court thus found that the 216(b) collective action was a more appropriate vehicle to hear the state law claims of plaintiffs who are interested in pursuing such claims and held that any person who opts in to the FLSA collective action may pursue any pendent state law claims they have.

III. CASE INVESTIGATION AND EVALUATION

A. General

- The decision whether to file a collective action or hybrid lawsuit is an important one. The factors that should be considered in making the case selection decision include (1) the nature of the wrongful conduct; (2) the quality of the potential class representatives; (3) whether others are affected; (4) the size of the potential class; (5) the basis for the belief that a violation of law occurred; (6) the size of the company; (7) the type of job(s) and industry involved; (8) the legal theories by which the allegations may be proven; (9) the prospects for efficiently and cost effectively litigating the case; (10) the solvency of the defendant; and (11) the venue in which the case may be litigated.

- Significant resources should be devoted to the investigation of a collective or class case. The end result will sometimes be a decision that there is no case or the case is not suitable for class treatment. The case investigation should be “front-end loaded” so that plaintiffs’ counsel can “hit the ground running,” after filing a complaint and engage immediately in meaningful discovery and prepare for the certification motions. Everything the plaintiffs’ lawyer does from the point of the initial intake forward should be undertaken with an eye toward obtaining class certification.
- It is important to have a historical perspective on the types of cases that have been successful. Company wide practices prevalent in certain industries may have improperly classified employees as exempt from the requirement to pay overtime. For example, certain patterns of wage and hour violations may exist in particular industries, such as retail stores, restaurant chains, insurance companies, mortgage companies, and financial services companies.

B. Investigation and Evaluation Tools

- Selection of Named Plaintiffs. Selection of appropriate named plaintiffs is critical. The individuals selected as named plaintiffs may not be the first individuals who contacted you or who were interviewed about a potential case. It is important to interview as many potential class members as you can before selecting the named plaintiffs.
 - Among the factors to consider in selecting a named plaintiff are (1) the strength of the individual’s claims; (2) whether the individual’s claims are timely; (3) whether the individual’s claims are typical of those of the class members; (4) whether the individual is similarly situated to the potential opt in plaintiffs; (5) whether the individual will be an adequate class representative; (6) whether the individual has any conflicts with other potential class representatives; (7) whether the individual understands and is willing to take on the role of a class representative; (8) the individual’s demeanor; (9) whether the individual comes with any “baggage” that can undermine the case, distract from the focus of the litigation, or lead to collateral litigation, such as a termination claim; and (10) whether the individual is credible. If there is any doubt, a check of criminal, bankruptcy and credit records should be done with the individual’s consent.
- Factual Investigation. The factual investigation is not only the basis for deciding whether to file an action, but the information collected during this phase also will be useful in drafting the complaint, crafting a discovery strategy, and moving for class certification once the case is filed.
 - *Company information.* It is important to learn as much as you can about the company from publicly available information. In the case of a public company, SEC filings and annual shareholder reports provide relevant

information about the company, including (1) the company's organizational structure; (2) the number, location and type of workplace facilities; and (3) the total number of employees in the workforce. News articles also can provide helpful information. Do not forget to search the company's Internet website, it can be a rich source of information.

- *Witness interviews.* It is important to interview as many witnesses and potential class members as possible to gather direct evidence of discriminatory conduct. This includes, class members, former managers of the company and non-class member current and former employees who have information regarding the company's employment practices. Some of the most helpful witnesses are recent past managers and employees who are willing to cooperate because they do not fear retaliation. It is important, however, to adhere to ethical prohibitions against contact with currently employed managers or discussing information protected by the company's attorney-client privilege with any witness.
- *Document review.* It also is important to review documents obtained from clients and witnesses, such as job descriptions, employee handbooks, pay plans, wage statements, training records and time records, if any.
- Other Case Evaluation and Selection Considerations. In addition to gathering the information described above regarding the company, plaintiffs, class members and potential classwide claims, consideration of the following issues is also important.
 - *Financial Status of Prospective Defendant.* The potential defendant needs to have sufficient financial stability and resources to pay the potential judgment and continue in business and provide jobs. Is the company stagnant or is it growing? If the company's stock is publicly traded, SEC filings are a source of information that should be reviewed. In some instances, it may be appropriate to retain a financial or investment expert or investigator to advise you about the financial status of the company.
 - *Reputation of the Company.* Companies often have reputations as "good" or "bad" employers. Reputation is not dispositive of whether a class action should be filed and even the best companies have problems. However, companies that are insensitive to the problems of discrimination, for example, often are similarly insensitive to the requirements of the wage and hour laws. Sources of information regarding a company's reputation include past complaints your firm may have received about the company; LEXIS, Westlaw and court docket searches for past and pending litigation against the company; administrative complaints obtained through FOIA and public records act requests; and searches for news articles about the company and its employee relations.

- *Tactical Considerations.* Before deciding to file a collective or class lawsuit, plaintiffs' counsel must consider the possible venues and available decision-makers, judges and jury pools. Liability evidence has to be particularly strong where there may be less sympathetic fact finders.
- *Scope of the Class.* How you define the potential class is extremely important and must be carefully considered. Do not overreach.
- *Assessment by a Jury Consultant.* In cases that would be triable to a jury, a quick opinion on the industry setting, nature of claims, and potential themes by a jury consultant could provide insights relevant to selecting or structuring the case.

IV. **PRE-FILING AND EARLY LITIGATION STRATEGIES**

A. **Considerations for Drafting the Complaint**

- The relief requested and claims alleged will dictate whether the case is tried to a jury or the court.
- The choice of forum, *i.e.*, state or federal court and, in some cases, venue, is an important decision.
- Although Fed. R. Civ. P. 8(a) requires only a notice pleading, the complaint should be detailed and tell a compelling story of treatment of employees that violates the law. There are a number of reasons for this. A well pleaded complaint will support the motion for conditional certification and also can be used during discovery support requests for documents or depositions. The press will likely be more interested in a detailed complaint.

B. **Filing the Complaint and Publicity**

- As discussed above, the thorough background investigation conducted before drafting the complaint permits the filing of more than a notice complaint. The complaint should present to the court and public a compelling, detailed story and named plaintiffs with sympathetic claims.
- Publicity at the time the complaint is filed is very important in order to communicate with and inform absent class members about the lawsuit and obtain information from potential witnesses who identify themselves in response to the publicity. This is particularly important in a FLSA collective action because the statute of limitations continues to run on each class member's claim until he or she opts in to the action. Additionally, early witness declarations obtained from individuals who contact you can be used to support the motion for conditional certification.

- The combination of publicity, the use of an “800” telephone number, and prompt response to calls can be an effective way to locate witnesses and communicate with class members. Be aware of and follow or seek relief from local rules limiting communications with class members.

C. Filing the Motion for Conditional Certification

- Plaintiffs can meet their burden at the notice motion stage through detailed allegations in the complaint and supporting affidavits from potential class members. Grayson, 79 F.3d at 1097. Because plaintiffs want early notice, they will have to rely on evidence gathered during their pre-suit case investigation to support their motion for notice. Plaintiffs’ counsel should not engage in protracted discovery prior to bringing a motion for notice. On the other hand, they will want to engage in early limited discovery to obtain the names and addresses of current and former employees who should be sent notice.
- Despite the lenient standard at the notice stage, plaintiff’s counsel should take care not to overreach because courts will refuse to approve notice requests that are not sufficiently supported. See e.g. Madrid v. Minolta Bus. Solutions, Inc., 2002 U.S. Dist. LEXIS 18539 (S.D.N.Y. 2002) (denying notice because plaintiff relied on single affidavit from one office in company with 41 offices nation wide); Bernard v. Household Int’l, Inc., 231 F. Supp. 2d 433 (E.D. Va. 2002) (lack of evidence of company wide policy caused court to limit notice to two offices in Virginia and deny notice as to the other 18 offices in 14 states.
- To ensure that the court authorizes early notice, plaintiffs’ counsel should take the following steps to support their motion for notice:
 - Draft the complaint with sufficient detail to allege and describe a common company policy or practice that violates FLSA and affects a number of employees who are performing similar job duties with the same rate of pay;
 - File declarations or affidavits from plaintiffs and potential opt ins demonstrating the existence and scope of a policy or practice that violates FLSA, such as the misclassification of a group of employees as exempt at all of employer’s offices;
 - The declarations should state with particularity that:
 - ✓ the testimony is based on personal knowledge of the facts, noting declarant’s position and dates of employment with defendant company;
 - ✓ identify the company practice that violates FLSA; i.e., failure to pay overtime to assistant managers at 500 fast food restaurants throughout the country because they are misclassified as exempt;

- ✓ describe the job duties performed by declarant;
 - ✓ identify pay basis and rate; and
 - ✓ state that declarant and others in his or her position regularly worked overtime without compensation, identifying average number of hours worked per week.
- Show that the same tasks are performed by all employees in the position at issue, regardless of location, through multiple declarations, declaration of an employee who worked in the position in more than one location, or by stating that the declarant had the opportunity to observe the work of other similarly situated employees.
 - Declarations from former managers, human resources personnel, or other employee witnesses not in the job classification at issue can also be used to support a notice motion
 - Attach copies of any policy documents that evidence a violation of the law or that support that allegations in the complaint, such as job descriptions and overtime and exemption policies.