FLSA COLLECTIVE ACTIONS - THE PLAINTIFFS' PERSPECTIVE

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I. INTRODUCTION

The Fair Labor Standards Act ("FLSA") begins with the words: "The Congress hereby finds… the existence… of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers…." 29 USC § 202(a). Thus, the basic American belief: "An honest day's pay for an honest day's work" is at the very core of the FLSA's overtime pay provisions. This principle is so engrained in the American consciousness and so fundamental to the American way of life that it cuts across philosophical lines. For this reason, even the most conservative and management-oriented of judges may rule in favor of employees when the facts demonstrate that workers have been cheated out of "an honest day's pay" under FLSA. Moreover, because of the FLSA's historical origins, as well as the basic principles of fundamental economic fairness that it embodies, the Act's statutory scheme is far different than other employment laws. Therefore, it is crucial for the employment lawyer to put on a very different thinking cap when analyzing and litigating overtime pay cases. [1]

Congress first adopted the Fair Labor Standards Act (the FLSA or the Act) in 1938 and has amended it numerous times over the years. With one notable exception (the Portal to Portal Act), each of the amendments has resulted in an expansion of FLSA's scope. FLSA litigation combines the application of a statute, 29 USC §§ 201 *et seq.*, and a comprehensive set of implementing regulations. 29 CFR §§ 510 *et seq.* FLSA claims can be enforced either by the Department of Labor (DOL) (29 USC § 216(c)) or by individual employees acting through private attorneys. 29 USC § 216(b). To add to the complexity, there exists a dizzying array of judicial interpretations of FLSA's provisions and regulations. Often, these interpretations differ from Circuit to Circuit and even within the same Circuit. Indeed, one of FLSA's unique aspects is that a very similar set of facts may produce a very different result for reasons that are not always apparent. Nevertheless, it remains true that there are certain core principles embodied within FLSA that enable it to serve by design as a powerful tool against economic injustice in the workplace.

One fundamental difference between FLSA and other employment laws is the manner in which the burden of proof is allocated. Employment law practitioners are accustomed and conditioned to the idea that the employee bears the burden of proof to show that discrimination, or retaliation, has occurred. However, in FLSA overtime pay litigation it is often not the employee, but the employer, that bears the burden of proof on issues of critical importance. For example, wage and hour cases often turn on the issue of whether an employer is, or is not, entitled to claim an exemption from overtime pay

[1] FLSA contains requirements not only concerning overtime pay, but also (among other things) concerning minimum wage (29 USC § 206), child labor (29 USC § 212), and gender-based equal pay for equal work (Equal Pay Act, 29 USC § 206(d)). A full rendition of all of these provisions and their interpretations is far beyond the scope that this paper will permit. Therefore, this paper will focus principally on the overtime pay provisions of FLSA with particular emphasis on the most frequently litigated overtime pay areas and the unique statutory mechanisms which are employed in these cases.

requirements and the burden of proof to establish entitlement to FLSA exemptions falls squarely on the shoulders of the employer, not the employee. *See, e.g., Walling v. General Industries, Co*., 330 U.S. 545 (1947); *Blackmon v. Brookshire Grocery Co.,* 835 F.2d 1135, 1137 (5th Cir.1988). Moreover, FLSA exemptions are narrowly construed against employers and only apply to those employees who fit plainly and unmistakably within their terms and spirit. *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997). Therefore, when a claimed exemption is at issue and the employer is unable to meet the burden of proving entitlement to that exemption, the employer loses the liability portion of the case. For this reason, as radical as it may seem, it is not uncommon for summary judgment to be granted against the employer as to liability when the employer fails to meet its burden of showing entitlement to a claimed exemption. *See, e.g., Albanese v. Bergen County Sheriff's Dept.,* 991 F. Supp. 410, 426-27 (D.N.J. 1997).

FLSA's record keeping requirements provide another good example of how different this area of the law is from other employment laws. Employers are required by FLSA to maintain certain records of hours worked and wages paid. 29 CFR § 516. If an employer fails to maintain these required records, the employees are then entitled to use their best good faith estimates of hours worked to compute damages. The burden of proof then falls upon the employer to rebut these estimates. *See, e.g., Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). If the employer is unable to rebut the estimates (which can be a very difficult task in the absence of the required records), the employees' good faith estimates are used to calculate the damages. *See* discussion *infra*. Thus, in this area of the law (unlike other areas of employment law) employees may gain a distinct advantage in litigation when an employer fails to maintain proper records. *See, e.g., McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988).

Another unique aspect of the FLSA is that the statute itself provides for claims to be brought collectively by groups of employees. *See* 29 USC § 216(b). These "collective actions" are a form of representative class action. As discussed in greater detail herein, there are very significant distinctions between FLSA collective actions (which are an "opt-in" form of class action in which each plaintiff must affirmatively file a "Consent Form" with the court to be included in the action) and Rule 23 "opt-out" class actions. In FLSA collective actions a lenient "similarly situated" standard is applied to determine whether the class will be certified, whereas in Rule 23 class actions a more difficult four prong standard (numerosity, commonality, typicality, and adequacy) is used to assess the propriety of class certification.

Due to many of the unique features of the FLSA discussed above (which can make these cases very lucrative), and arguably also because of the prevalence of wage and hour violations in certain industries, there has been an exponential increase in FLSA collective actions in recent years. [2] These actions often involve hundreds, and even

[2] In 2001, FLSA collective actions filed in federal court actually exceeded employment discrimination class actions for the first time. See *Wage-Hour Class Actions Surpassed EEOC In Federal Courts Last Year, Survey Shows*, BNA's Wage, Hour & Leave Report, March 29, 2002. This trend has continued to the present time.

thousands, of employees, who in the aggregate are seeking and securing many millions of dollars in unpaid overtime compensation. Industries which are vulnerable to FLSA collective actions include food processing companies, restaurant chains, retailers, financial services companies, insurance companies and others. The two major liability areas faced by these employers are claims for unpaid overtime for off-the-clock work and unpaid overtime owed to employees misclassified[3] as exempt under the FLSA.

Recent examples of these types of wage and hour collective actions include the following cases in which plaintiffs were successful in obtaining major settlements and judgments since September 2004:

- *Seekly v. Allstate Insurance Co.* (claims adjusters) (California State Court) -- $120 million
- *In Re Farmers Insurance Exchange Claims Representatives' Overtime Pay Litigation*, MDL No. 1439 (D. Or.) -- $52 million
- *Burns v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (brokers) (N.D. Cal.) -- $37 million
- *Butler v. Countrywide Home Loans, Inc.,* (account executives/loan officers) (California State Court) -- $30 million
- *Giannetto v. Computer Services Corp.* (IT workers) (C.D. Cal.) -- $24 million
- *Service Employees International Union v. Safeway, Vons, Albertsons and Ralph's* (grocery chain janitors) -- $22.4 million
- *Olivas v. Smart & Final, Inc.* (California State Court) -- $22 million
- *Franklin v. Bank of America* and *Abduallah v. Bank of America* (loan account executives) (D. Minn.; N.D. Cal.) -- $15 million

[3] By far the most common misclassification cases involve employees classified as exempt from overtime pay requirements under the "white collar exemptions" which cover primarily administrative, professional and executive employees. It is important to note that under the new "white collar" regulations which became effective in August 2004, it arguably became easier for employers to successfully classify certain employees as exempt. *See* 69 Fed.Reg. 22122 (2004). Concomitantly, under the new regulations, it may be more difficult for plaintiffs to successfully claim that they were misclassified as exempt. However, the new regulations are not retroactive and conduct occurring before the effective date of the new regulations is governed by the prior regulations. *See DeJesus-Rentas v. Baxter Pharmacy Services Corp*., 400 F.3d 72, n.2 (1st Cir. 2005) (licensed compound pharmacists are exempt professionals). A full discussion of the differences between the old white collar regulations and the new ones is far beyond the scope of this paper. Suffice it to say, however, that in handling any "white collar" misclassification case in which all or any part of the conduct at issue arose after August 2004, the practitioner should be certain to review the new regulations (*See* 29 C.F.R. § 541.0 et seq.) and should be very cautious about relying on case decisions grounded in the previous regulations.

- *Chao v. Cingular Wireless* (call center employees) (pre-litigation) -- $5.0 million
- *Hernandez v. Kovacevich "5" Farms* (agricultural workers) (E.D. Cal.) -- $1.7 million
- *Chao v. Group Health Cooperative* (HMO employees) (W.D. Wash.) -- $1.6 million
- *Belt v. EmCare, Inc.* (settlement of part of case) (nurse practitioners and physician assistants) (E.D. Tex.) -- $1.5 million
- *Parks v. Eastwood Insurance Services, Inc.* (C.D. Cal.) -- $1.2 million (plus $2,080,415 in fees and costs)
- *Chao v. Scotto's Smithtown Restaurant Corp.* (restaurant workers) (E.D.N.Y.) -- $1.045 million
- *Harrington v. Manpay LLC* (off-duty police officers) (California State Court) -- $1.0 million

As the foregoing list should make clear, many successful wage and hour collective actions are brought in state courts and under state wage and hour laws. Unlike the FLSA which requires an "opt-in" class (as discussed below) it is possible to seek opt-out class certification under certain state laws. Appendix A to this paper provides a table of the states in which overtime pay claims may be brought in opt out class actions and a summary of the basic provisions of those state laws. Beyond that, however, a discussion of state law wage and hour class actions is beyond the scope of this paper. This is particularly true because Texas is not among the states which permit such actions, except in limited circumstances. *See, e.g.,* Texas Local Govt. Code, Sec. 142.

Accordingly, this paper will explore the statutory mechanisms which govern the litigation of Section 216(b) collective actions under the FLSA and recent court decisions concerning a variety of related issues including the two step framework for securing conditional certification and resisting subsequent decertification of FLSA classes, motions for notice to the collective, related discovery issues, hybrid collective/class actions, the effect of collective bargaining agreements on FLSA claims, the arbitrability of FLSA claims, and issues concerning settlements and attorneys' fees.

II. COLLECTIVE ACTIONS UNDER § 216(B)

As noted above, the FLSA allows groups of employees to bring an action against their employer to recover unpaid minimum wage or overtime pay on behalf of themselves "and other employees similarly situated." *See* 29 USC § 216(b). However, employees who wish to participate in the FLSA collective action must affirmatively "opt-in" to the case by filing a consent form with the court to join the lawsuit. In contrast, class actions brought under Rule 23 require that class members affirmatively "opt out" of the action if

they do not wish to participate.[4] *See*, *e.g.*, *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001).

Arising from the distinction between 216(b) opt-in classes and Rule 23 opt-out classes are very important differences in how the applicable statutes of limitations operate. Plaintiffs' counsel must be wary of the fact that statutes of limitations do not operate in Section 216(b) collective actions as they do in Rule 23 class actions. In a Rule 23 class action, the statute is tolled for all class members when the complaint is filed. Stated differently, the filing by the class representative serves to stop the running of the statute of limitations for all other plaintiffs subsequently found to be class members. In contrast, due to the opt-in requirement of 29 U.S.C. § 216(b), the statute of limitations in an FLSA collective action is not tolled by the filing of the complaint. Instead, the statute continues to run for each individual class member until the day that individual's opt-in consent is filed with the court. 29 U.S.C. § 256; *See also Redman v. U.S. West. Bus. Resources, Inc*., 153 F.3d 691 (8th Cir. 1998); *Cash v. Conn Appliances, Inc.*, 2 F. Supp. 2d 884, 897 (E.D. Tex. 1997) (noting that limitations periods in collective actions continue to run until each individual plaintiff "consents in writing to becoming a party plaintiff").

The FLSA statute of limitations is two years, but can be extended to three years for "willful" violations. 29 U.S.C. § 216(b). Thus, each individual plaintiff will have a "window of recovery" that extends back at least two years from the day that individual's consent form is filed with the court. Upon a willfulness finding, the window of recovery will be expanded to extend three years back from the day the individual consent form is filed. Moreover, because many employers continue to engage in the challenged conduct even after a complaint is filed, current employees will have a "window of recovery" that reaches back 2 to 3 years and extends forward for as many years as the unlawful pay practices continue.

Because plaintiffs must affirmatively "opt-in" to an FLSA collective action, a more lenient standard applies to class certification of these claims than the standard which applies in Rule 23 "opt-out" classes. Rule 23 classes must meet the four prong test of numerosity, commonality of issues, typicality of claims, and adequacy of representation. In contrast, despite efforts by defendants to impose Rule 23 standards on the certification of 216(b) collective actions, it is clear that the far simpler and easier to satisfy one prong test of "similarly situated" applies to FLSA collective actions. [5]

However, because it is easier to obtain class certification in an FLSA collective action, the initial certification typically is conditional and subject to decertification during a second stage of certification proceedings after discovery has been conducted. This two-

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[4]; *See, e.g., Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975); *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 239 (S.D.N.Y. 1997); *Lusardi v. Xerox Corp.,* 118 F.R.D. 351 (D.N.J. 1987).

[5] *See, e.g., Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir.1996)("It is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23 of the Federal Rules of Civil Procedure."); *Bayles v. American Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1067 (D. Colo. 1996)("Despite the unpredictability of an ad hoc approach, I see no basis to conclude that the paradigm of Rule 23 can be engrafted upon § 216(b)."); *Lusardi*, 118 F.R.D. at 358 (same).

step process for assessing the propriety of class certification in FLSA collective actions was first used by a district court in New Jersey in 1987 and has since come into common usage across the country. See *Lusardi v. Xerox Corp.,* 118 F.R.D. 351 (D.N.J. 1987) and *H&R Block, Ltd. v. Housden*, 186 F.R.D. 399, 400 (E.D. Tex. 1999) (crediting the *Lusardi* court for developing the two step approach).

In the first step, which typically takes place at the inception of the case, the plaintiffs must establish through affidavits, declarations, and other evidence that they are "similarly situated" to other current and former employees of the employer with regard to job duties and pay practices. If the plaintiffs meet this initial burden, the court will conditionally certify a class and allow plaintiffs to send notice to similarly situated potential plaintiffs.

In the second step, which typically takes place after discovery has been completed, the defendant may seek to decertify the class by attempting to show with the discovery evidence that the opt-in plaintiffs are not in fact similarly situated. *See, e.g, Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995)(affirming the district court's use of a two-step approach); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1103 (10th Cir. 2001); *Barnett v. Countrywide Credit Indus., Inc.*, 2002 WL 1023161, at *1 (N.D. Tex. May 21, 2002) (applying *Lusardi* two-step approach); *Housden*, 186 F.R.D. at 400. *Hipp*, 252 F.3d at 1217-19; *Scott v. Aetna Serv., Inc.*, 210 F.R.D. 261, 263 (D. Conn. 2002); *McQuay v. American Int'l Group, Inc.*, 8 Wage & Hour Cas.2d (BNA) 412, 2002 WL 31475212 (E.D. Ark. Oct. 25, 2002) (adopting two step method); *De Asencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660, 663 (E.D. Pa. 2001) (adopting two step method).

III. MOTIONS FOR NOTICE TO THE COLLECTIVE

In FLSA collective actions, a motion for class certification is inextricably linked to a motion for notice to the collective, *i.e.,* a motion for notice to similarly situated potential plaintiffs of the existence of the lawsuit and of their right to opt-in to the suit if they wish to participate. [6] Frequently, these two interrelated motions are filed simultaneously or are embodied in one motion. For reasons discussed herein, astute plaintiffs' counsel will seek both conditional certification and notice to the collective as early in the case as possible after filing and service of the complaint.

The authority for a motion to provide potential plaintiffs with notice of a pending FLSA action is found in a 1989 decision of the United States Supreme Court, *Hoffmann-La Roche, Inc. v. Sperling,* 493 U.S. 165 (1989) [7] which held that a district court has the

[6] The "window of recovery" in an FLSA suit is two years but may be extended to three years for willful violations of the FLSA. *See* 29 U.S.C. § 255(a). As a result of this potential three year reach-back, Plaintiffs typically will request that notice be sent to all similarly situated employees who worked for defendant during the three years preceding the filing of the lawsuit.

[7] Although *Sperling* is an ADEA collective action, the ADEA adopted and utilizes the FLSA's collective action procedures. For this reason, many of the cases concerning collective actions were decided under the ADEA's identical provisions and ADEA cases can be considered authoritative in deciding similar issues under the FLSA.

discretion to "facilitate notice to potential plaintiffs in a section 216(b) FLSA collective action so that these potential plaintiffs are informed of the action and may choose to 'opt in' to the action." 493 U.S. at 169. To secure court supervised notice to the potential class members the plaintiffs must demonstrate that the potential plaintiffs are "similarly situated" to those who brought the lawsuit. *Id.* When plaintiffs succeed in making the "similarly situated" showing, "the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* When a court approves notice to the putative class members in an FLSA case, it typically also provides a deadline by which those potential plaintiffs must opt-in to the case by filing a signed consent form to be included in the action. Only the potential class members who file a consent form by the applicable deadline may join in the action. *Id.*

As mentioned above, to secure notice to the class Plaintiffs must demonstrate that members of the proposed class are "similarly situated." *See, e.g., Sheffield v. Orius Corp.*, 211 F.R.D. 411, (D. Or. 2002). However, the statutory language of the FLSA and the governing regulations do not provide guidance on the meaning of "similarly situated," and it has been left to the courts to wrestle this issue to the ground. Courts have made this determination on a case by case basis sometimes with conflicting results. *See, e.g., Mooney*, 54 F.3d at 1213; *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996); *Thiessen*, 267 F.3d at 1102; *Ray v. Motel 6 Operating, Ltd.*, 4 Wage & Hour Cases 2d 573, 575 (D. Minn. 1996); *D'Anna v. M/A-COM, Inc.*, 903 F. Supp. 889, 893-94 (D.Md.1995); *Severtson v. Phillips Beverage, Co.*, 141 F.R.D. 276, 278 (D. Minn. 1992). *Harper v. Lovett's Buffet, Inc.*, 185 F.R.D. 358, 362 (M.D. Ala. 1999). *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997).

To determine the propriety of class certification and related motions to serve notice, courts analyze two essential issues: whether potential plaintiffs are similarly situated concerning "job requirements" and "pay provisions." *Dybach v. Fla. Dep't of Corr.*, 942 F.2d 1562, 1567-68 (11th Cir. 1991). Different courts have gone about making this determination in different ways. For example, some courts have examined whether the employees at issue were "victims of a single decision, policy, or plan." *Bayles v. American Med. Response of Colo.*, Inc., 950 F. Supp. 1053, 1066-67 (D. Colo. 1996); *See also Brooks v. Bellsouth Telecomms., Inc.*, 164 F.R.D. 561 (N.D. Ala. 1995), *aff'd*, 114 F.3d 1202 (11th Cir. 1997). Other courts have assessed whether potential plaintiffs work in the same location, are making similar claims and are seeking substantially the same relief. *See, e.g., De Asencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660, 662 (E.D. Pa. 2001).

Regardless of the methodology employed by the court to determine whether plaintiffs and potential plaintiffs are "similarly situated" the cases make clear that the initial burden on plaintiffs is a lenient one and only a "modest factual showing" is required to meet this burden. *See, e.g., Mooney*, 54 F.3d 1214; *Roebuck v. Hudson Valley Farms, Inc.*, 239 F. Supp. 2d 234, 235 (N.D.N.Y. 2002); *Realite v. Ark Restaurants Corp.*, 7 F. Supp.2d 303, 306 (S.D.N.Y. 1998); *Jackson v. New York Tele. Co.*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995); *Severtson v. Phillips Beverage, Co.*, 137 F.R.D. 264, 266 (D.

Minn. 1991). In spite of the lenient standard at this stage of the proceedings, plaintiffs must still assemble enough affidavit evidence to persuade the court to grant conditional certification and notice. In the absence of such evidence, some courts have denied motions for conditional certification and notice. *See, e.g., D'Anna v. M/A-Com., Inc.*, 903 F. Supp. 889, 894 (D. Md. 1995) (denying motion for notice because plaintiff's allegations of a potential class were "broad and vague" and lacked "factual support"). *See also Madrid v. Minolta Bus. Solutions, Inc.*, 2002 WL 31190172 (S.D.N.Y. 2002)(denying certification and notice based on a lack of evidence of any policy or practice which deprived plaintiffs of appropriate overtime compensation). Plaintiffs also may lose a notice motion when they wait too long to bring the motion. *See, e.g., Belbis v. County of Cook*, 2002 WL 31600048 (N.D. Ill. 2002) (denying a motion for notice not brought until after discovery had closed).

Courts will make the initial decision concerning conditional class certification and notice based on the evidence available at the time the motion is asserted by plaintiffs' counsel. For this reason, among others, it is often to plaintiffs' advantage to file a motion for class certification and judicially supervised notice at the earliest possible time in the litigation. Initially, it was thought that this decision could be based on the pleadings alone. *See*, *e.g.*, *Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 442-45 (N.D.Ill.1982). However, the current view is that courts must examine some evidence to make this determination. Typically, when the motion is filed before much, if any, discovery has been conducted, the court will determine whether plaintiffs and potential plaintiffs are "similarly situated" based on the pleadings and on any affidavits presented to the court. *See Scott v. Aetna Serv., Inc.*, 210 F.R.D. 261, 264 (D. Conn. 2002). *See also Mooney*, 54 F.3d at 1213 (notice decision based on pleadings and affidavits submitted); *Grayson*, 79 F.3d at 1105; *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1313 (M.D. Ala. 2002).

After plaintiffs present evidence in support of the motion for certification and notice, a defendant will argue that plaintiffs have not established that a class of similarly situated potential plaintiffs exists. Even when defendants fail to persuade a court that the class is not similarly situated, they may succeed in persuading the court that notice should be limited to a smaller group than the group proposed by plaintiffs. For example, some courts have held that potential plaintiffs generally should be from the same geographic location to avoid a predominance of individualized issues. *See, e.g., Morisky v. Public Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493 (D.N.J. 2000); *Bayles*, 950 F. Supp. at 1067; *Lusardi*, 118 F.R.D. at 375. Other courts have found insufficient evidence to support a claim that a nationwide or regional policy or practice exists which would justify notice to a nationwide or regional group of potential plaintiffs. *Tucker v. Labor Leasing, Inc.*, 872 F. Supp. 941, 949 (M.D. Fla. 1994). Similarly, courts have rejected proposed notices to multiple facilities when plaintiffs were unable to show unlawful alleged conduct that was widespread. *See Haynes v. Singer*, 696 F.2d 884 (11th Cir. 1983). Defendants also are able to defeat multi-facility or nationwide notice by demonstrating that local control exists over the relevant employment decisions. *See Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303, 305 (D. Colo. 1998); *Brooks*, 164 F.R.D. at 569; *Ulvin*, 141 F.R.D. at 131; *Plummer v. General Elec. Co.*, 93 F.R.D. 311, 312 (E.D. Pa. 1981).The result of such determinations is that courts will conditionally certify a smaller

class than requested by plaintiffs and limit notice to the smaller group of potential plaintiffs which the court views to be "similarly situated" to the representative plaintiffs.

Even when defendants persuade courts to limit the notice that goes out, courts generally will grant conditional certification and authorize the sending of notice to some, if not all, of the potential class members. However, this conditional certification and notice does not resolve the issue of similarity in a final way. Instead, courts typically determine that potential plaintiffs are similarly situated for purposes of sending notice subject to discovery and without prejudice to a later motion to decertify which will be brought by defendant. *See, e.g., Ballaris v. Wacker Silttronic Corp.*, 2001 U.S. Dist. LEXIS 13354 (D. Or. 2001) (certifying a collective action only for notice and discovery purposes); *Realite v. Ark Restaurants Corp.*, 7 F. Supp.2d 303, 308 (S.D.N.Y. 1998) (same); *Ray v. Motel 6 Operating, Ltd.*, 4 Wage & Hour Cases 2d 573, 575 (D. Minn. 1996) (same). Following discovery, the defendant has another opportunity to contest the propriety of the class through a motion to decertify.

IV. DISCOVERY ISSUES

Discovery in FLSA collective actions should proceed in predictable and logical stages. First, prior to notice issuing and in conjunction with the motion for class certification and judicially supervised notice, plaintiffs will seek contact information (names, addresses, phone numbers, e-mail addresses, etc.) for current and former employees who fall within the window of recovery for the case. This information is necessary in order to distribute the notice of the lawsuit to the potential plaintiffs who may wish to opt-in. Second, following notice and prior to the motion to decertify being filed, both sides will wish to engage in extensive discovery on the issue of whether potential plaintiffs are similarly situated to the representative plaintiffs. This discovery will take the form of written discovery (interrogatories, document requests, admissions, etc.) and depositions of key plaintiffs and key management personnel. It is during this stage that each side seeks to build its factual case for or against decertification of the class. Finally, simultaneously with the discovery of factual similarities among the plaintiff class, the plaintiffs and defendant will wish to conduct discovery on liability and damages issues as in any lawsuit. Defendant also could seek discovery concerning the immigration status of plaintiffs, however, as noted below, thus far courts have rejected such discovery requests as irrelevant.

A. Discovery Of Contact Information For Potential Plaintiffs

Some courts have permitted limited discovery of the names and addresses of similarly situated individuals, *before* the decision is made to issue notice. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989); *Wyatt v. Pride Offshore, Inc.*, 1996 WL 509654 (E.D. La. Sept. 6, 1996); *Tucker v. Labor Leasing, Inc.*, 155 F.R.D. 687, 689 (M.D. Fla. 1994). Others have determined that the contact information for potential plaintiffs becomes relevant and discoverable only after the notice motion is granted. *See, e.g., Adams v. United States*, 21 Cl. Ct. 795 (Cl. Ct. 1990). However, all courts are now typically requiring a defendant to produce the contact information promptly after

conditional certification of a class takes place in view of the fact that the statute of limitations for potential plaintiffs continues to run until a consent form is filed with the court. *See, e.g., Roebuck v. Hudson Valley Farms, Inc.,* 239 F. Supp. 2d 234 (N.D.N.Y. 2002)(ordering defendant to produce names and last known addresses of potential class members within 35 days); *Barnett v. Countrywide Credit Indus., Inc.*, 2002 WL 1023161, at *2 (N.D. Tex. 2002), (ordering defendant to produce names and last known addresses in electronic form within 10 days); *Bailey v. Ameriquest Mortgage Co.*, 2002 WL 1835642 (D. Minn. 2002)(overruling defendant's request to stay production of contact information pending appeal of a denial of a motion to compel arbitration). *But see De Asencio v. Tyson Foods, Inc.*, 5 Wage & Hour Cas.2d (BNA) 198, 2002 WL 1805534 (E.D. Pa. 2002)(permitting defendant to send out notices to potential plaintiffs in lieu of producing contact information for potential plaintiffs). In view of the concerns over statutes of limitations running while defendants delay in providing contact information for notice purposes, at least one court has held that a defendant's failure to produce a list of names and addresses of potential plaintiffs warrants a tolling of the statute of limitations. *See Meyers v. Cooper Cellar Corp.*, 1996 WL 30509 (W.D. Tenn. 1996).

B. Discovery Of Information Pertinent To The Motion To Decertify

Following conditional certification and notice to the class, plaintiffs should be acutely aware that a motion to decertify will most likely be filed by defendant following the conclusion of discovery. Accordingly, plaintiffs must conduct discovery, in part, with a view toward preparing to defend against that motion.

As discussed below, the key issue on a motion to decertify is the similarity (or dissimilarity) between the job duties and pay provisions of representative plaintiffs and plaintiffs who opt-in after notice is circulated. *See, e.g., Scott v. Aetna Serv., Inc.*, 210 F.R.D. 261 (D. Conn. 2002). Similarly, discovery concerning whether plaintiffs have the same salary grade and perform the same type of work is relevant to a motion to decertify. *Morisky v. Public Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000). In like fashion, it would be prudent for plaintiffs to engage in discovery to determine and define similarities in levels of discretion exercised by plaintiffs, job duties of plaintiffs, supervisory responsibility of plaintiffs, supervisory authority of plaintiffs, disciplinary authority of plaintiffs and similarity of pay plans. *See, e.g., Bradford v. Bed Bath & Beyond, Inc.*, 184 F. Supp. 2d 1342 (N.D. Ga. 2002).

C. Discovery Of Immigration Status Of Potential Plaintiffs

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275, 1283 (2002), the Supreme Court decided foreign workers unlawfully terminated for participating in union activities, were not entitled to an award of back pay because such an award would be contrary to the Immigration Reform and Control Act of 1986, and its underlying policies. Predictably, this raised a question concerning whether undocumented workers not entitled to back pay in NLRA cases should be entitled to back pay under the FLSA. In response to that question, some defendants have sought discovery in FLSA cases

concerning the immigration status of plaintiffs. Thus far, however, courts have not allowed employers to seek discovery of plaintiffs' immigration status in FLSA collective actions. *See, e.g., Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002)(holding that defendant was not entitled to discover the immigration status of immigrant workers who sought unpaid wages under the FLSA); *Flores v. Albertsons, Inc.*, 2002 WL 1163623 (C.D. Cal. 2002)(same); *Galaviz-Zamora v. Brady Farms, Inc.*, --- F.R.D. ---, 2005 WL 2372326 (W.D. Mich. Sept. 23, 2005) (immigration status not subject to discovery).

V. MOTIONS TO DECERTIFY

During the discovery process, defendant will seek to develop information to demonstrate that plaintiffs are not similarly situated to potential plaintiffs and opt-in plaintiffs with regard to job responsibilities and pay practices. In contrast, plaintiffs will seek to develop information to strengthen and reinforce the court's initial determination of the similarly situated nature of the conditionally certified class. At the end of this discovery process, the defendant will file a motion to decertify which will test how each side did during discovery to develop facts helpful to supporting their arguments. Courts will generally perform a "careful factual analysis of the full range of the employee's job duties and responsibilities" to make decisions on motions to decertify. *See, e.g., Scott v. Aetna Serv., Inc.*, 210 F.R.D. 261, 264-65 (D. Conn. 2002)(denying a motion to decertify because plaintiffs' job duties and responsibilities were substantially similar); *Morisky v. Public Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000)(denying a motion to decertify because plaintiffs had the same salary grade and performed the same type of work). *See also Moss v. Crawford & Co.*, 201 F.R.D. 398 (W.D. Pa. 2000)(denying motion to decertify); *Kelley v. SBC*, 1998 WL 928302 (N.D. Cal. 1998)(same).

A case which provides a particularly helpful analysis of similarly situated factors in a motion to decertify setting is *Bradford v. Bed Bath & Beyond, Inc.*, 184 F. Supp. 2d 1342 (N.D. Ga. 2002), a multi-state FLSA collective action brought by department heads from numerous stores in numerous locations who asserted they were misclassified as exempt "managers". *Id.* at 1344. After notice to the putative class members and after discovery was conducted, defendant sought to decertify the class. The court then performed a detailed analysis of the deposition testimony to determine if the job duties of the class members were substantially similar. *Id.* at 1346. In doing so, the court examined the following factors to assess the similarity of the plaintiffs in their roles at the various stores:

- Management hierarchy;
- Discretion exercised by plaintiffs;
- Job duties of plaintiffs;
- Supervisory responsibility of plaintiffs;
- Supervisory authority of plaintiffs;
- Disciplinary authority of plaintiffs;
- Similarity of pay plans; and,
- Procedural or fairness concerns that might warrant decertification.

From this analysis, the court concluded that the management hierarchy in each store was similar, and that the plaintiffs performed "very similar" work and exercised little actual discretion. *Id.* at 1346-48. Plaintiffs also were similarly situated in that they had little actual supervisory responsibility, or authority, for training, scheduling, hiring, firing, or disciplining subordinates. *Id.* at 1348-50. The court also was not persuaded by defendant's argument that plaintiffs were not similarly situated because they were paid different salaries. *Id.* at 1351. Finally, the court found no procedural or fairness concerns that required decertification. Id. Based on the foregoing analysis, the court held that the plaintiffs' were similarly situated and denied defendant's motion to decertify. *Id.* at 1352.

When a motion to decertify is denied as in the foregoing examples, the original plaintiffs and opt-in plaintiffs are allowed to proceed with the case as a representative class action. In contrast, however, if a motion to decertify is granted, the nature of the case undergoes a radical revision. In that instance, the opt-in plaintiffs are dismissed without prejudice and the original plaintiffs proceed to trial on their individual claims. *See, e.g., Mooney*, 54 F.3d at 1214. The opt-ins may then re-file their claims as individual FLSA lawsuits. Practically speaking, however, a successful decertification motion means that it will be far more difficult, far more time consuming and far more expensive for the plaintiffs to succeed with their claims. [8]

Defendants may succeed with motions to decertify when they are able to demonstrate that "individual questions of fact predominate over common questions of fact." *See St. Leger v. A.C. Nielsen Co.*, 123 F.R.D. 567, 568-69 (N.D. Ill. 1988) (denying FLSA collective action). Similarly, motions to decertify may succeed if a defendant is able to establish that "numerous individualized defenses" are available so that a court will be faced with making individual assessments of each claim, requiring the equivalent of a mini trial for each plaintiff. *See Brooks*, 164 F.R.D. at 569 (class not certified because of diverse factual circumstances giving rise to numerous individualized defenses); *Lusardi*, 122 F.R.D. at 466 (class decertified because of disparate individual defenses to claims); *Bayles*, 950 F. Supp. at 1067 (class decertified because individualized proof needed to support plaintiffs' claims).

Notwithstanding the foregoing, it is important to distinguish decertification cases brought under the ADEA from those brought under the FLSA. In fact, many of the cases where plaintiff classes have been decertified are ADEA cases. These cases are often cited as support for decertification motions in FLSA cases because the ADEA uses the same statutory scheme as the FLSA. However, the issues pertinent to decertification differ greatly between ADEA cases and FLSA cases. When a motion to decertify is filed in an FLSA case, the inquiry concerns whether plaintiffs performed similar job duties and were subject to similar pay practices. There is no required element of intent in the

[8] In addition to outright decertification, a court also may decide to subdivide the class into subgroups. *See, e.g., Ark*, 7 F. Supp.2d at 308. Subdivision of a class imposes additional challenges for plaintiffs, but still leaves plaintiffs with a workable class action, whereas outright decertification may make it unfeasible to pursue all of the resulting individual actions.

liability phase of an FLSA case. In contrast, because class action ADEA cases allege intentional discrimination on the basis of age and typically involve mass lay offs or reductions in force, the factors that must be analyzed to determine substantial similarity are far more complex and varied. This necessarily means that it is more likely a court will find a lack of substantial similarity (resulting in decertification) in an ADEA case than in an FLSA case.

The following cases illustrate this distinction: In *Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D.N.J.1988), *aff'd in part, appeal dismissed*, *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3rd Cir. 1992) the court decertified an ADEA class because the "opt-in plaintiffs performed different jobs at different geographic locations and were subject to different job actions concerning reductions in work force which occurred at various times as a result of various decisions by different supervisors made on a decentralized employee-by-employee basis." Similarly, in *Ulvin v. Northwestern Nat. Life. Ins. Co.*, 141 F.R.D. 130, 131 (D. Minn. 1991) the court decertified and ADEA class because "class members varied significantly as to age, year of termination, type of termination, division of company worked for, employment status, supervisors, and salaries." And, finally, in *Mooney v. Aramco Services Co.* the Fifth Circuit upheld a decertification decision based on an analysis that revolved around the fact that the plaintiffs were "of vastly different ages when hired, and varied in age at termination" and "were discharged from their employment in several different years upon the recommendation of different decision making supervisors for a variety of reasons." *Mooney*, 54 F.3d at 1214-15.

VI. "HYBRID" FLSA COLLECTIVE / STATE LAW CLASS ACTIONS

In combination with FLSA collective actions brought under federal law, many state laws provide their own protections against wage and hour violations. Unlike FLSA collective actions which are governed by the opt-in procedures of 29 U.S.C. Section 216(b), state law class actions are governed by Rule 23. By asking the federal court to assert pendent jurisdiction over the state law claims, it is possible to have a wage and hour class action in federal court which contains both an FLSA opt-in group and a state law Rule 23 opt-out class. These cases are often referred to as "hybrid" class actions because they contain both opt-in (under FLSA) and opt-out (under applicable state law) classes within the same lawsuit. *See, e.g., Belbis v. County of Cook*, 2002 WL 31600048 (N.D. Ill. Nov. 18, 2002). In *Belbis*, approximately 300 nurses who worked for Cook County hospitals affirmatively opted-in to the FLSA 216(b) collective action. In the same case, the plaintiffs also sought recovery and class status under Illinois wage and hour laws and the court certified a Rule 23 opt-out class of approximately 1300 nurses to pursue these claims.

A similar result took place in *De Asencio v. Tyson Foods, Inc.*, 8 Wage & Hour Cas.2d (BNA) 190, 2002 WL 1585580 (E.D. Pa. July 17, 2002). In that case, the court held that the FLSA "opt-in" method and the Rule 23 "opt-out" method were not inconsistent or in conflict because the FLSA and state law claims were "separate and distinct" and, therefore, reconcilable. *Id.* at *4. The court also noted that concepts of judicial economy dictated that both claims be tried in one forum. As a result, the court certified a state law

opt-out class action of 3,400 and allowed it to proceed simultaneously with a FLSA collective action containing 504 opt-in plaintiffs.

Scott v. Aetna Serv., Inc., 210 F.R.D. 261 (D. Conn. 2002), also concerned a hybrid FLSA/state law class action. In that case, the defendant argued (as defendants typically do in these circumstances) that the state law opt-out class should consist only of those individuals who had already opted-in to the FLSA collective action. The court rejected this argument (as did the court in *De Asencio v. Tyson Foods, supra)* and found that the claims asserted in the state law class arose from the same factual nexus (the same employment relationship) as the FLSA opt-in claims and, therefore, the two claims could be tried together in the interest of judicial economy. *Id.* at 264. The court then performed a standard Rule 23 analysis and determined that plaintiffs satisfied the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy. *Id.* at 266-67. Significantly, the court also noted that an opt-out class action was a superior method under Rule 23(b)(3) for litigating the state law claims because class members may not individually opt-in to the FLSA collective action due to fear of retaliation and cost prohibitions. Lastly, the court explained that allowing the state law class action to proceed with the FLSA collective action would eliminate the risk of inconsistent results. *Id.* at 268.

While the foregoing decisions illustrate the reasoning of courts that have certified hybrid FLSA/state law class actions, there are also a number of courts that have not allowed state law wage and hour class actions to co-exist with FLSA collective actions in the same suit. *See, e.g., Muecke v. A-Reliable Auto Parts and Wreckers*, 7 Wage & Hour Cas.2d (BNA) 1611, 2002 WI 1359411 (N.D. Ill. 2002). Like the *Belbis* case discussed above, *Muecke* was a suit brought under both the FLSA and under Illinois Minimum Wage Law, and the Illinois Wage Payment and Collection Act. Also like *Belbis*, the *Muecke* case involved allegations of unpaid, off-the-clock time worked by the plaintiff group. Also, like *Belbis*, the *Muecke* court found that the plaintiffs satisfied the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy. *Id.* at *2. However, unlike the *Belbis* court, the *Muecke* court found that plaintiffs were not able to show that the state law class action was a superior method for adjudicating the controversy under Rule 23(b)(3). *Id.* Instead, the court concluded that the FLSA opt-in collective action was the superior method for adjudicating plaintiffs' claims because, the "opt-in" process assured that the FLSA action would include only those individuals who truly desired to pursue their wage claims. *Id.*

The *Muecke* court also expressed concerns about the potential for disproportional representation between the state law opt-out class and the FLSA opt-in collective action. Whereas, the state law class would contain all current or former employees who did not affirmatively opt-out of the case, the FLSA action would contain only those potential plaintiffs who affirmatively decided to opt-in to the FLSA action. *Id.* The court was concerned that this created the potential that a modestly sized FLSA collective action would end up being the "tail wagging the dog" of a huge state law class. Based on this reasoning, the court concluded that the proposed Rule 23 state law class would not be certified because it was not the superior means for resolving the claims under

Rule 23(b)(3). *Id.*

It is interesting that both the *Belbis* case and the *Muecke* case (which arrived at opposite results) come from federal district courts in the Northern District of Illinois. To add further to that interest, another federal district court in the same jurisdiction has arrived at yet another result when confronted with similar facts. In *De La Fuente v. FPM Ipsen Heat Treating, Inc.*, 2002 WL 31819226 (N.D. Ill. 2002), the court decided to defer the Rule 23 class certification decision on the state law claims until after the FLSA opt-in period ended. Noting that other courts are split on the issue of certifying state law class actions brought with FLSA actions, the court decided to allow the FLSA action to proceed for notice and discovery purposes, and then to reconsider certification of the state law class after the opt-in period closed. *Id.* The court was motivated by several factors in reaching this decision. On a practical level, the court was concerned about the inherent confusion of circulating a notice that simultaneously explained the right to opt-in to the FLSA class and the right to opt-out of the state law class action. *Id.* The court also believed it would be in better position to decide on whether the state law class was the superior means for resolving the claims under Rule 23(b)(3) after it knew how many individuals had opted in the FLSA collective action. At that point, after the opt-in period had ended, the court also could determine whether the plaintiffs were adequate class representatives under Rule 23(a). *Id.*

VII. COLLECTIVE BARGAINING AGREEMENTS AND FLSA ACTIONS

The interplay between FLSA claims and an applicable collective bargaining agreement (CBA) has been the subject of many court decisions. Defendants of unionized work forces will generally point to the CBA and argue that the FLSA claims of unionized employees are subject to the grievance procedures of the CBA and, therefore, must be grieved and arbitrated rather than taken to court. In general, particularly in the private sector, these defense claims have been rejected. The seminal case on this issue is *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728 (1981). *Barrentine* states the general proposition that the important, congressionally protected rights provided under the FLSA can not be preempted by the terms of a collective bargaining agreement. Stated differently, the pay protections of the FLSA are individual rights which cannot be bargained away by an employee's union in the collective bargaining process. *Barrantine*, 450 U.S. at 745 (noting that FLSA rights are "independent of the collective bargaining process" because they apply to "petitioners as individual workers, not as members of a collective organization").

Belbis v. County of Cook, 2002 WL 31600048 (N.D. Ill. 2002), discussed *supra*, is one of the recent cases to address this issue. In *Belbis*, the defendant argued that the unionized nurses who were plaintiffs in the FLSA action were barred by the dispute resolution procedures of their collective bargaining agreement from pursuing their FLSA claims in court. The court rejected these arguments and ruled that the CBA did not bar plaintiffs' from asserting their FLSA claims in court because the CBA did not define pre and post shift briefing activities. *Id.* at *3. The court held that an FLSA claim could be barred by a CBA only if the CBA clearly defines what constitutes "compensable work."

Id. However, if a CBA does not clearly define the working time that is compensable and "an employee is not being paid for work that is clearly compensable ... *Barrentine* protects the employee's congressionally-granted right to seek redress through the FLSA in court." *Id.* citing *Barrentine*.

VIII. ARBITRATION AGREEMENTS AND FLSA ACTIONS

In recent years there has been an increasing amount of litigation concerning the issue of whether FLSA actions are subject to valid arbitration agreements. Thus far, most courts have concluded that FLSA claims are subject to otherwise valid and binding arbitration agreements. *See, e.g., Carter v. Countrywide Credit Industries, Inc.,* 362 F.3d 294 (5th Cir. 2004). However, compelling arbitration is necessarily dependent on the existence of a valid contract to arbitrate. *Personal Security & Safety Sys. v. Motorola Inc.,* 297 F.3d 388, 392 (5th Cir.2002). The federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties. *Am. Heritage Life Ins. Co. v. Lang,* 321 F.3d 533, 537-38 (5th Cir.2003).

Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002) illustrates the application of arbitration agreements in the FLSA context. In *Adkins*, approximately 60 current and former employees of defendant filed consent forms and brought suit under the FLSA for recovery of unpaid, off-the-clock hours worked. The defendant then filed a motion to compel arbitration asserting that every Labor Ready employee had signed an arbitration agreement. *Id.* at 499. The district court granted defendant's motion to compel arbitration.

On appeal, the plaintiffs argued that the unique protective purposes of the FLSA were in conflict with the pro-arbitration policies of the FAA. *Id.* at 506. However, the Fourth Circuit rejected plaintiffs' arguments. Noting that the ADEA uses the same enforcement scheme as the FLSA, and that ADEA claims were held to be arbitrable by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Fourth Circuit concluded that the FLSA does not preclude mandatory arbitration of FLSA claims. *Id.* at 506-07. *See also Cole v. Long John Silver's Restaurants, Inc.,* --- F.Supp.2d ---, 2005 WL 2237587 (D.S.C. Sept. 15, 2005) (arbitrator ruled former employees could arbitrate their FLSA claims as a class).

Barnett v. Countrywide Credit Indus., Inc., 2002 WL 1023161 (N.D. Tex. 2002), reached the same result as *Adkins* with regard to employees who had signed arbitration agreements, but also established that employees of the same employer who had not signed arbitration agreements were free to pursue their FLSA claims in court. In *Barnett*, many, but not all, of the employees who were potential class members had signed arbitration agreements. To assure that all employees who did not sign the arbitration agreement received notice of the suit, the court decided first to send notice to all similarly situated current and former employees and then to sort out the employees bound by arbitration agreements from those who were not after the notice was sent. Specifically, the court held that notice would be sent to all similarly situated current and former employees, but ruled that "only those persons who did not sign arbitration

agreements may send back their consent form and opt-in to the suit." *Id.* at *2.

Arbitration agreements can be resisted using standard defenses to contract formation such as a lack of consideration. *See, e.g., Harmon v. Hartman Management, L.P.,* 2004 WL 1936211 (S.D.Tex. Aug. 24, 2004)(denying motion to compel arbitration due to a lack of consideration); *Walker v. Ryan's Family Steak Houses, Inc.,* – F.3d –, 2005 WL 544353 (6th Cir. Mar 09, 2005)(same). Similarly, the courts in the following recent FLSA cases refused to compel arbitration: *Groves v. Ross Stores,* Cal. Super. Ct., No. RG04-182262 (Sept. 16, 2005); *Robinson v. Food Service of Belton, Inc. d/b/a Kentucky Fried Chicken,* 2005 WL 1799212 (D. Kan. July 11, 2005); *Wineman v. Durkee Lakes Hunting & Fishing Club*, 352 F.Supp.2d 815 (E.D. Mich. Jan. 13, 2005)(also finding that arbitration agreement cannot shorten FLSA statute of limitations); *Allen v. Apollo Group, Inc.,* 2004 WL 3119918, 10 Wage & Hour Cas.2d (BNA) 345 (S.D. Tex. Nov. 9, 2004); *Mascol v. E & L Transportation, Inc.,* --- F.Supp.2d 1123936 (E.D.N.Y. May 9, 2005).

In the following recent cases, however, the courts compelled arbitration of FLSA claims: *Johnson v. Long John Silver's Restaurants, Inc.,* 414 F.3d 583 (6th Cir. July 5, 2005); *Pennington v. Frisch's Restaurant,* 2005 WL 1432759 (6th Cir. June 17, 2005); *Lim v. Offshore Specialty Fabricators,* 404 F.3d 898 (5th Cir. March 24, 2005).

IX. SETTLEMENTS

Plaintiffs' counsel should be aware that in general FLSA claims cannot be validly settled without the approval of either the DOL or the court in which the action is filed. *See* 29 U.S.C. § 216(c); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946). *But see Martinez v. Bohls*, 361 F.Supp.2d 608 (W.D. Tex. February 28, 2005) (private release of FLSA claims valid where there exists a bona fide dispute as to the amount of hours worked or compensation due at the time the parties entered into the compromise and release). Notwithstanding the *Martinez* decision (which at this point appears to be aberrational) settlement agreements which purport to waive an employee's rights under the FLSA are not generally enforceable unless such agreements have been approved by the DOL or a court. Thus, an employer which has attempted to settle FLSA claims without DOL or court approval remains vulnerable to an FLSA collective action lawsuit.

To avoid this situation, an employer should always seek the approval of the DOL when settling FLSA claims outside of litigation. *See, e.g., Sneed v. Sneed's Shipbuilding*, 545 F.2d 537 (5th Cir. 1977). Alternatively, when an FLSA case that is in litigation is settled the parties should submit the terms and conditions of the settlement to the court for a fairness review and ask the court to enter a stipulated judgment finding that the settlement is fair to the employees. *See, e.g., Lynn's Food Stores v. United States*, 679 F.2d 1350 (11th Cir. 1982); *Jarrard v. Southeastern Shipbuilding Corp.*, 163 F.2d 960 (5th Cir. 1947); *D.A. Schulte*, 328 U.S. at 113 n.8 (dicta).

X. ATTORNEYS' FEES

The FLSA expressly provides for the recovery of "reasonable" attorneys' fees, "in addition to any judgment awarded" to the plaintiffs. 29 U.S.C. § 216(b). However, approval of the attorneys' fees is in an inherent part of a court's fairness review when FLSA collective actions are settled and is a necessary part of a court's award in the event a case is tried and results in a favorable outcome for plaintiffs. Thus, regardless of whether a case concludes by settlement or by judgment, the court is responsible for approving attorneys' fees received by class counsel. *See, e.g., Uphoff v. Elegant Bath, Ltd.,* 176 F.3d 399 (7th Cir. 1999)(upholding a district court's decision to reduce the plaintifffs' attorney's fee award). For this reason, it is imperative for plaintiffs' counsel to keep detailed, accurate and contemporaneous records of all time spent working on FLSA collective actions.

Attorneys' fees may be awarded as a proportion of the class recovery. In that event, 25% of the total amount of a class recovery has been found to be a reasonable amount for class counsels' attorneys' fees. *See, e.g., Toreros v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)(finding 25% of the recovery to be a presumptively reasonable "benchmark" for the attorneys' fee award). Fees awarded on a percentage basis are subject to adjustment either upward or downward when a court reviews the work performed and the fees sought. Fees also may be awarded based upon a lodestar calculation. *See Wing v. Asarco, Inc.*, 114 F.3d 986, 988-89 (9th Cir. 1997).

Due to the important public policy concerns addressed by FLSA, courts have found that attorneys are entitled to fee awards greatly in excess of the damages recovered. *See, e.g., Perrin v. John B. Webb & Associates, Inc.,* 2005 WL 2465022 (M.D. Fla. Oct. 6, 2005) (awarding $7,446.00 in fees in case where Plaintiff recovered $270 and recognizing that "in order for plaintiffs with minimal claims to obtain counsel, those counsel must be able to recover a reasonable fee for their time."). *See also Parks v. Eastwood Insurance Services, Inc.* (C.D. Cal.) -- $1.2 million recovery for plaintiffs and over $2 million in fees and costs to plaintiffs' counsel.

APPENDIX A - SUMMARY OF STATES IN WHICH OVERTIME/WAGE CLAIMS MAY BE BROUGHT IN OPT-OUT CLASS ACTION

STATE	STATUTE OF LIMITATIONS	LIQUIDATED DAMAGES	GOOD FAITH DEFENSE TO LIQUIDATED DAMAGES
Alaska	2 yrs	2X	Yes
Arizona	1 yr	3X	Yes
Arkansas	3 yrs	None	n/a
California	4 yrs	Multiple penalties	Varies
Colorado	2 yrs/3 yrs if willful	None	n/a
Connecticut	2 yrs	2X	Plaintiff must prove bad faith
D.C.	3 yrs	2X	No
Delaware	1 yr	2X	No
Hawaii	6 yrs	2X	Yes
Idaho	2 yrs	3X	No
Illinois	3 yrs OR 5 yrs	2X	No
Iowa	2 yrs	2X	Yes
Kansas	3 yrs	2X	Requires willfulness finding
Kentucky	5 yrs	2X	Yes
Maine	6 yrs	2X	No
Maryland	3 yrs	3X	Yes
Massachusetts	2 yrs OR 3 yrs	3X	Requires willfulness finding
Michigan	3 yrs	2X	Yes
Minnesota	2 yrs OR 3 yrs	2X	No
Missouri	2 yrs	2X in limited circumstances	No
New Hampshire	3 yrs	2X	No
New Jersey	2 yrs	None	n/a
New Mexico	1 yr	2X	No
New York	6 yrs	None	n/a
North Carolina	2 yrs	2X	Yes
North Dakota	2 yrs	2X or 3X in limited circumstances	No
Ohio	2 yrs	None	n/a
Oklahoma	3 yrs	2X	No
Oregon	2 yrs	2X	No
Pennsylvania	3 yrs	25 % of wages due	Yes
Rhode Island	3 yrs	None	n/a
South Carolina	3 yrs	3X	Yes
Vermont	6 yrs	2X	No
Washington	3 yrs	2X	Yes
West Virginia	2 yrs	2X	No
Wisconsin	2 yrs	2X	No