COLLECTIVE ACTION

DOS AND DON'TS

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FLORIDA MINIMUM WAGE UPDATE

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Introductory Overview of Notice Process

There are essentially three approaches by which courts analyze whether a class of plaintiffs is "similarly situated" under 216(b).[1] *Pfohl v. Farmers Ins. Group*, 2004 U.S. Dist. LEXIS 6447 *8 (D. Ca., March 5, 2004). The approach followed in the Eleventh Circuit is the *ad-hoc* two-tiered analysis. *See*, e.g. *Hipp v. Liberty National Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001) (approving two-step certification analysis). According to *Hipp*, at the notice stage, the district court makes a decision, "usually based only on the *pleadings* and *any affidavits* which have been submitted – whether notice of the action should be given to potential class members." *Hipp*, 252 F.3d 1208 (emphasis added). Because of the minimal evidence at this stage in litigation, "this determination is made using a fairly lenient standard," typically resulting in "conditional certification" of a representative class. *Id.*

Courts differ in the level of proof necessary in the first step of the inquiry. Some courts have determined that plaintiffs need merely allege that the putative class members were injured as a result of a single policy of a defendant employer. *Id., citing, e.g., Goldman*, 2003 U.S. Dist. LEXIS 7611 *27 (E.D. Pa. April 16, 2003) ("During this first-tier inquiry, we ask only whether the plaintiff and the proposed representative class members allegedly suffered from the same scheme."). Courts in the Eleventh Circuit

[1] In the second approach, also known as the *Shushan* approach, district courts have incorporated into § 216(b) the requirements of current Federal Rule of Civil Procedure 23. *See, Shushan v. University of Colo.*, 132 F.R.D. 263 (D. Colo. 1990). In *Shushan*, the district court concluded "that Rule 23(a)'s four prerequisites [numerosity, commonality, typicality, and adequacy of representation] and 23(b)(3)'s requirement that common questions of fact predominate should be used to determine whether plaintiffs are similarly situated." *Pfohl*, 2004 U.S. Dist. LEXIS *8. In the third approach, known as "spurious," district courts have suggested incorporating into § 216(b) the requirements of the pre-1966 version of Rule 23, which allowed for "spurious" class actions. *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1102-1103 (10th Cir. 2001). *See* analysis in *Bayles v. American Medical Response of Colorado, Inc.*, 950 F.Supp.1053, 1064-1066 (D. Co. 1996).

have applied a stricter, although still lenient, test that requires the plaintiff to make a "modest factual showing" that the similarly-situated requirement is satisfied. *Id. citing, e.g., Dybach v. Florida Dep't of Corrections*, 942 F.2d 1562, 1567-68 (11th Cir. 1991).[2]

At the notice stage, courts determine whether plaintiffs and potential opt-ins are "similarly situated" based upon detailed allegations in a complaint supported by affidavits or declarations. *Grayson*, 79 F.3d at 1097; *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995); *Harrison v. Enterprise Rent-A-Car Co.*, 1998 U.S. Dist. LEXIS 13131 *8 (M.D. Fla. July 1, 1998); *Brooks v. Bellsouth Telecom*, 164 F.R.D. 561, 568 (N.D. Ala. 1995). Court-facilitated notice to the "class" regarding FLSA collective action litigation is warranted when plaintiffs demonstrate that there are others who may wish to opt-in and who are "similarly situated" with respect to the job requirements and pay provisions. *Dybach*, 942 F.2d at 1567-68; *Hipp*, 252 F.3d at 1217-18; *Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418 (N.D. Ala. 1991). Defendant's rebuttal evidence does not bar § 216(b) notice; plaintiffs' substantial allegations need only successfully engage the employer's affidavits to the contrary. *Grayson*, 79 F.3d at 1099, n. 17.

Substantial discovery is not necessary for this Court to issue notice under the two-tier approach. Where discovery is in infant stages and plaintiffs are not yet privy to the names and contact information of all employees, plaintiffs' allegations that other workers were employed under the same job description and compensation scheme, and affected by the same unlawful policies and practices, even if generalized, are adequate to support

[2] District courts in the Eleventh Circuit are not required to follow the two-tier approach. *See*, *Rappaport v. Embarq Mgmt. Co.*, 2007 U.S. Dist. LEXIS 92869, **9-10 (M.D. Fla., December 18, 2007).

notice. *See, Salinas-Rodriguez v. Alpha Servs., LLC,* 2005 U.S. Dist. LEXIS 39673 (D. Miss. December 27, 2005).

Under the *Hipp* standard, at the conclusion of discovery (often prompted by a motion to decertify), the court then makes a second determination, utilizing a stricter standard of "similarly situated." *Id.* at 678. During this "second stage" analysis, a court reviews several factors, including "(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; (3) fairness and procedural considerations; and (4) whether plaintiffs made the filings required by the ADEA before instituting suit." *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 954 (11th Cir. 2007)(affirming district court's decertification order where defendants' defense was not applicable to all plaintiffs because not all were union members governed by CBA). At the second stage, the similarities necessary to maintain a collective action under § 216(b) must extend "beyond the mere facts of job duties and pay provisions." *Id.*

Dos & Don'ts During the Notice Process

1. Do File Consent to Join for Named Plaintiff:

In most circuits, a FLSA collective action is deemed commenced for limitations purposes only when a complaint has been filed *and* a consent has been filed. 29 U.S.C. §§ 216(b) and 256(a); *see also McLaughlin v. Boston Harbor Cruises, Inc.*, 2006 U.S. Dist. LEXIS 48472 *4 (D. Mass. July 17, 2006) (holding that plaintiff in collective action who failed to file a consent to join until three years after filing her complaint failed to toll the statute for purposes of collective action by filing of complaint but permitting claimant to

file suit in her individual capacity as an individual capacity suit is considered commenced upon filing of the complaint)

For some time it appeared that courts in the Eleventh Circuit might represent an exception to this rule. *See, Macias v. IK Retail, Inc.*, 2007 U.S. Dist. LEXIS 448 (S.D. Fla., Jan. 5, 2007) (denying defendants' motion to dismiss for failure to file written consent to join form.) However, in *Albritton v. Equity Group-Georgia Division*, 508 F.3d 1012 (11th Cir. 2007), the Eleventh Circuit issued a definitive opinion affirming a district court's dismissal of two lawsuits as a result of the failure by the named plaintiffs to comply with the 216(b) consent requirement.

2. The Content of the Consent Form

A consent form must "clearly manifest the individual's consent to become a party plaintiff to the litigation." *Melendez Citron v. Hershey P.R. Inc., Inc.*, 363 F. Supp. 2d 10, 16 (D.P.R. 2005). The consent form should be signed by the plaintiff for whom it is filed, *e.g. Montalvo v. Tower Life Building*, 426 F.3d 1135, 1148-49 (5th Cir. 1970); *Kulik v. Superior Pipe Specialties Co.*, 203 F. Supp. 938, 940-41 (N.D. Ill. 1962) (holding that a typewritten list of names without signatures was insufficient to constitute "written consent" to join the suit). However, some courts have accepted unsigned forms, *e.g. Wertheim v. Arizona*, 1993 U.S. Dist. LEXIS 21292, at *21-22 (D. Ariz. Sept. 30, 1993) (accepting unsigned consent forms where at least a portion of the form was filled out and then mailed to counsel). Counsel need not file the original signed consent form; a copy is adequate. *Montalvo*, 426 F.3d at 1148-49.

A consent form should include language broad enough to encompass foreseeable amendments to the complaint. This will help avoid the possibility that the Court will

require counsel to re-file consent forms each time the complaint is amended. For example, counsel will not need to re-file a consent form for a plaintiff who consents to the adjudication of his "claims for overtime compensation and any other benefits, including liquidated damages, available under the [FLSA]." *Prickett v. Dekalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003) (holding that the language quoted above "indicates that [plaintiffs] consented to [the adjudication of] . . . *all* of their claims for overtime compensation under the FLSA, not merely the claims . . . specified in the [original] complaint") (emphasis added); *see Threatt v. Residential CRF, Inc.*, 2006 U.S. Dist. LEXIS 9808, at ** 7-11 (N.D. Ind. Feb. 28, 2006) (excusing plaintiffs' failure to re-file an amended version of the consent form where plaintiffs' consent forms already were on file putting defendant on notice, plaintiffs' two-month delay did not negatively affect the judicial proceedings, and plaintiffs' error was understandable considering that their counsel sent them three different versions of the consent form).

A court should not, however, interpret a consent to join form more broadly than the language therein specifically permits. Under this reasoning, and acknowledging its prior holding in *Prickett*, the Eleventh Circuit Court of Appeals declared that a consent form will not survive dismissal of the litigation and serve as a consent in a subsequent lawsuit – even if the subsequent lawsuit essentially constitutes a refilling. *See*, *Albritton v. Equity Group*, 508 F.3d 1012 (11th Cir. 2007).

3. Do Use Caution in Obtaining Declarations From the "Putative Class"

It is common practice for employers on notice of pending litigation to interview and obtain declarations or affidavits from current employees early on in the litigation process with the prospect of defeating or minimizing an order conditionally certifying a

collective action and facilitating notice pursuant to FLSA Section 216(b). However, courts are recognizing that there is an inherent concern of reliability and truthfulness when statements are elicited from current employees who may feel intimated or pressured to provide their employer with the right answer. Moreover, as more cases are plead as hybrid collective/class actions, the concern of improper communications typically associated with Rule 23 putative class members may filter over into the FLSA collective action context.

Courts have recognized the inherent unreliability of pre-certification and pre-notice declarations from current employees in collective actions. In *Siddiqui v. T-Mobile*, 2006 U.S. Dist LEXIS 68696 (W.D. Wa., September 12, 2006), the district court discounted 99 declarations of current employees "because of the risk of bias and coercion inherent in that testimony." 2006 U.S. Dist LEXIS 68696, at * 9. In *McElmurry v. U.S. Bank National Association*, 2005 U.S. Dist. LEXIS 45199 (D. Or., December 1, 2005), the court recognized that although more attenuated in a collective class than in a class action there is "is some 'inherent pressure in the relationship between a current employee who is a [collective action] putative class member and his or her employer who is a defendant." *Id*. at * 16. Likewise, in *Wells Fargo Home Mortgage Overtime Pay Litigation*, 2007 U.S. Dist. LEXIS 77533, **4, 9 (N.D. Ca., October 17, 2007), the court considered the declarations from 67 current employee attesting to a wide variety of employment experiences, but with an eye toward the "heightened potential for coercion" due to the employee-employer relationship.

However, In *Dominguez v. Don Pedro Restaurant*, 2007 U.S. Dist. LEXIS 40787 (N.D. Ind. June 1, 2007), plaintiffs sought an order barring defendants' communications

between with potential class during the time a motion for notice was pending arguing that defendants misrepresented the lawsuit to discourage class participation, coercively gathered signatures to foreclose recovery, or that it was seeking declarations to secure a waiver of FLSA rights. The court denied plaintiffs' motion in determining that the affidavits defendant was gathering from employees as to their claims was evidence gathering. *Id*.

Similarly, in *Williams v. Accredited Homes Lenders, Inc*., 2006 U.S. Dist LEXIS 50653, *4 (N.D. Ga., July 25, 2006), the district court gave substantial weight to 50 declarations of current employees "testifying that, consistent with . . . [Company] policy, they always accurately report their time – and they are always properly paid overtime," even though 150 plaintiffs had already opt-in to the case and many had executed declarations stating they were not paid overtime. In evaluating the testimony of the declarants, the court determined that the fact some employees were paid overtime, while others claimed they were not, would require an individualized inquiry not suitable for collective adjudication and denied plaintiffs' motion. *Id*. at *14. The reliability of this testimony was not questioned.

At least one court, *Parks v. Eastwood Insurance Services, Inc*., 235 F. Supp. 2d 1082, 1083 (C.D. Cal. 2002), has found that the ethical rules governing *ex parte* communications in a pre-certification class action should equally apply in the 216(b) collective action context. Prophylactic measures may placate courts concerns that declarations are unreliable or were taken by intimidation and coercion. Moreover, it is important that putative class members of collective actions understand of their right to participate in a collective action and are not fearful of retaliation for participating.

In *Mcelmurry v. U.S. Bank National Association*, 2005 LEXIS Dist. 45199 (D. Oregon, December 1, 2005), the Court made suggestions on how to preserve the truthfulness of statements elicited by defendants from their current employees.

- Describe the nature of the action
- Inform employees of their right to participate in the action
- Inform employees of their right to refuse to participate in the interview and tell them they will not be retaliated against in any way for their refusal to do so.
- Explain to employees their right to review the declaration for accuracy and their right to refuse to sign it.
- *Maddock v. KB Homes, Inc*., 2007 U.S. Dist. LEXIS 58743, *9 (C.D. Ca. July 9, 2007), adds to this list: Inform employees they have a right to discuss these issues with an attorney.
- Disclose that the defendant's interests may be adverse to their own.

4. Do Extend Limitations Period to Facilitate Pre-Suit Negotiation

Enlightened counsel can agree that some pre-suit notice and negotiation is to the advantage of both potential plaintiffs and defendants and can reduce the cost of liability under the FLSA for employers. However, the fact that the statute of limitations on plaintiffs' claims is running until consents to join are filed can undermine the parties' ability to engage in pre-suit negotiations. Therefore, do protect clients from wasting their claims.

By voluntarily agreeing to extend the statute of limitations in a FLSA case pending sending of notice the parties can take time to evaluate and negotiate pending

claims without detriment to the plaintiffs' rights. For example, in *Cuzco v. Orion Builders, Inc.*, 477 F.Supp.2d 628, 631 (D.N.Y. 2007), the court approved the parties' stipulation to toll statute of limitations for all prospective opt-in plaintiffs from July 25, 2006 because of the delays in fully presenting motion for notice for the Court's consideration. An example of a tolling agreement is attached. *See also, Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 199 (S.D.N.Y. 2006) ("Where parties are ordered or agree by stipulation to suspend proceedings during the pendency of legal proceedings, the time during which a party is prevented from obtaining legal relief is not counted for purposes of statutes of limitations"); *Roebuck v. Hudson Valley Farms*, 239 F. Supp. 2d 234, 240 n.10 (N.D.N.Y. 2002); and *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 260 n.14 (S.D.N.Y. 1997).

5. Reaching Out to Plaintiffs Pre-Notice:

"For an opt-in class to be created under section 216(b), an employee need only show that he is suing his employer for himself and on behalf of other employees "similarly situated."" *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996). Plaintiffs seeking to proceed under 216(b) need show only "that their positions are similar, not identical,' to the positions held by the putative class members." *Id*. To do so, a showing of opt-ins and declarations in support are useful in this regard, but finding and contacting witnesses to obtain them can be problematic.

a. Discovery Prior to Notice:

Prior to a motion for notice, plaintiffs may seek to obtain contact information for putative class members through discovery. There is support for the entitlement of plaintiffs to discovery of the names, addresses, position and title of employees with the

same or similar job duties as the plaintiff prior to conditional certification of the class because plaintiffs need that information in order to satisfy the similarly-situated standard. In *Hoffmann-La Roche, Inc. v. Sperling*, the Supreme Court affirmed the district court's order granting plaintiffs the right to discover the names and addresses of putative class members. *See, Sperling v. Hoffman-La Roche*, 118 F.R.D. 392, 409-10 (D.N.J.1988), *aff'd in part and appeal dismissed in part*, 862 F.2d 439 (3d Cir. 1988), *aff'd, Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989)). "Discovery aimed to gather information about this subject is relevant and the proper topic for an interrogatory even before the collective action is certified." *See, Stillman v. Staples*, Case 2:07-cv-00849-KSH-PS, Dkt. 35 (D. N.J., July 30, 2007).

b. Informal Notice and Advertising Prior to Notice

Defendants frequently object to communications by plaintiffs' counsel about the pendency of a lawsuit to a putative class. In the Eleventh Circuit, plaintiffs are not prohibited from communicating with putative class members providing such communications are "not factually inaccurate, unbalanced or misleading." *See, e.g.*, *Maddox v. Knowledge Learning Corporation*, 2007 WL 2284780 *4 (N.D. Ga., August 3, 2007). *Accord, Piper v RGIS Inventory Specialists, Inc.*, 2007 U.S. Dist. LEXIS 44486 *23 (N.D. Ca. June 11, 2007).

For instance, in *Maddox*, defendant filed a motion for a cease and desist order after learning plaintiffs were using a website to encourage putative class members to join the case. The case had not been conditionally certified for notice. *Id.* at *2. The court declined to shut down plaintiffs' website but did order plaintiffs to correct certain statements on the site deemed inappropriate. *Id.*

Courts have held that reaching out to plaintiffs by an advertisement prior to conditional certification for notice purposes does not undermine the notice process and is permissible so long as the advertisement is not misleading or coercive. *See Vogt v. Texas Instruments, Inc.*, 2006 U.S. Dist. LEXIS 96515 (N.D. Tex., August 8, 2006.) *See also, Herring v. Hewitt Associates, Inc.*, 2007 U.S. Dist. LEXIS 53278 *18 (D. N.J. July 24, 2007)(declining to prohibit the use of plaintiffs' communications via internet radio, but proscribed plaintiffs' counsel to communicating only with plaintiffs who communicate with them first and consent to further communication.)

But where plaintiffs disseminated informal notice of the lawsuit and opportunity to opt in a federal district court in Georgia concluded plaintiffs "short-circuited the notice process" and applied a heightened second-stage analysis to the plaintiffs motion for conditional class certification. *See, Williams v. Accredited Home Lenders, Inc.*, 2006 U.S. Dist. LEXIS 50653 *11-12 (N. D. Ga. July 25, 2006).

7. Defining the Class:

Plaintiffs should be cautious in seeking certification of an overbroad class for which they lack sufficient supporting evidence, such as declarations, that the putative class members have been subject to single decision, policy or plan of defendant. *Ryan v. Staff Care, Inc.*, 2007 U.S. Dist. LEXIS 49060 **10-13 (D. Tex. July 6, 2007) (finding that plaintiffs presented evidence they were similarly situated with respect to job requirements and pay provisions to a putative nationwide class of sales, recruiting and marketing consultants, but declining plaintiffs request to certify a class of all individuals "who sold placement services.")

In *Rappaport v. Embarq Mgmt. Co.*, 2007 U.S. Dist. LEXIS 92869 *9-16 (M.D. Fla., December 18, 2007) the court stated that plaintiffs did not limit their class definition (nationwide class of "inside sales agents") by "geography, job position, or functional group." *Id*. at *13. The court stated that the burden at notice is "low" but not "invisible," and declined certification based upon plaintiffs' failure to demonstrate a company-wide policy of denying overtime compensation. A federal district court in Louisiana even authorized notice to a conditionally certified class that included employees and subcontractors of a defendant company. The court did so in the absence of affidavits from any employees of the subcontractor based upon evidence that all the employees were subject to the defendants' pay provisions. *Lima v. International Catastrophe Solutions, Inc.*, 2007 U.S. Dist. LEXIS 49087 **12-13 (E.D. La. June 27, 2007).

8. Proving class members would want to join if they knew of the case

Proving that putative class members *would* be interested *if* they knew of the lawsuit is problematical but district courts in the Eleventh and Eighth Circuits interpret *Dybach v. State of Fla. Dep't of Corrs.*, 942 F.2d 1562, 1567-68 (11th Cir. 1991) to hinge conditional certification for notice purposes on a showing by plaintiffs that other employees would have a desire to opt into the action if they knew about it. This could be called the "chicken before the egg rule" and the Eleventh Circuit is its most vigorous proponent. *Louis-Charles v. Sun-Sentinel Co.*, 2008 WL 708778 (S.D. Fla. Mar. 14, 2008) (denying conditional FLSA certification where plaintiff did not have evidence of other employees who wanted to join).*See also, e.g., Mackenzie v. Kindred Hosps. E., L.L.C.*, 276 F.Supp.2d 1211, 1220 (M.D. Fla. 2003). The alleged standard is that evidence of interest can be based upon affidavits, consents to join the lawsuit, or expert

evidence on the existence of other similarly situated employees. *See*, *Davis v. Charoen Pokphand (USA), Inc.*, 303 F.Supp.2d 1272, 1277 (M.D. Ala. 2004).

In *Rodgers v. CVS Pharmacies, Inc.*, 2006 U.S. Dist. LEXIS 23272 **1-3 (M.D. Fla. March 22, 2006), the plaintiff, a night-time salaried supervisor for CVS, argued that cash handling and customer service duties made him similarly situated to approximately 250,000 hourly employees who performed customer service, photo lab, shift supervisor, beauty advisor and pharmacy technician positions. *Id*. Plaintiff submitted his declaration and those of two opt-in plaintiffs in support of the contention that other similarly-situated employees would wish to opt-in. *Id*. at **10-11. The court found plaintiff did not provide sufficient evidence to authorize notice. Without further evidence the court could not determine that others would wish to opt-in. *Id*. at *19.

In *Barten v. KTK & Associates, Inc.*, 2007 U.S. Dist. LEXIS 54068 (M.D. Fla., July 24, 2007), plaintiffs were servers and bartenders. They filed affidavits and consents to join from two other servers, as well as declarations by three named plaintiffs. In the affidavits plaintiffs stated they had friends who feared retaliation if they joined the lawsuit. *Id*. at *3. The court characterized the "plaintiffs' averments that they "think" others would opt-in as speculative, vague and conclusory," stating that "plaintiff's belief in the existence of other employees who desire to opt in and "unsupported expectations that additional plaintiffs will subsequently come forward are insufficient to justify certification of a collective action and notice to a potential class." *Id*. at *7. The court also noted that only one viable opt-in plaintiff had been identified during the eleven months that the lawsuit had been pending. *Id*.

A district court in the Middle District of Florida deemed the interest requirement satisfied in *Thorp v. Ace Mortgage Funding, LLC,* 8:06-cv-02244-JDW-MSS, Dkt. 67, M.D. Fla., August 16, 2007, on the basis of thirteen declarations and evidence that another five consent to joins were filed while the notice motion was pending. And s*ee Garcia v. Salamanca Group, Ltd.*, 2008 WL 818532 (N.D. Ill. Mar. 24, 2008) (rejecting rule requiring plaintiff to provide declarations from other employees interested in opting in where plaintiff identified by name 18 other employees who had complained about unpaid overtime); *Lynch v. United Servs. Auto. Ass'n,* 2007 U.S. Dist. LEXIS 32642 (D.N.Y. April 25, 2007) (stating notice is warranted because plaintiff established by submission of additional consent forms and declarations that other putative class members exist who may be interested in opting into this litigation.); *Robbins-Pagel v. WM. F. Puckett, Inc.*, 2006 U.S. Dist. LEXIS 85253 **6-7 (M.D. Fla. November 22, 2006) (three affidavits, one from plaintiff and two from former employees of defendant alleging claims for unpaid overtime, was enough evidence to establish other similarly situated individuals may be interested in joining the action).

9. Do Move for Notice Early In the Case

After notice issues, the opt-in period closes, and discovery is complete, defendants may appropriately move to decertify the conditionally-certified class, impelling the court to proceed with the second tier of the *Hipp* analysis, a more stringent test to determine if class members are similarly situated. *See, Anderson v. Cagles*, 488 F.3d 945, 952 (stating that lenient standard adopted in *Hipp* is most useful in making certification decision early in litigation before discovery is completed.) For instance, in *Morisky v. Public Service Electric and Gas Co.*, 111 F.Supp.2d 493 (D. N.J. 2000), a

district court imposed a second-tier analysis on plaintiffs' motion for conditional certification.[3] Observing the substantial number of opt-in plaintiffs and that discovery was to have been completed before the motion for conditional certification was filed, the court proceeded with the second-tier analysis. *Id*. at 498-99. Ultimately, the court denied plaintiffs' motion for certification because the plaintiffs failed to show they were similarly situated or that collective adjudication would be efficient (determining the exempt or non-exempt status of plaintiffs would have to be determined on an employee-by-employee basis). *Id*. at 499.

However, defendants sometimes attempt to force the more stringent second stage analysis prematurely, especially where the parties have engaged in substantial discovery before moving for notice. This usually does not bode well for plaintiffs. For instance, in *Williams v. Accredited Home Lenders, Inc.*, 2006 U.S. Dist. LEXIS 50653 *11-12 (N. D. Ga. July 25, 2006), the court applied a second-stage analysis to the plaintiffs' motion for conditional class certification and motion to compel, where plaintiffs waited to move for certification until a substantial amount of discovery had occurred. Before the notice motion, one hundred and fifty current and former loan officers opted in and the parties had taken depositions of 20 opt-in plaintiffs and defendants' senior managers. The Court found the first-stage analysis irrelevant at that point and based upon the evidence gathered, the court determined that the plaintiffs and opt-ins were not similarly situated; the allegations of "off the clock" work would require a fact-specific, individualized inquiry into each plaintiffs' activities; plaintiffs had not demonstrated a common policy

[3] Plaintiffs were not seeking certification for notice purposes. Over 100 potential plaintiffs had already opted in. *Morisky*, 111 F. Supp.2d at 497.

violating the FLSA, and the proving the claims through computer activity reports, emails and phone records would be "utterly unmanageable." *Id*. at *13-15.

However, some courts resist these attempts to conflate the two-tier analysis. In *Cuzco v. Orion Builders*, 477 F.Supp.2d 628, 632 (S.D.N.Y. 2007), a federal district court in New York stated that "even though discovery is underway, it would be inappropriate at this time to attempt to make more than the first-step certification decision.

10. Late Opt-ins:

An individual who submits his consent to join form after the prescribed period for opting in to the case has passed is not precluded from pursuing his or her claim. The late opt-in can file his or her own case, even after a collective action has been approved. *See, Lindsay v. GEICO, 2004 U.S. Dist. LEXIS 29830 *4, n.4 (D.D.C., November 9, 2004)* reversed and remanded 448 F.3d 416 (D.C. App. 2006). Another option is to file a second opt-in collective action as a "follow on" to the first one for plaintiffs who failed to timely opt in. This second case can be related to the earlier one. However, defendants might well want to avoid a follow on case and permit late opt ins to join the original case so that they can ensure they have obtained releases from the maximum number of employees at the end of the first case.

11. Representative Discovery

In *Hipp*, the Eleventh Circuit directed district courts that after the initial certification of a class, a collective action should "proceed as a representative action through discovery." 252 F.3d 1214, 1218; *see also, Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995). Notwithstanding, once a substantial putative class of opt-ins

has been established, defendants may try to force plaintiffs to respond to discovery on behalf of each opt-in plaintiff. There is some support for this tactic. For instance, in *Reich v. Southern Md. Hosp., Inc.*, 43 F.3d 949, 951-52 (4th Cir. 1995), the Fourth Circuit held that representative testimony by 58 employees was insufficient to represent a class of 3,368 employees and the First Circuit held that a single employee cannot properly represent 244 employees at trial in *Secretary of Labor v. DeSisto*, 929 F.2d 789, 792-96 (1st Cir. 1991).

However, representative evidence from a class is commonly used to determine both liability and damages in overtime litigation, particularly where the defendant employer has failed to maintain time records. *See*, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 915 (9th Cir. 2003) (representative evidence affirmed "notwithstanding somewhat discrepant donning and doffing rates;" uniformity not required, only determination of reasonable time) *aff'd IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). *See also* Kearns, The Fair Labor Standards Act (BNA 1999), § 18.VII.E ("representative testimony has been widely accepted by the courts" in FLSA cases). It is well established that a court may "award damages to [an] employee, even though the [award] be only approximate" by relying on representative evidence. *See, Alvarez*, 339 F.3d at 915, quoting *Mt. Clemens*, 328 U.S. at 688. Specifically, courts permit FLSA awards based on approximate or reasonable time determinations. *Id.; Brock v. Seto*, 236 F.2d 1446, 1448-9 (9th Cir. 1986).

Trial of FLSA damages by representative evidence has its basis in the *Mt. Clemons* rule that the employee should not be penalized for the employer's failure to keep required time records:

> Where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes…the solution...is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-8; *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) (overtime case permitting award of damages to 16 employees based on testimony of four of them).

Every case permitting trial of overtime damages by representative testimony relies on the above *Mt. Clemens* rule. A federal district court in the Western District of Texas granted plaintiffs' motion limiting discovery to a random sample of 35 class members in a case with 1000 opt-in plaintiffs. *See*, Order, *Schiff v. Racetrac Petroleum, Inc.*, Civil Action No. 2-03-CIV-402 (TJW) (E.D.Tex. June 8, 2005). In *Bradford v. Bed, Bath & Beyond, Inc.*, 184 F.Supp.2d 1342 (N.D. Ga., 2002), 300 department managers opted into a FLSA collective action after court-authorized notice issued. The Court found that a representative group of 25 of these managers, including the named plaintiffs and six opt-in plaintiffs chosen by the defendant, was sufficient to allow a fair characterization of the

job duties of the entire class of plaintiffs over time. *Id.*, at 1352. *See also, e.g., Cowan v. Treetop Enterprises, Inc.*, 163 F.Supp. 2d 930 (M.D. Tenn. 2001) (issuing a judgment in favor of current and former employees after denial of decertification motion based upon discovery encompassing 25% of defendants' restaurants).

Moreover, limiting discovery to a representative sample of opt-ins is consistent with the evidentiary standards for proving liability and damages in a FLSA case. *See, Mt. Clemens.*, 328 U.S. at 688 (testimony of 7 of 300 employees was sufficient to establish a FLSA damages award); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973) (holding that testimony of an investigator and 16 employees was sufficient to support a finding that 37 employees consistently failed to report all overtime hours worked); *Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3rd Cir., 1994) (not all employees need to testify to show violations or recoup back wages); *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823, 828 (11th Cir. 1988) ("the fact that several employees do not testify does not penalize their claims as 'each employee need not testify in order to make out a *prima facie* case of the number of hours worked as a matter of just and reasonable inference'"); *Donovan V. Simmons*, 725 F.2d 83, 86 (10th Cir. 1983) (testimony of twelve employees sufficient to support an award for all former employees); *Donovan v. Burger King Corp.*, 672 F.2d 221, 225 (1st Cir. 1982) (affirming judge's decision in pretrial conference to limit witnesses in Fair Labor Standards Act action to representative sample that would "give me a feeling for what is going on in these places.").

Individualized discovery may serve only to "obfuscate the issues and drastically enhance the costs of litigation... such a result cannot be countenanced." *McGrath v. City*

of Philadelphia, 1 Wage & Hour Cas.2d (BNA) 1500, 1502 ((E.D. Pa. 1994). It is both unmanageable and inappropriate.[4] *See, Adkins v. Mid-America Growers, Inc.,* 141 FR.D. 466, 468 (N.D. Ill., 1992) (describing individualized discovery as "too onerous.") The "use of extensive and complicated interrogatories and depositions by the party opposing the class may debilitate the putative class in such a way as to preclude certification by dissuading class members from continuing to assert their claims." *Adkins*, 141 F.R.D. at 468 (citations omitted).

Courts may also rely on a small sample of representative testimony when there is consistent testimony evidencing a pattern or practice. *McLaughlin v. DialAmerica Marketing, Inc.*, 716 F.Supp. 812 (D. N.J. 1989) *aff'd, Donovan v. DialAmerica Mkting., Inc.*, 935 F.2d 1281 (3rd Cir. 1991). In *McLaughlin*, a federal district court evaluated the use of a representative sample to determine the lost minimum wage damages of a class of 350 non-testifying homeworkers whose schedules or times of work had not been recorded by the employer or employee. Despite variability among the class as to the number of pieces of work they elected to accept each week, the time in which they took to complete their assignments, and the absence of hours worked, the Court found that the "testimony of 43 witnesses, both at trial and by deposition" confirmed that every home researcher experienced minimum wage violations. Representative testimony of the time required to process cards and work habits, enabled the court to make findings as to the work habits of non-testifying witnesses and a determination of their hours worked as a matter of "just and reasonable inference." *Id., at* 825 (citing *Mt. Clemens*, 328 U.S. at 687 (1946).

[4] It is important that discovery not be limited to determining the similarity of the opt-in plaintiffs to the representative plaintiffs in order to avoid the necessity for a second round of discovery of plaintiffs' claims after denial of a decertification motion. *Hipp*, 252 F.3d at 1218, provides that after the initial stage of conditional certification, the case proceed as a representative action through discovery, *prior* to the decertification motion.

Florida Constitutional Minimum Wage Update

Effective May 2, 2005, at Article X, Section 24, Fla. Const. (hereinafter, "Guarantee"), Florida's Constitution began requiring employers to "pay Employees Wages no less than the Minimum Wage for all hours worked in Florida." Article X, Section 24, Fla. Const. As of January 2008, this wage increased to $6.79 per hour. *See*, *Id*. at (c) (directing that the rate be recalculated on September 30th of each year succeeding the Guarantee's enactment).

The guarantee provides that "case law, administrative interpretations, and other guiding standards developed under the federal FLSA shall guide the construction of this amendment and its implementing statutes or regulations." *Id.* at § 24 (f). Fla. Stat. 448.110, passed one year later, provides that no individual not entitled to minimum wage under the FLSA will be entitled to minimum wage under the Guarantee. However, since the Guarantee contains no reference to the FLSA's statutory exemptions from minimum wage and overtime in Section 213(a and b), the regulations pertaining to those sections are arguably be inapplicable even though they are construed in the FLSA's interpretative regulations.

The Portal to Portal Act, 29 U.S.C. § 259 *et seq*., which amends the FLSA, identifies certain employee activities which are not compensable under the FLSA, such as**:** (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases,

such principal activity or activities. 29 U.S.C. § 254(a). The Employee Commuting Flexibility Act contained in the Portal to Portal Act, states that employees may not be entitled to compensation for time spent commuting back and forth to work in an employer's vehicle.[5] The Portal to Portal Act does not apply to the Florida minimum wage guarantee, and so, unlike the FLSA, the Guarantee may require that minimum wage be paid for time spent commuting as well as on preliminary and postliminary activities.

Collective vs. Class Action Remedies

The minimum wages rights under the Guarantee may be brought as a class action pursuant to Fla. R. Civ. Pro. 1.220. Art. X, § 24(e). Florida's class action Rule of Civil Procedure 1.220, is interpreted similarly to its federal counterpart, Fed.R.Civ.P. 23. *Liggett Group, Inc., et al. v. Engle*, 853 So.2d 434, 445 (Fla. 3d DCA 2003) (citations omitted). A party seeking certification of a class must survive a rigorous analysis to determine if it has met its burden to show numerosity, commonality, typicality, and adequacy of representation. *Freedom Life Ins. Co. of America v. Wallant*, 2004 Fla. App. LEXIS 2002, 6 (Fla. 4th DCA December 29, 2004). In addition, claims must meet at least one of the three bases for class certification. *See, Rule 1.220(b).* The party seeking certification must show either that (1) the prosecution of separate claims or defenses by or against individual members of the class would establish incompatible standards of conduct for the party opposing the class, or that adjudications concerning individual members of the class would, as a practical matter, be dispositive of the interests of other

[5] The ECFA states that "the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee." 29 U.S.C. § 254(a).

members of the class; (2) the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class; or (3) the claim or defense is not maintainable under either of the preceding bases, but that the questions of law or fact common to the putative class predominate over any question of law or fact affecting only individual members of the putative class, and that the class representation is the superior method for fair and efficient adjudication. *R. 1.220, Fla. R. Civ.P., Liggett Group,* 853 So. 2d at 445 (citations omitted). Pursuant to Fla. Stat. 448.110, the plaintiffs must prove prove the identity and damages of each individual plaintiff.

Because it is an opt-out action, a certified Rule 23 class is more likely to incorporate all or most eligible members. *De Asencio v. Tyson Foods, Inc.,* 342 F.3d 301, 310 (3d Cir. 2003). Aggregation of claims in larger numbers in a Rule 23 class **"**profoundly affects the substantive rights of the parties to the litigation. Notably, aggregation affects the dynamics for discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants. The more aggregation, the greater the effect on the litigation." *De Asencio,* 342 F.3d at 310.

The FLSA does not preempt state law contract provisions that are more generous than the FLSA demands. *Freeman v. City of Mobile,* 146 F.3d 1292, 1298 (11th Cir. 1998). Therefore, actions under Florida's new minimum wage amendment should not be preempted by the FLSA because its provisions are more generous than the FLSA with respect to the statute of limitations for bringing claims.

Implementing Legislation

On December 12, 2005, the Florida legislature enacted Florida Statute Section 448.110, which imposed additional requirements on plaintiffs bringing suits under the

Florida minimum wage act, including that the plaintiff notify the employer in writing of their intention to sue prior to filing the action.[6] The notification must include the minimum wage amount to which person claims to be entitled, the actual or estimated work dates and hours for which payment is sought, and the total amount of unpaid wages. *See*, §448.110(6)(a). The statute of limitations is then tolled for a fifteen-day period in which employer may respond. *Id*. at (b). If the employer fails to resolve the claim the grievant can file a claim for unpaid wages consistent with the notice. *Id*.

On June 30, 2006, Judge Moody in the Middle District of Florida, in *Throw v. Republic Enterprise Systems, Inc.*, 2006 U.S. Dist. Lexis 46215 (M.D. Fla. June 30, 2005), held that plaintiffs who bring a suit under the Florida minimum wage act are not required to satisfy the notice requirement of Section 448.110(6)(a) because Section 24(e) of the Act "creates a constitutional right directly enforceable in a court of law by an aggrieved party with no requirement that notice be given." *Id*. at **1-6. Practitioners in the Southern District of Florida should comply with the notice provisions, however, because in January 2008, Judge Marra in the Southern District of Florida issued an opinion upholding the notice requirement. *Resnick v. Oppenheimer & Co., Inc*., 2008 U.S. Dist. LEXIS 1163 (S. D. Fla., January 8, 2008).

[6] Fla. Stat. § 448.110(6)(a)(2005).

TOLLING AGREEMENT

This Agreement is made by and between ABC, Inc. ("ABC") and John Doe, Jill Doe, and Bill Doe ("Plaintiffs") and all sales associates employed by ABC at any time between June 16, 2003 and the date this tolling agreement is ended by either party pursuant to the terms of this Agreement (collectively, "Claimants").

WHEREAS Claimants are or were employees of ABC and Plaintiffs have threatened to file suit in federal district court (the "Action") bringing claims on behalf of themselves and other current or former ABC employees under the Fair Labor Standards Act, 29 U.S.C.§ 201 *et seq.* ("FLSA");

WHEREAS counsel for Plaintiffs and ABC discussed possible settlement of the proposed Action and have agreed that further discussions are warranted;

WHEREAS, counsel for ABC have agreed to investigate the FLSA claims asserted and to report back to counsel for Claimants no later than June 30, 2006;

NOW THEREFORE, for good and sufficient consideration, the receipt of which is hereby acknowledged, Plaintiffs and ABC hereby agree as follows:

1. Tolling Provision. No statute of limitations on any claim under the FLSA shall run against Claimants and the same shall be tolled during the period of time while this Agreement is in effect and neither party shall put forward or rely upon the period of time while this Agreement is in effect as a bar or laches or for any other purpose to defeat such a claim. This paragraph does not apply to claims made to enforce this Agreement. Nothing contained in this Agreement shall be deemed as an admission by any party with respect to any allegations or claims.

2. Duration. This Agreement is effective as of June 16, 2006, and shall terminate thirty (30) days after either party gives written notice of cancellation to the other.

3. Use of Agreement. During the term of this Agreement, Plaintiffs shall refrain and forebear from commencing, instituting or prosecuting any lawsuit, action or other proceeding against ABC raising FLSA claims. Except as specifically stated, this Agreement shall not be deemed to constitute a waiver of any rights, claims or defenses of the parties to this Agreement, nor shall it be deemed to limit or affect any defense based upon the statute of limitations, laches or any other limitations (whether equitable, statutory, contractual or otherwise) to the extent such defense could have been asserted on or before June 16, 2006.

4. Modification. This Agreement can be modified only in a writing signed by the parties. This Agreement shall constitute the entire understanding between the parties concerning the subject matter of this Agreement and supersedes and replaces all prior negotiations, proposed agreements, and agreements, written or oral, relating to this subject.

5. Successors. This Agreement shall bind and benefit each of the parties and their respective predecessors, successors and assigns.

6. Governing law. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Florida.

7. Execution of Counterparts. Separate counterparts of this Agreement may be executed by the parties with the same force and effect as if all such parties had executed a single copy of this Agreement.

8. Authority to Bind. Each Counsel executing this Agreement represents and warrants that he has been authorized to enter into this Agreement on behalf of the party on whose behalf he signed and that signatory has full and complete authority to do so.

9. Confidentiality. The parties and their attorneys shall keep the terms of the Agreement confidential, and shall not disclose such terms to anyone unless required to disclose such information by court order or to enforce this Agreement.

10. Notices. Any notice, request, instructions or other document to be provided hereunder by either party to the other shall be in writing and delivered personally or mailed by certified mail, postage prepaid, return receipt requested (such personally delivered or mailed notice to be effective on the date actually received) or by electronic means as follows:

If to Claimants, address to:

Sam J. Smith
Burr & Smith, LLP
442 West Kennedy Blvd., Suite 300
Tampa, FL 33606

If to ABC, address to:

DATED: _____, 2006 Plaintiffs

By: _____
Counsel

DATED: _____, 2006 ABC, Inc.

By: _____