PREVENTING WAGE THEFT: A Two-Day Guide To Litigating Cases Involving Wages, Hours & Work - Friday, March 8-Saturday, March 9, 2013

A Day in the Life of A FLSA Collective Action – Part I[1]
"Considerations on Intake, Preparation for Filing, and Settlement"

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I. Intake Considerations and Preparation for Filing

A. Intake

The first "day in the life" of a collective action must surely be intake. We have learned that the thorough assessment of an intake or co-counsel opportunity to bring a collective action is one of the most important aspects of litigating a case. Litigating collective actions typically involves contingency fee representation and is time and expense intensive. While a law firm might be able to "bet the farm" and lose a few times, it cannot survive long if the losses continue.

A collective action is of course based upon a claim which must be assessed much like any other: to measure proof of liability, extent of damages, and ability on the part of the prospective defendant(s) to pay.[2] Because of the potential investment a law firm makes in a collective action, it may be wise to be more risk averse than with respect to an individual claim. For instance, liability may be less certain in misclassification cases than in a case in which hourly-paid workers in a call center are directed to perform post-shift duties without reporting their time for compensation purposes, but which time can be verified by electronic data.

One of the distinguishing features of a collective action is that it is brought by a plaintiff on behalf of the plaintiff and others similarly-situated.[3] During an investigation, we vigorously

[1] The author's paper is designed to point out issues for consideration with respect to intake, preparation for filing and, in the event the case does not proceed down the litigation track, issues which may be encountered in settlement proceedings, including timing, filing under seal, and including terms of confidentiality. By way of disclaimer, it does pretend to address nuances which vary with respect to each, so in all aspects, the practitioner must review the case law in their respective jurisdiction.

[2] Unlike many other employment laws, the FLSA provides for individual liability, so it may be prudent to increase the likelihood of a finding of liability and increase collectability by naming a shareholder, officer and manager with authority to hire, fire and set compensation levels and terms of employment, in addition to a corporate defendant. *See,* 29 U.S.C. § 203(d) (defining "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee.")

[3] While circuits vary in their precise formulations, generally Section 216(b) class certification occurs in two stages: conditional and final certification. *See, e.g., Anderson v. Cagle's Inc*., 488 F.3d 945, 951 (11th Cir. Ga. 2007) citing *Hipp v. Liberty Nat'l Life Ins. Co*., 252 F.3d 1208, 1219 (11th Cir. 2001). At the conditional certification stage, providing little or no discovery has taken place, courts typically apply a "fairly lenient standard" for determining whether the plaintiffs are truly similarly situated. *Id.* (citations omitted). At the second stage, typically occurring after the close of discovery, the burden is on the lead plaintiffs to show that the potential opt-in

attempt to reach out to as many potential members of the collective as possible to confirm that they are in fact similarly-situated such that they will at least achieve conditional certification and hopefully survive a motion for decertification. Finding other witnesses may be problematical, especially in circumstances in which the client does not know how to contact other individuals similarly injured.

Many factors must be considered in assessing the ultimate success of the case besides similar job titles and pay provisions, depending upon your jurisdiction. *See, e.g., Morgan v. Family Dollar Stores,* 551 F.3d 1233, 1245-1246 (11th Cir. Ala. 2008) (affirming district court's determination that all store managers were similarly situated to plaintiffs based upon findings that: (1) they had the same job description; (2) spent 75 to 90% of their time on the same non-management duties; and (3) spent little time on the management duties in their job description; (4) were subject to the same compensation classification "across the board"; (5) that 90% of the named and opt-in Plaintiffs interviewed and trained and directed the work of employees and maintained production and sales records, and shared similar restrictions on the scope of their responsibilities). *But see, e.g., Cagle's*, 488 F.3d 945 (affirming decertification of collective on the basis that plaintiffs and putative opt-in plaintiffs were not all members of the union and bound to the collective bargaining agreement, a condition precedent to a key defense in the case).

B. First to File Rule

While all this "investigation" is going on, what if another law firm files the case on behalf of another employee? Under the "first-to-file" rule, a district court may decline jurisdiction over an action "when a complaint involving the same parties and issues has already been filed in another district." *See, Pacesetter Systems, Inc. v. Medtronic, Inc*., 678 F.2d 93, 94-95 (9th Cir. 1982). A good example of a comprehensive analysis of the application of this rule in the context of the FLSA is provided in *Adoma v. Univ. of Phoenix, Inc*., 711 F. Supp. 2d 1142, 1144-50 (E.D. Cal. 2010). Plaintiff Adoma alleged several theories of liability for unpaid wages on behalf of herself and others similarly situated in her complaint under both state law and under the FLSA. The defendant alleged that it faced similar suits in another district of California as well as in Pennsylvania, and sought to dismiss, or in the alternative, stay and transfer plaintiffs' case. While acknowledging its right in equity to exercise discretion in the application of the rule, the court first examined three threshold factors: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the similarity of the issues. In doing so, it confirmed that Adoma's claim was in fact the most recent complaint filed. In examining the similarity of the parties, the court noted that substantial similarity rather than strict identity is required, and that in a collective action, "the classes, and not the class representatives, are compared." *Id.*, citing *Ross v. U.S. Bank Nat. Ass'n*, 542 F. Supp. 2d 1014, 1020 (N.D. Cal. 2008) (citing Cal. Jur. 3d Actions § 284). Noting disagreement between courts as to whether the comparison can occur before

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plaintiffs are similarly situated to them; however, the FLSA's "similarly situated" standard "is less stringent" than the predominance inquiry typically applicable to class certification disputes under Federal Rule of Civil Procedure 23(b). *See, Frye v. Baptist Mem. Hosp., Inc*., 2012 U.S. App. LEXIS 17791, 6-8 (6th Cir. Tenn. 2012) (citing *Grayson v. K Mart Corp*., 79 F.3d 1086, 1096 (11th Cir. 1996)). Courts caution that "the similarities necessary to maintain a collective action under § 216(b) must extend 'beyond the mere facts of job duties and pay provisions,'" in furtherance of judicial economy. *Frye*, 2012 U.S. App. LEXIS 17791 at ** 6-8.

conditional certification, the court sided with those concluding that it can be applied to similar "proposed group actions."

Other district courts, however, have held that the first-to-file rule applies to similar proposed group actions, and based upon its conclusion that the proposed classes for the collective actions were substantially similar in seeking to represent at least some of the same individuals, the court concluded that the second prerequisite of the first-to-file rule was satisfied. In assessing the third prong of similarity of the cases, the court again looked only for "substantial similarity." Both cases advanced FLSA off-the-clock claims for unpaid overtime, but *Adoma* reflected an additional theory supporting liability for unpaid overtime. Because the court determined it could not arrive at the central question of the alternate theory without addressing the common factual issues implicated in both cases, it concluded the issues in both cases were substantially similar. Notwithstanding these conclusions which would warrant imposition of the doctrine, the court ultimately exercised its discretion to except the case from application of the first-to-file rule based upon the fact that plaintiffs opting into the first-filed case would be deprived of the additional theories of liability Plaintiff Adoma asserted. Adoma's Counsel also persuasively asserted that they were prepared to immediately move for conditional certification protecting the limitations period of the putative opt-in plaintiffs whereas the plaintiffs in the other action had delayed, losing a full year of their FLSA claims and had not conducted a sufficient amount of discovery increasing the likelihood their case would encompass solely claimants in Pennsylvania and not those in California. The court also noted that defendant's motion would operate to deprive the plaintiff Adoma of her own attorney.[4]

Because these conflicts magnify the litigation and the outcome is uncertain, there is no question that a practitioner should consider working out a mutually-agreeable solution to the dilemma. Illustrating this point, while litigation was ongoing in *Brewer, et al. v. BP P.L.C., et al.*, Case No. 2:11-cv-00401-JCW (E.D. La.), a case similar in all respects was filed 5 days later in the Southern District of Texas, Houston Division, against two of the same defendants, *Lisotta v. TRG The Response Group, LLC, et al.*, Case No. 4-11-cv-00627 (S. D. Tex. May 9, 2011). Plaintiffs' Counsel in *Brewer* attempted to reach an agreement with counsel in *Lisotta,* such as would enable both counsel to continue their representation of a collective and proceed cooperatively. Upon learning that defense counsel had an interest in litigating the case in Texas, Brewer's Counsel proposed a stipulation with *Lisotta* and defendants' counsel that the actions be consolidated and to dismiss the *Brewer* case on the condition that consented to conditional certification of the consolidated action (also agreeing to dismiss the case against the defendant not named in *Lisotta* under conditions not relevant here). The stipulation provided that both counsel would continue representing the plaintiffs and opt-in plaintiffs with which they had already contracted and that the court in Texas would designate lead counsel. Counsel for *Lisotta* rejected this proposal whereupon Counsel for *Brewer* filed a motion to intervene and transfer in the *Lisotta* case. As a counter, *Lisotta's* Counsel moved the District Court in Houston to conditionally certify *Lisotta* pursuant to a stipulation into which it had privately entered with defendants. *See, Lisotta,* Dkt. 21. Upon review, of this motion and *Brewer's* motion to intervene

[4] It is also wise to notify the Department of Labor of your representation to prevent their bringing a claim on the issue. Once the Secretary files an action for back wages and liquidated damages, or for an injunction, or intervenes in an ongoing collective action, the employee's right to commence or join a private action is terminated. 29 U.S.C. §§ 216(b)-(c).

and transfer, the District Court in Houston denied Lisotta's motion for conditional certification and applying the First-to-File Rule, severed Plaintiff Lisotta's individual claims and transferred the claims of the collective to the District Court in Louisiana to be consolidated with the claims made in *Brewer*, in light of the fact that the allegations in *Lisotta* were entirely subsumed in *Brewer*. *See, Lisotta, Dkt.* 26.

C. Communications Prior to Conditional Certification

Communicating with potential witnesses or opt-in plaintiffs is problematical in many jurisdictions and they differ with respect to the latitude granted plaintiffs' counsel prior to authorizing court-authorized notice. Generally, pre-notice communications not shown false or misleading are permitted. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 (1981) (stating that even the "possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules"). In *Maddox v. Knowledge Learning Corp*., 499 F. Supp. 2d 1338, 1344 (N.D. Ga. 2007), the court stated, in light of case law from the Eleventh and other circuits, "that it would be an abuse of discretion to totally proscribe plaintiffs in a Section 216(b) collective action from communicating with potential class members through a website or other means prior to conditional certification." *See also Arteaga v. Hutchins Drywall, Inc.*, 2011 U.S. Dist. LEXIS 75382 (D. Nev. July 11, 2011) citing *West v. Mando America Corp*., 2008 U.S. Dist. LEXIS 81296 (M.D.Ala. 2008) (no judicial approval required prior to locating similarly situated persons in FLSA § 216 action); *Garner v. G.D. Searle Pharms*., 802 F.Supp. 418, 421 (M.D.Ala.1991) (same); *Melendez Cintron v. Hershey Puerto Rico, Inc*., 363 F. Supp. 2d 10, 19 (D.P.R. 2005) (refusing to sanction plaintiffs for pre-certification letter to potential class members that did not make false representations and was not misleading); *Payne v. Goodyear Tire & Rubber Co*., 207 F.R.D. 16, 21 (D. Mass. 2002) (declining to impose restrictions on defendant's pre-notice contact with potential class members where the record contained no evidence that defendant was pressuring plaintiffs not to join the litigation).

Communications for the specific purpose of soliciting opt-ins is prohibited under the rules of some jurisdictions. *See, e.g.*, [Florida] R. Reg. Fla. Bar 4-7.4(a)(anti-solicitation provision prohibiting lawyer from soliciting professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain). In apparent contradiction, courts may deny conditional certifications where plaintiffs are unable to demonstrate "interest" on the part of potential class members in participating in the case.[5] *See, e.g., MacKenzie v. Kindred Hosp. E., LLC*, 276 F.Supp.2d 1211, 1220 n. 6 (M.D. Fla. 2003).

[5]Evidence of "interest" is not required in all jurisdictions. "Courts are split with respect to whether and how plaintiffs must demonstrate that those similarly-situated, putative class members are interested in joining the suit." *Watson v. Surf-Frac Wellhead Equip. Co*., 2012 U.S. Dist. LEXIS 150968 ** 7-8 (E.D. Ark. Oct. 18, 2012) citing *O'Donnell v. Robert Half Int'l, Inc*., 534 F. Supp. 2d 173, 179 (D. Mass. 2008). *Compare Heckler v. DK Funding*, 502 F. Supp. 2d 777, 780 (N.D. Ill. 2007) (producing evidence of other opt-in plaintiffs "would essentially force plaintiffs or their attorneys to issue their own form of informal notice or to otherwise go out and solicit other plaintiffs… undermin[ing] a court's ability to provide potential plaintiffs with a fair and accurate notice and leav[ing] significant opportunity for misleading potential plaintiffs."), *Davis v. Soc. Serv. Coordinators*, 2012 U.S. Dist. LEXIS 122315 ** 53-54 (E.D. Cal. Aug. 27, 2012) ("lack of other consenting opt-in plaintiffs or a demonstrated interest by others in joining the suit is irrelevant" at first-tier certification stage); J*ohnson v. VCG*

D. One Plaintiff Insufficient

Once you have clients who wish to pursue a collective action, it is important to research whether other cases have been filed against the employer. A potential collective may be diminished if potential claimants have previously signed enforceable releases or waivers, so it is critical to research whether the defendant has faced litigation on the issue previously. The research may also reveal who your potential opposing counsel may be and defenses the company has raised in similar litigation, including arbitration.[6]

a. Rule 68 Offers

We typically name more than one plaintiff in the complaint which allows the complaint to be drafted such that the named plaintiffs' claims are similar to the collective action claims. If it will not intrude on the limitations period, we may delay filing the consent to join form of a potential named plaintiff until the parties litigate conditional certification to ensure that the case cannot potentially be mooted by offers to the named plaintiffs. *See, e.g., Dionne v. Floormasters Enters. Inc.*, 667 F.3d 1199 (11th Cir. 2012); *Mackenzie*, 276 F. Supp. 2d. at 1219 and *Orozco v. Borenstein*, 2012 U.S. Dist. LEXIS 122642 (D. Ariz. Aug. 28, 2012) (granting defendant's motion to dismiss for lack of subject matter jurisdiction while motion for conditional certification was pending and rejecting plaintiff's contention opposition to dismissal based upon failure to pay third year of damages, pre-judgment interest and fees). *But see, Sandoz v. Cingular Wireless LLC.*, 553 F.3d 913 (5th Cir. 2008)(providing that "[i]f the court ultimately grants the motion to certify, then the Rule 68 offer to the individual plaintiff would not fully satisfy the claims of everyone in the collective action; if the court denies the motion to certify, then the Rule 68 offer of judgment renders the individual plaintiff's claims moot.") and *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, 191-201 (3d Cir. Pa. 2011) (based on relation-back doctrine, reversing and remanding order granting defendants motion to dismiss based upon Rule 68 offer for determination as to whether plaintiff's motion to certify is timely and granted).[7]

b. Bankruptcy Petitions

Holding Corp., 802 F. Supp. 2d 227, 237-239 (D. Me. 2011) (recognizing potential for "chicken and egg problem" but denying conditional certification where Plaintiffs "neither identified nor suggested the existence of other" interested opt-in plaintiffs but offering to reconsider the Plaintiffs' motion on evidence that other current or former employees would seek to join the case if the Court were to certify a collective action or, in the alternative, consider the Plaintiffs' motion to compel identity of other employees); *Songer v. Dillon Res., Inc*., 569 F. Supp. 2d 703 (N.D. Tex. 2008) (requiring showing); *Musticchi v. Little Rock*, 2009 U.S. Dist. LEXIS 120549 (E.D. Ark. Feb. 2, 2009) (requiring showing); *Robinson v. Tyson Foods, Inc*., 254 F.R.D. 97 (S.D. Iowa 2008) (requiring showing); *Hart v. JPMorgan Chase Bank, N.A*., 2012 U.S. Dist. LEXIS 175983 (M.D. Fla. Dec. 11, 2012) (requiring showing); *with Mowdy v. Beneto Bulk Transp*., 2008 U.S. Dist. LEXIS 26233 (N.D. Cal. March 31, 2008) (dismissing idea that plaintiffs must demonstrate opt-in interest prior to conditional certification, finding: "As a practical matter it would make little sense to require plaintiffs to have the knowledge they attempt to obtain by gaining approval of notice from the court."); *Amendola v. Bristol-Myers Squibb Co*., 558 F. Supp. 2d 459 (S.D.N.Y. 2008) (not requiring showing); *Kautsch v. Premier Communications*, 504 F. Supp. 2d 685 (W.D. Mo. 2007) (not requiring showing).

[6] On the other hand, where a violation is continuing, evidence of prior claims may constitute strong evidence of willfulness operating to increase the statute of limitations to three years.

[7] Opting in one or more plaintiffs after the named plaintiff files the case may also provide evidence of interest in joining the action. *See supra*, Section III, n. 4.

Naming more than one plaintiff also affords protection against additional issues which may unexpectedly arise to eliminate a named plaintiff, such as the filing of a bankruptcy petition. FLSA claims brought by employees are subject to the automatic stay provisions of the Bankruptcy Code. *See*, 11 U.S.C. § 362. Under the doctrine of judicial estoppel the filing of a bankruptcy petition may disqualify a plaintiff or opt-in plaintiff from asserting claims previously undisclosed to the bankruptcy court. *See, e.g., Muse v. Accord Human Res., Inc*., 129 Fed. Appx. 487, 488 (11th Cir. Ga. 2005) citing *DeLeon v. Comcar Indus., Inc*., 321 F.3d 1289, 1291 (11th Cir. 2003). In *Family Dollar Store*s, 551 F.3d 1233, 1245, the total number of opt-ins was reduced over time from 2,500 to 1,424 based on numerous events, including bankruptcy filings.

c. Arbitration Agreements

The presence of an arbitration agreement should be explored because increasingly, such agreements purport to preclude class and collective actions. With rare exception, arbitration agreements containing class waivers are held to be enforceable in FLSA cases. See, *Owen v. Bristol Care, Inc*., 2013 U.S. App. LEXIS 356, 12-13 (8th Cir. Mo. Jan. 7, 2013) (rejecting application of *D.R. Horton, Inc., v. NLRB, No. 12-60031* (5 th Cir., Jan. 13, 2012)) citing as concurring authorities *Vilches v. Traveler's Cos*., 413 Fed. Appx. 487, 494 n. 4 (3d Cir. 2011); *Horenstein v. Mortg. Mkt., Inc*., 9 F. App'x 618, 619 (9th Cir. 2011); *Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus. Inc*., 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc*., 303 F.3d 496, 503 (4th Cir. 2002). *But see, Carey v. 24 Hour Fitness, USA, Inc*., 669 F.3d 202, 208-209 (5th Cir. Tex. 2012) (in which the Fifth Circuit found an arbitration agreement containing class action waiver illusory and unenforceable because the employer had unilaterally reserved the right to modify the agreement) and *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000) (arbitration agreement illusory and unenforceable because the agreement gave the provider of the arbitration services the unlimited right to modify the arbitration rules without giving notice to the employee or gaining the employee's consent). In any event, some consideration needs to be given as to whether the intake and claim warrant the risk and time which would be incurred entering into this preliminary battle over whether a class action waiver is enforceable.

E. Declarations

In addition to the allegations in their complaint, plaintiffs in a collective action frequently use affidavits or declarations to meet their burden to demonstrate that there are others similarly-situated to them (and, as may be required, that others similarly situated would join the case if made aware of it). Plaintiff's Counsel should begin drafting and finalizing these declarations as soon as it becomes clear what the common allegations will be so that a motion for conditional certification can be promptly filed.[8] Prior to drafting declarations, plaintiffs' counsel must be

[8] Some courts will assess a motion for conditional certification and notice under a heightened standard if discovery has ensued or been completed. *See, e.g., Creely v. HCR ManorCare, Inc.,* 789 F.Supp.2d 819, 826 (N.D. Ohio 2011) (reviewing criteria endorsed by various courts for assessing motions for conditional certification before discovery, after discovery on certification issues, and after discovery has been completed and applying a "hybrid standard" requiring a "modest 'plus' factual showing" rather than a "lenient" factual showing that there is a group of potentially similarly situated plaintiffs that may be discovered by sending opt-in notices). *But see, Wade v. Werner Trucking Co*., 2012 U.S. Dist. LEXIS 156257 (S.D. Ohio Oct. 31, 2012) (applying lenient standard on

familiar with how courts in the jurisdictions respond to such declarations. Frequently, declarations may contain "boilerplate" statements, describing the employer's policies and their experiences. *See, e.g., Guzelgurgenli v. Prime Time Specials, Inc.,* 2012 U.S. Dist. LEXIS 113212, 26-28 (E.D.N.Y. Aug. 8, 2012) (holding court not precluded from considering unnotarized declaration signed "under penalty of perjury," citing 28 U.S.C. § 1746(2), or declarations reflecting "boilerplate" or overlapping statements, where personalized to reflect dates of employment, hours worked, wage and job responsibilities and observing that overlap is "not surprising in light of the fact that they are alleging the existence of a common illegal practice"); *Davis v. Soc. Serv. Coordinators*, 2012 U.S. Dist. LEXIS 122315 ** 55-57 (E.D. Cal. Aug. 27, 2012) ("use of similarly worded or even 'cookie cutter' declarations [for conditional certification] is not fatal to a motion to certify an FLSA collective action" and declining to strike declarations which fail to comply with the hearsay standards of the Federal Rules of Evidence) citing *Stickle v. SCI W. Market Support Center, L.P.*, 2009 U.S. Dist. LEXIS 97735 (D. Ariz. Sept. 30, 2009) (rejecting defendants' argument that plaintiff's testimonial evidence in support of conditional class certification should be disregarded for containing statements that (1) lacked personal knowledge, (2) were hearsay, and (3) were conclusory, speculative, and unsupported personal beliefs about what other employees said or did). *See also, Bollinger v. Residential Capital, LLC*, 761 F. Supp. 2d 1114, 1120 (W.D. Wash. 2011). Courts have held that the concern that declarations are very similar is relevant to the weight of the evidence and is better assessed at the second stage. *See Jewell v. Aaron's, Inc.*, 2012 U.S. Dist. LEXIS 92285 (N.D. Ga. June 28, 2012) (adopting relaxed standard and accepting generalized declarations at first stage of certification process); *Labrie v. UPS Supply Chain Solutions, Inc*., 2009 U.S. Dist. LEXIS 25210 (N.D. Cal. Mar. 18, 2009) (declining to credit defendant's argument that plaintiffs' "identical, conclusory declarations" were not competent evidence against conditional certification). However, some courts reject statements in declarations in support of conditional certification which are not based upon personal knowledge. *See, e.g., In re Wells Fargo Wage & Hour Empl. Practices Litig*., 2012 U.S. Dist. LEXIS 112769 ** 56-57 (S.D. Tex. Aug. 10, 2012).[9]

II. Settlement Agreements

One of the principles underlying the enactment of the Fair Labor Standards Act reflects "recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered the national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945). Widely but not universally adopted, is the requirement expressed in *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982), which addresses this concern by stating that in the "context of suits brought directly by employees against their

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motion for conditional certification where discovery had only proceeded to the point of disclosure of job descriptions with respect to decisions in question, and citing *Lacy v. Reddy Elec. Co*., 2011 U.S. Dist. LEXIS 142050 (S.D. Ohio Dec. 9, 2011) for proposition that heighted conditional certification analysis should not apply where only defendant had opportunity for discovery on certification issues).

[9] However, this case also addresses plaintiffs' objections to "happy camper" declarations submitted by the employer in opposition to conditional certification. The court declined to consider defendants' declarations with respect to conditional certification since plaintiffs had not yet been afforded any opportunity to depose the declarants. *See, Id.*

employer under section 216(b) to recover back wages for FLSA violations," the parties must present any proposed settlement to the district court, which "may enter a stipulated judgment after scrutinizing the settlement for fairness."[10]

In *Lynn's Food Stores*, 679 F.2d 1350, the Eleventh Circuit rejected the parties' attempt to settle and waive FLSA claims outside the adversarial context of a lawsuit. After a DOL investigation determined that the employer was liable for back wages and liquidated damages, the employer offered its employees a pro-rata share of $1,000 in exchange for their waiver of all FLSA claims "on behalf of himself (herself) and on behalf of the U.S. Department of Labor." *Id.* After 14 employees signed the agreement, the employer brought suit against the DOL seeking judicial approval of the settlement. Citing *Brooklyn Savings Bank,* 324 U.S. 697, the Court rejected the settlement as an unauthorized attempt to compromise FLSA claims, holding that "[t]here are only two ways in which back wage claims under the FLSA can be settled or compromised by employees," either the Secretary of Labor can supervise payment, or, "in the context of suits brought directly by employees against their employer . . . [a] court may enter a stipulated judgment after scrutinizing the settlement for fairness."[11] *Id.* at 1352-53. "If a

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[10] *See, accord*, *Deitz v. Budget Innovations & Roofing, Inc*., 2012 U.S. Dist. LEXIS 177878 (M.D. Pa. Dec. 13, 2012) ("Impossible to ensure that an agreement settles a bona fide factual dispute over the number of hours worked or the regular rate of employment in the absence of judicial review of the proposed settlement agreement.") citing *Dees*, 706 F. Supp. 2d at 1236; *Beard v. District of Columbia Hous. Auth.*, 584 F. Supp. 2d 139, 143 (D.D.C. 2008) ("It is a long held view that FLSA rights cannot be abridged or otherwise waived by contract because such private settlements would allow parties to circumvent the purposes of the statute by agreeing on sub-minimum wages."); *Copeland v. ABB, Inc*., 521 F.3d 1010, 1014 (8th Cir. 2008) (explaining that an employee did not waive her FLSA rights by choosing to take an unpaid excused absence because the only way an employee may waive FLSA rights is by accepting payment of unpaid wages under the supervision of the Secretary of Labor or by bringing a lawsuit against his employer and requesting the court to enter a stipulated judgment); *O'Connor v. United States*, 308 F.3d 1233, 1243-44 (Fed. Cir. 2002) (citing *Lynn's Food* as governing FLSA settlement agreements under private sector labor law); *Walton v. United Consumers Club, Inc*., 786 F.2d 303, 306 (7th Cir. 1986) (explaining in dicta that "[c]ourts . . . have refused to enforce wholly private [FLSA] settlements").

But see, e.g., *Martinez v. Bohls Equip. Co*., 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005) (holding that parties may reach private compromises of FLSA claims where there is a *bona fide* dispute as to the amount of hours worked or compensation due and that a release secured in exchange for compensation is enforceable) and *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247, 255 (5th Cir. La. 2012) (releases secured on private resolution of a *bona fide* dispute over the number of hours for which plaintiffs were owed pay, not involving a compromise of "guaranteed FLSA substantive rights," were enforceable).

[11] Other than suggesting that the settlement occur in the context of an adversarial lawsuit and resolve issues that are in dispute, the Eleventh Circuit did not direct the analysis the district court should employ to determine if a settlement is fair and reasonable. In the absence of such a standard, many district courts apply the standards used to ensure the protection of absent class members. For instance, in *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984), the Eleventh Circuit suggested six factors for use in determining whether a Rule 23 settlement is fair, adequate, and reasonable These factors are: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Id. See also, Lomascolo v. Parsons Brinckerhoff, Inc.*, 2009 U.S. Dist. LEXIS 89136 (E.D. Va., June 23, 2009). Adopted by, Objection overruled by, Motion granted by *Lomascolo v. Parsons Brinckerhoff, Inc.*, 2009 U.S. Dist. LEXIS 89129 (E.D. Va., Sept. 28, 2009) (considering on motion for approval: (1) the extent of discovery that has taken place; (2) the stage of the proceedings, including the complexity, expense and likely duration of the litigation; (3) the absence of fraud or collusion in the settlement; (4) the experience of counsel who have represented the plaintiffs; (5) the opinions of class counsel and class members after receiving notice of the settlement whether expressed directly or through failure to object; and (6) the probability of plaintiffs' success on the merits and the amount of the settlement in relation to the potential recovery)

settlement in an employee FLSA suit does reflect a reasonable compromise over issues, such as coverage or computation of back wages that are actually in dispute; [the Eleventh Circuit] allows the district court to approve the settlement in order to promote the policy of encouraging settlement of litigation." *Id.* The court's role is to ensure that the employer does not "overreach" and take advantage of employees in settling claims for wages. *Id.*[12]

Myriad issues may arise in the course of obtaining approval. Two of particular interest are management and approval of a settlement which occurs prior to conditional certification of the collective, and the inclusion of terms or procedures designed to ensure confidentiality.

A. Settlement Prior to Conditional Certification

Employers subject to collective action litigation may avoid transactional costs and publicity by consenting to a voluntary resolution prior to litigating plaintiffs' motion for conditional certification. In some cases, courts have declined to evaluate the fairness of a settlement until all the plaintiffs who may desire to do so have opted into the action and had an opportunity to object to the terms of the settlement. *See, e.g., Tam Su v. Elec. Arts, Inc*., 2006 U.S. Dist. LEXIS 98894 (M.D. Fla. Aug. 29, 2006) and *Leigh et al. v Bottling Group, LLC*, 2012 U.S. Dist. LEXIS 17016 (D. Md., February 10, 2012).

Early settlements are consistent with the goal recognized in *Lynn's Foods*, to encourage settlement agreements in order to secure "the just, speedy, and inexpensive determination of every action." Fla. R. Civ. P. 1.010. In both *Tam Su* and in *Leigh*, the parties settled their disputes shortly after the defendant filed an answer to the complaint and filed unopposed motions seeking approval of the terms of the settlement and authorization to send notice to potential opt-in plaintiffs of their opportunity to participate in the settlement. However, the courts were doubtful that a collective action could properly be settled prior to determining the size of the collective and without providing opt-in plaintiffs an opportunity to object.[13]

Prior to "scrutiniz[ing] the settlement for fairness," the *Leigh* court imposed a "two-stage approval process." After the opt-in period closed, relying upon *Dees v. Hydradry, Inc.*, 706 F.Supp.2d 1227, 1241-42 (M.D. Fla. 2010), it required a description of "the nature of the dispute (for example, a disagreement over coverage, exemption, or computation of hours worked or rate

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and *Lane et al. v. Ko-Me, LLC*, 2011 U.S. Dist. LEXIS 97870 (D. Md. August 31, 2011) (parties must provide sufficient information for the court to determine the *bona fides* of the dispute, including the nature of the dispute; the employer's business and the type of work performed by the employee; the employer's reasons for disputing the employee's right to a minimum wage or overtime; employee's justification for entitlement and if disputed, each party's estimate of the number of hours worked and the applicable wage) citing *Dees*, 706 F.Supp.2d at 1241-42.

[12] Typically excepted from this requirement are settlements in which no compromise is involved in that the employer offers the plaintiff full compensation on his FLSA claim. *See, e.g., Tam Su*, 2006 U.S. Dist. LEXIS 98894 citing *Mackenzie*, 276 F. Supp. 2d at 1217.

[13] Permitting putative class members an opportunity to object to the proposed settlement of a collective action seems inconsistent with the Section 216(b) mechanism, since unlike Rule 23 settlements, collective action settlements under Section 216(b) are only binding on those potential opt-in plaintiffs who consent to join the action. *Sandoz*, 553 F.3d at 919 ("[U]nlike in a *Rule 23* class action, in a *FLSA* collective action the plaintiff represents only him - or herself until similarly-situated employees opt in."); *Grassik v. Avatar Props.*, 2008 U.S. Dist. LEXIS 114949 (M.D. Fla. Nov. 10, 2008) ("Consistent with the FLSA's requirements of opting in, the settlement would affect only those individuals who affirmatively agree to participate in it.

of pay) resolved by the compromise; the employer's business and the type of work performed by the employee; the reason, articulated by the employer for disputing the employee's right to a minimum wage or overtime; the employee's justification for entitlement to the disputed wages; and, if disputed, each party's estimate of the number of hours worked and the applicable wage. *Leigh*, 2012 U.S. Dist. LEXIS 17016 ** 14-15 citing *Dees*, 706 F.Supp.2d 1227, 1241-42 .[14] Rather summarily acknowledging this standard, the *Leigh* Court found the settlement fair to the plaintiffs, but denied Plaintiffs' Counsels' motion for fees as excessive. *Id.*

Courts have observed that "from a practical standpoint, where the plaintiffs would receive less than the full value of their claims in a settlement, it is difficult to conceive of how their recovery could not be adversely affected by an exorbitant award of attorneys' fees." *See, Lane et al. v. Ko-Me, LLC*, 2011 U.S. Dist. LEXIS 97870 **6-7 (D. Md. August 31, 2011) *and quoting Cisek v. National Surface Cleaning, Inc*., 954 F.Supp. 110, 110 (S.D.N.Y. 1997) (plaintiffs' counsel "should have perceived that every dollar the defendants agreed to pay [the attorneys] was a dollar that defendants would not pay to the plaintiffs"). However, given that *Lynn's Foods* underlies the requirement for judicial oversight of FLSA settlements and instructs that the court's role is to ensure that the employer does not "overreach" and take advantage of employees in settling claims for wages, the Court's determination that the voluntary settlement was fair to the plaintiffs' but that that Plaintiffs' Counsel's fee was excessive, seems to expand the court's role. In addition to protecting the plaintiffs, these courts seem to take on responsibility *sua sponte* to protect employers from potential "overreaching" by plaintiffs' counsel.[15]

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[14] Assessment of the data the Court describes seems to presage a complex analysis and brings to mind the observations the Judge made in *Martinez* after reviewing the historical framework leading to the decision in *Lynn's Foods* and its own decision *not* to follow the Eleventh Circuit. Relying on *U.S. v. Allegheny-Ludlum Indus., Inc*., 517 F.2d 826 (5th Cir. 1975), the Court opined that it cannot be consistent with the intention of the framers' of the FLSA that "[j]udicial caseloads, as well as the workload of the Wage and Hour Administration, would likely be swamped with unnecessary disputes, many dubious and with little evidence, that could not be finally settled without approval from either a court or the Secretary of Labor." The Court also quoted Judge Jackson, in his concurring opinion in *Walling v. Portland Terminal Co*., 330 U.S. 148, 155, 67 S. Ct. 639, 91 L. Ed. 809 (1947): "Interminable litigation, stimulated by a contingent reward to attorneys, is necessitated" by the failure to permit private compromises and releases of FLSA claims involving *bona fide* disputes as to liability. *Martinez v. Bohls Equip. Co*., 361 F. Supp. 2d at 622.

[15] *See, e.g., Silva v. Miller*, 307 F. App'x 349, 351 (11th Cir. 2009) (unpublished) (where the plaintiff and his counsel have entered into a contingency fee agreement, court must "review the reasonableness of counsel's legal fees to assure both that counsel is compensated adequately and that no conflict of interest taints the amount the wronged employee recovers under a settlement agreement."); *Leigh*, 2012 U.S. Dist. LEXIS 17016 **16-17 (concluding that a judicial determination as to the reasonableness of the plaintiffs' attorneys' fees to be paid by the defendant is mandatory even in connection with the approval of settlements) (citations omitted); *Almodova v. City & County of Honolulu*, 2012 U.S. Dist. LEXIS 111373 (D. Haw. Aug. 8, 2012)(performing lodestar analysis to determine reasonableness upon settlement of FLSA collective action with respect to fee to be paid by defendant from settlement amount and to be paid be plaintiffs pursuant to contingency fee contracts). *But see, Bonetti v. Embarq Mgmt. Co.*, 715 F.Supp.2d 1222, 1226 (M.D. Fla. 2009) (observing that "the present approach to approving FLSA settlements rests on a tenuous assumption …. that if the plaintiff's counsel receives a fee that is higher than what the Court deems reasonable, then …. a higher fee to the plaintiff's counsel was necessarily obtained at the plaintiff's expense" and directing that "[a]bsent evidence to the contrary, however, the Court should assume that the plaintiff's lawyer has abided by his ethical obligations and avoided the temptation to place his own interest ahead of his client's" and that the parties should reach agreement as to the plaintiff's recovery before the fees of the plaintiff's counsel are considered.).

B. Filing Settlements Under Seal

Consistent with *Lynn's Foods,* many district courts recognize a strong presumption in favor of keeping FLSA settlement agreements unsealed and available for public view. *See, Carpenter v. Colonial Mgmt. Group, LP*, 2012 U.S. Dist. LEXIS 100979, 3-5 (D. Md. July 19, 2012).[16] This presumption is based upon "the general public interest in the content of documents upon which a court's decision is based, including a determination of whether to approve a settlement and the "private-public character" of employee rights under the FLSA, whereby the public has an "independent interest in assuring that employees wages are fair and thus do not endanger 'the national health and well-being.'" *Carpenter*, 2012 U.S. Dist. LEXIS 100979 ** 3-5 *quoting Hens v. Clientlogic Operating Corp*., U.S. Dist. LEXIS 116635 (W.D. N.Y. Oct. 31, 2010) (citations omitted).

In *Carpenter*, the court rejected defendant's motion, based upon a concern with negative publicity or attention that could follow from having the terms of this settlement made public, as "wholly inadequate to justify sealing the motion for approval of the settlement agreement." The court also rejected a confidentiality provision included in the settlement agreement without any argument to support its inclusion. 2012 U.S. Dist. LEXIS 100979 ** 3-5. *See also*, *Thompson v. Shannon Rollings Real Estate, LLC*, 2012 U.S. Dist. LEXIS 146708 (S.D. Ga. Oct. 11, 2012) (denying motion to file settlement agreement under seal because "sealing from public scrutiny of FLSA agreements between employers and their employees would thwart the public's independent interest in assuring that employees' wages are fair and thus do not endanger the national health and well-being" and denying approval of settlement agreement for the same reason, because confidentiality provision in agreement was likely to be unenforceable); *Gamble v. Arpaio*, 2013 U.S. Dist. LEXIS 4576, 12-13 (D. Ariz. Jan. 10, 2013) (denying motion to file motion to dismiss complaint alleging violation of First Amendment) citing *In re Sepracor Inc. FLSA Litigation*, 2009 U.S. Dist. LEXIS 97791 (D. Ariz. Oct. 8, 2009) (noting "[s]ealing [FLSA] settlement agreement from public scrutiny would thwart the public's independent interest in assuring that employee's wages are fair and thus do not endanger the national health and well-being.") (internal quotation marks and citations omitted).

In a recent case, *Swarthout v. Ryla Teleservices, Inc*., 2012 U.S. Dist. LEXIS 155178 ** 9-12 (N.D. Ind. Oct. 30, 2012)(citing 21 orders filed by the parties in support of the motion granting motions to seal not available on Lexis or Westlaw), a district court in the Seventh Circuit granted an unopposed motion to seal a settlement of FLSA claims being filed to seek approval. The Court noted that the parties failed to acknowledge (or meet) "the strict position the Seventh Circuit has taken regarding requests to seal documents from the public record."

[16] Citing *Kianpour v. Restaurant Zone, Inc*., , 2011 U.S. Dist. LEXIS 97205 (D. Md. Aug. 30, 2011); *Bouzzi v. F & J Pine Restaurant, LLC*, 841 F. Supp. 2d 635 (E.D. N.Y. Jan. 11, 2012) (FLSA settlement agreement is a judicial [*4] document to which presumption of public access attaches); *Taylor v. AFS Techs., Inc*., Civ. No. 09-2567-PHX-DGC, 2010 U.S. Dist. LEXIS 57851, 2010 WL 2079750, at *2 (D. Ariz. May 24, 2010) (recognizing strong presumption in favor of keeping FLSA settlement agreements unsealed and available for public view); *Poulin v. Gen. Dynamics Shared Resources, Inc.*, 2010 U.S. Dist. LEXIS 47511 (W.D. Va. May 5, 2010) (noting earlier orders finding parties had not identified significant interests to outweigh the public interest in access to judicial records). *See also, Ko-Me, LLC*, 2011 U.S. Dist. LEXIS 97870 ** 9-10 (The district court should reject as unreasonable a compromise that contains a confidentiality provision, which is unenforceable and operates in contravention of the FLSA).

stating that "good cause may exist if the documents are sealed in order to maintain the confidentiality of trade secrets, privileged information, including documents covered by the attorney-client privilege, and other non-public financial and business information." *Id.* (citations omitted). In support of the motion, the parties asserted that the defendant was currently defending FLSA lawsuits in other jurisdictions, in different stages, and that disclosure would prejudice the defendant, would protect the parties' "central" term of confidentiality, and encourage settlement. The Court exercised its discretion to grant the parties' motion to file the Settlement Agreement under seal, because, the parties did "not have the option, as litigants do in most non-FLSA collective action cases, to execute a private, confidential settlement agreement and then file a stipulation of dismissal" and "confidentiality of the settlement was a key and material term of these parties' confidential Settlement Agreement." *Swarthout*, 2012 U.S. Dist. LEXIS 155178 * 12; *accord Medley v. Am. Cancer Soc'y.*, 2010 U.S. Dist. LEXIS 75098 (S.D.N.Y. July 23, 2010) (permitting the filing of a FLSA settlement agreement under seal because its terms were confidential, but providing no additional analysis). *ut see, Bryant v. Lab. Corp. of Am. Holdings*, 2012 U.S. Dist. LEXIS 95178 ** 2-7 (S.D. W. Va. July 10, 2012) (specifically rejecting as a justification to file FLSA settlement *in camera* as "functional equivalent" of filing under seal, based upon parties' contention was a material term of settlement and relying on *Miles v. Ruby Tuesday, Inc*., 799 F. Supp. 2d 618, 624 (E.D. Va. 2011) ("[t]o seal a settlement because the parties deem privacy material to their agreement could easily convert the exception to the commonplace, as all settlements would then be sealed if any party insisted on it as a condition of settlement.") and *Prater v. Commerce Equities Mgmt. Co*., 2008 U.S. Dist. LEXIS 98795 (S.D. Tex. Dec. 8, 2008) (declining motion to file FLSA settlement agreement under seal as part of the judicial record solely as a result of the requirement that the parties' seek court approval). *And see, accord, Hollomon v. AT&T Mobility Servs., LLC*, 2012 U.S. Dist. LEXIS 66158 (E.D. Ark. May 11, 2012).

C. Term of Confidentiality within Settlement Agreement

Including a term requiring confidentiality within a settlement agreement may prevent approval. *See, Altenbach v. Lube Ctr., Inc*., 2013 U.S. Dist. LEXIS 1252 ** 7-8 (M.D. Pa. Jan. 3, 2013) (denying approval of settlement because "[n]on-publicization" provision impermissibly frustrates the implementation of the FLSA and "compelled silence unreasonably frustrates implementation of the 'private-public' rights granted by the FLSA and thwarts Congress's intent to ensure widespread compliance with the statute.") *relying on Dees*, 706 F. Supp. 2d at 1244-45 ("A confidentiality agreement, if enforced, ... empowers an employer to retaliate against an employee for exercising FLSA rights" by advising other employees of FLSA violations). *And see, Thompson*, 2012 U.S. Dist. LEXIS 146708; *Galvez et al. v Americlean Services Corp*., 2012 U.S. Dist. LEXIS 91070 (E.D. Va., June 29, 2012); *Brumley v. Camin Cargo Control, Inc*., 2012 U.S. Dist. LEXIS 11702, 9-11 (D.N.J. Jan. 30, 2012); *Hogan v. Allstate Bev. Co*., 821 F. Supp. 2d 1274, 1282-1284 (M.D. Ala. 2011)(denying approval of settlement containing confidentiality agreement in absence of evidence that plaintiff received any independent compensation in return for confidentiality provision and commenting that confidentiality agreements in FSLA cases have the potential to hinder unfairly the congressional goal of universal compliance with the FLSA, contravene common-law presumption that judicial records are public documents and prevent the employee from alerting other workers to potential FLSA violations without risking personal liability); *Mosquera v. Masada Auto Sales, Ltd.*, 2011 U.S. Dist. LEXIS 7476, ** 3-5

(E.D.N.Y., Jan. 24, 2011) (denying approval of FLSA settlement agreement containing confidentiality provision as a "corollary to the 'fear that employers [will] coerce employees into settlement and waiver.'") (citations omitted); *Poulin v. General Dynamics Shared Res., Inc.*, 2010 U.S. Dist. LEXIS 47511 * 6-7 (W.D. Va. May 5, 2010)(stating that "a confidentiality provision in an FLSA settlement agreement undermines the purposes of the Act, for the same reasons that compelled the Court to deny the parties' motion to seal their Settlement Agreement"); *Nafanzo v. Krishna Krupa, LLC*, 2010 U.S. Dist. LEXIS 110139 * 2 (S.D. Ala. Oct. 15, 2010)(finding as unreasonable a FLSA agreement containing a confidentiality provision).